

ATTACHMENT 2

Full Text of the Public Comments Received
on the Batch 5 Proposed Rules and the Previously
Submitted Rules in Batches 3 & 4 Returned to the
Commission for Further Consideration

Rule 1.2 – Public Comment – File List

E-2009-291a LA Public Defender[1.2]

E-2009-292a OCBA [1.2]

E-2009-293a State Bar OCTC [1.2]

E-2009-310g COPRAC [1.2]

E-2009-350a CPDA [1.2]

E-2009-351a SDCBA [1.2]

E-2009-358a Santa Clara County Bar [1.2]

E-2009-368a CACJ [1.2]

E-2009-370a LACBA [1.2]



MICHAEL P. JUDGE
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EXECUTIVE OFFICE

November 3, 2009

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

Re: Proposed Ethical Rules (Rule 1.2 and 1.6)

Dear Ms. Hollins,

We write to express our position to the proposed Rules:

Rule 1.2

Rule 1.2 governs the "Scope Of Representation And Allocation Of Authority Between Client And Lawyer." The rule requires that a lawyer abide by a client's decisions concerning the "objective" of the representation, and consult with the client about the "means" by which the objectives are to be pursued.

The proposed rule is opposed, according to the Discussion Draft provided by the Commission, by a minority of the Commission. We agree with the concern of the minority regarding the intersection of the proposed rule and the provisions of Penal Code section 1018. That concern is set forth in the Discussion Draft and reprinted below:

[T]he minority observes that, in some cases, a lawyer must be able to disagree with a client's decisions concerning the objectives of the representation and to refuse to "abide by" the client's decision as to a plea in a criminal case. The minority notes that if a lawyer believes there is a valid defense in a death penalty case, the lawyer is required to exercise independent judgment about whether to oppose the client's plea and to advocate against conviction or the death penalty. Penal Code section 1018, states in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received

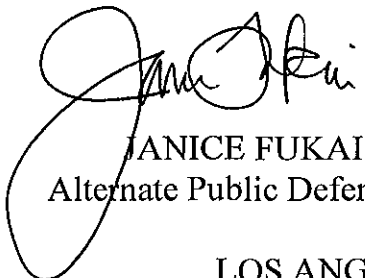
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without the consent of the defendant's counsel." (See, e.g., *People v. Massie* (1985) 40 Cal.3d 620; *People v. Alfaro* (2007) 41 Cal.4th 1277, cert. denied 128 S.Ct. 1476, 170 L.Ed.2d 300.) The minority concludes that, if the Supreme Court approves Rule 1.2, so a lawyer who does not comply with a client's decision regarding a plea in a criminal case faces discipline, then the validity of Penal Code section 1018 is jeopardized.

~~Rules 1.6~~

~~Rule 1.6 is mostly in accord with the protection afforded in present rule 3-100. However, we object to limiting "confidential information" to "relating to the representation" in 1.6(a). The present protection afforded in Business and Professions Code section 6068(e)(1) is "to maintain inviolate the confidence, and at every peril to himself or herself to preserve, the secrets of his or her client." This protection should not be narrowed simply because the exception, which allows but does not require disclosure to prevent a criminal act likely to result in death or substantial bodily harm, in 6068(e)(1) contains the narrower definition of "relating to the representation." The narrower definition in the exception permitting disclosure obviously is an effort to restrict the ambit of information communicated even in the face of a threat of death.~~

~~A second objection is to proposed rule 1.6(b)(4), which would allow a lawyer to reveal confidential information "to comply with a court order." Under *People v. Kor* (1954) 129 Cal.App.2d 436, the lawyer is required to resist the court order to disclose, even upon pain of contempt. Thus section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to disclose confidential information).~~


JANICE FUKAI
Alternate Public Defender

Sincerely,


MICHAEL P. JUDGE
Public Defender

LOS ANGELES COUNTY, CALIFORNIA

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 1.2 – Scope of Representation and Allocation of Authority between Client and Lawyer**

Founded over 100 years ago, the Orange County Bar Association has over 7000 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 law firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

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

The OCBA opposes the Commission's proposed Rule 1.2 and supports the adoption of ABA Model Rule 1.2. The Commission proposes changing paragraph (d)(1) of the Model Rule by adding "or a violation of any law, rule, or ruling of a tribunal" after "fraudulent," and by adding "rule or ruling of a tribunal" at the end of paragraph (d)(2) after "law." The OCBA believes that the additional language proposed by the Commission may introduce a degree of ambiguity into the Rule, and may make it overbroad and difficult to enforce, inasmuch as the added language could be construed to encompass rules and rulings of tribunals having no jurisdiction over the particular cause at issue. Furthermore, the added language may be unnecessary, because the remedies of contempt and sanctions are available for violations of a tribunal's rules and rulings by those practitioners before that tribunal.

In addition, the OCBA recommends that Comment [5] be stricken in its entirety. Comment [5] purports to relate to paragraph (b) of the proposed Rule. Paragraph (b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." The first sentence of Comment [5] states that legal representation should not be denied to people "who are unable to afford legal services." This statement is not germane to the language of paragraph (b), which has nothing to do with ability to pay for legal services. Moreover, this part of the Comment could be construed as creating an obligation to provide legal services with little or no compensation. The rest of the Comment merely restates paragraph (b), and is thus unnecessary.



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a long, horizontal tail.

Russell G. Weiner
Interim Chief Trial Counsel



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

November 9, 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 1.2

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 1.2 and offers the following comments.

As to paragraph (a), COPRAC agrees with the minority of the Commission and believes that it is difficult to differentiate between means and objectives. COPRAC also agrees with the minority that the language of section (a) of the rule might be read to conflict with a client's Constitutional and statutory duties to the lawyer's clients. COPRAC also notes that the last sentence of paragraph (a) raises the issue whether the lawyer can waive a jury trial on behalf of a client in a civil case.

As to paragraph (d), COPRAC objects to the inclusion in paragraph (d)(1) of the proposed rule (modifying paragraph (d) of the corresponding ABA Model Rule) of the phrase referring to "a violation of any law, rule, or ruling of a tribunal." Although this phrase is used in current Rule of Professional Conduct 3-210, these terms are not defined in the rules, appear to be very broad, and go well beyond the prohibition in the Model Rule on counseling or assisting with respect to criminal or fraudulent conduct by the client. We understand that the rationale for the provision is "greater protection of the public and the fair administration of justice." COPRAC believes, however, that such language may subject lawyers to an inappropriate and unnecessarily harsh disciplinary standard, where no such protections are realized. As an example, where lawyers routinely "assist" clients by making regulatory filings on their behalf, where such filings might not be in full compliance with all applicable rules (perhaps the deviation was deemed immaterial by the client, or because two rules conflict in their application preventing full compliance with both). Absent fraud or criminal conduct, COPRAC does not believe such assistance should subject lawyers to possible discipline.

Should the above phrase be included in the rule, we recommend a modification to Comment [9] to conform the references to this phrase. The phrase including the added scope is included in the first sentence of Comment [9]. A corresponding reference to the added scope should be included in the second sentence of Comment [9].

In addition, COPRAC wants to express its approval of the guidance that the proposed rule provides concerning limited scope representation, which we view as important to facilitate access to justice. We also believe that it is important to have a California rule of professional conduct that addresses lawyers' participation in crimes and frauds, particularly in the post-Enron environment.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.2 Scope of Representation [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.

PLEASE SEE ATTACHED LETTER



California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
e-mail: cpda@cpda.org

CPDA

A Statewide Association of Public Defenders and Criminal Defense Counsel

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Gary Mandinich, 2005-2006
Barry Melton, 2006-2007
Kathleen Cannon, 2007-2008
Leslie McMillan, 2008-2009

November 13, 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 1.2

Dear Ms. Hollins:

The California Public Defenders Association is concerned that language in Rule 1.2 creates the potential for harmful conflict with long-established practices regarding the responsibilities of counsel toward their clients and their clients' cases.

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. Our attorney members act as legal counsel for the vast majority of indigents accused of criminal conduct in California. Established in 1969, CPDA is the state-designated continuing legal education provider for all local public defender offices in California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

CPDA concurs with the objections expressed by the Minority of the Commission, principally those concerns noting the absence of any clear distinction between 'objectives' and 'means' of representation. CPDA joins in the comments and concerns expressed by Michael P. Judge, Public Defender and Janice Fukai, Alternate Public Defender of Los Angeles County in their letter dated November 3, 2009.

CPDA's primary concern is with the Proposed Rule as developed in Proposed Comment [2].

While stating a broad summary of the functional operations of the attorney-client relationship, the Comment's language muddles the attorneys' ethical obligations when making the difficult decisions inherent in practice, particularly those made during the tumult of trial.

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rule 1.2
Page Two

CPDA proposes that to avoid creating a potential conflict with established legal practice, the second and third sentence in Comment [2] should be deleted. (Proposed deletion: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.")

Attorneys are retained (or appointed by request) by clients because of their training, expertise and skill. The client rarely has as complete an understanding of the law or legal proceedings and the attorney owes it to the client and the integrity of the justice system to insure that erroneous assumptions brought to the case by the client, or that one narrow focus defined by the client, do not prevent complete investigation and assessment of all options on behalf of the client.

As noted in the Comment, the rich existing record of decisional law clearly defines the responsibility that lawyers have to know and practice legal obligations while respecting the client's goals.

To this end, CPDA believes that it would be helpful if the Comment included references to the most common guidelines provided by established case law.

For example, in assessing their role in representing a client, the criminal trial attorney must look to the Constitutional mandates, especially case law interpreting the Sixth Amendment right to effective assistance of counsel. "[L]aw and tradition ...allocate to the counsel the power to make binding decisions of trial strategy in many areas." (*Faretta v. California* (1975) 422 U.S. 806, 820.)

Audrey Hollins
State Bar of California
Re: Proposed Rule 1.2
Page Three

Court decisions defining the attorney's strategic responsibilities stem from a recognition that the attorney's education and expertise place trial counsel in the best position to make those intelligent decisions necessary to meet the client's objective: to prevail at trial. Thus, *In re Horton* (1991) 54 Cal.2d 82 at 94-95, observed: 'In the civil context, the attorney has the authority to enter into stipulations binding on the client in all matters of procedure, though he or she
November 13, 2009

may not stipulate in a manner to "impair the client's substantial rights or the cause of action itself"....In the criminal context, too, counsel is captain of the ship. As we said recently: "When the accused exercises his constitutional right to representation by professional counsel, it is counsel, not defendant, who is in charge of the case. By choosing professional representation, the accused surrenders all but a handful of 'fundamental' personal rights to counsel's complete control of defense strategies and tactics." (Citing *People v. Hamilton* (1989) 48 Cal.3d 1142, at p. 1163 and *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 781.)

Thus, trial counsel's ability to control trial strategy has been recognized to include a variety of specific strategic decisions, including selection of witnesses, (*People v. Williams* (1970) 2 Cal.3d 894, 903-906); requests for continuances, (*Townsend v. Superior Court* (1975) 15 Cal.3d 774, 780); choice of a defense where more than one defense is available, (*People v. Carlyon* (1961) 191 Cal.App.2d 617, 822); whether certain evidence should be introduced, (*People v. Murphy* (1972) 8 Cal.3d 349, 366-67); whether an objection should be made, (*People v. Lanphear* (1980) 26 Cal.3d 814, 828); and whether a trial judge should be challenged, (*People v. Jackson* (1960) 186 Cal.App.2d 307, 317-318). Trial counsel makes these decisions while respecting the client's concerns and goals, and those fundamental rights over which the client retains complete control: whether to plead guilty, (*Brookhart v. Janis* (1966) 384 U.S. 1, 7-8); whether to waive the right to trial by jury, (*People v. Holmes* (1960) 54 Cal.2d 442, 443-444); whether to waive the right to counsel, (*Faretta v. California* (1975) 422 U.S. 806, 834); and whether to waive the right to be free from self-incrimination, (*In re Tahl* (1969) 1 Cal.3d 122, 132).

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rule 1.2
Page Four

CPDA believes that inclusion of these fundamental decisional references, along with deletion of the two sentences identified above, will clarify the existing ambiguities in the Proposed Rule and Comment.

Sincerely,

A handwritten signature in black ink, appearing to read 'BS' or 'B Sheela', written in a cursive style.

Bart Sheela
President,
California Public Defenders Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 1.2

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 ☐

(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 ☐

(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 ☐

(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:

CONCLUSIONS (pick one):

☒ 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.*



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation	Santa Clara County Bar Association	Commenting on behalf of an organization
		☒ Yes
		☐ No
* Name	Jil Dalesandro	
* 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 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

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

- ☒ 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.

Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."

Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections, 825; 995; 996. This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version."



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation	California Attorneys for Criminal Justice (CACJ)	Commenting on behalf of an organization
		☒ Yes
		☐ No
* Name	Robert Sanger	
* City	Santa Ynez	
* State	California	
* Email address (You will receive a copy of your comment submission.)	rsanger@sangerswysen.com	

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

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
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Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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

Rule 1.2 Scope of Representation [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.

Proposed Rule 1.2 Scope of Representation and Allocation of Authority
Between Client and Lawyer:

Our proposed modification would be to add the following language to paragraph (a) at the end following sentence: A lawyer shall abide by a client's decision whether to settle a matter, "to the extent it is not in conflict with statutory or constitutional law."



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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DAVID W. SWIFT

LUCY VARPETIAN

NORMA J. WILLIAMS

ROBIN L. YEAGER

November 12, 2009

Audrey Hollins

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.2 – Scope
of Representation and Allocation of Authority Between Client and Lawyer

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.2:

Opposition to Proposed Rule 1.2

PREC opposes Proposed Rule 1.2 in its entirety because the committee believes that it is not appropriate as a disciplinary rule.

Failure to follow the client's objectives [1.2(a)] may result in a malpractice action or fee dispute, but should not lead to discipline. The statement that a lawyer's representation of a client is not an endorsement of the client's views or activities [1.2(b)], is also true but has no place in a disciplinary rule. The scope of representation [1.2(c)] may be determined by agreement between the lawyer and client -- if a client does not believe that a proposed restriction on the scope of representation is reasonable, he or she does not have to retain the lawyer. Existing law deals with advising a violation of the law, rules, or rulings of a tribunal [1.2(d)]. (Bus. & Prof. Code, 6068, subds. (a), (b) & (c).)

Suggested Amendments to Proposed Rule 1.2

To the extent the rule is adopted, PREC suggests that Proposed Rule 1.2 be amended as follows:

1. Paragraph (a)

The last sentence of paragraph (a) should state:

"In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify, and whether to file an appeal."

When a criminal defendant desires to appeal, the lawyer must file a notice of appeal even if the lawyer believes there are no legitimate issues to appeal. In federal courts, a lawyer who believes there are no legitimate grounds for appeal is allowed to file a so-called “*Anders* brief” instead of an appellate brief. There is an analog in a state action.

2. Paragraph (d)

We suggest that ABA Model Rule 1.2(d) be adopted as is. Specifically, we suggest the following changes to Proposed Rule 1.2(d):

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

The additional language regarding the “violation of any law, rule, or ruling of a tribunal” makes Proposed Rule 1.2(d)(1) too broad and potentially ambiguous. For example, counseling a client that, in certain circumstances, it is okay to ignore a particular local rule of court would be a disciplinary offense. This goes too far. Limiting the prohibition to conduct “the lawyer knows is criminal or fraudulent” is sufficient. ABA Model Rule 1.2(d) is clear and succinct, and is better for disciplinary proceedings.

Existing Rule 3-210 of the California Rules of Conduct states: “A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.”

Proposed Rule 1.2(d)(2) goes beyond the existing California rule prohibiting a lawyer from “advising” a client to violate a law, rule, or ruling – it expands the prohibition to “assisting” the client in a violation of a law, rule, or ruling. It makes sense to preclude a lawyer from assisting a client in committing a crime or fraud, but it does not make sense to prohibit a lawyer in all cases from assisting a client in violating a law or rule. Indeed, the client may have to violate the rule to have standing in court to challenge its application to the client. Proposed Rule 1.2(d)(2) recognizes this problem and would allow a lawyer to

provide assistance in making a good faith challenge to the law, rule, or ruling. Still, there may be situations where a local rule cannot be followed for practical purposes but there is no argument that the rule is invalid. For example, if a local rule requires filing a trial brief 10 days before trial but the lawyer is not able to file it until the 5th day before trial, is the lawyer subject to discipline for assisting the client in violating the local rule if the lawyer files the brief late without seeking leave of court?

The committee believes that the ABA standard is better for disciplinary purposes. We suggest that corresponding changes be made to Comments 9 and 11.

3. Comment 1

A statement should be added to Comment 1 regarding mandatory or permissive withdrawal. Comment 1 relates to Proposed Rule 1.2(a), which states in pertinent part:

“Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation. . . .”

Some clients hire lawyers to pursue vengeful or unnecessary litigation. While these objectives may not be criminal, fraudulent, or unlawful, they are nevertheless improper and a lawyer should not be duty-bound to accept or continue in that representation. The committee is concerned that Proposed Rule 1.2(a) could be interpreted to impose discipline on a lawyer for failing to abide by a client’s objectives, even where those objectives would give rise to either mandatory or permissive withdrawal by the lawyer.

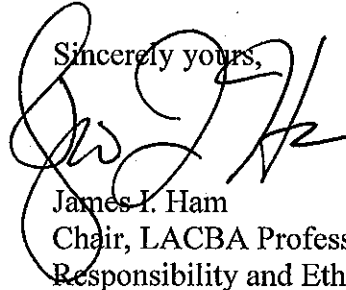
The first sentence of Comment 1 states: “Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.” We suggest that the following sentence be added: “Paragraph (a) does not override the rules concerning mandatory or permissive withdrawal.”

Office of Professional Competence, Planning & Development
State Bar of California
November 12, 2009
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Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. Ham', written over the words 'Sincerely yours,'.

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

Rule 1.6 – Public Comment – File List

E-2009-291b LA Public Defender[1.6]

E-2009-292b OCBA [1.6]

E-2009-293b State Bar OCTC [1.6]

E-2009-310f COPRAC [1.6]

E-2009-311 Sall Law Firm [1.6]

E-2009-351b SDCBA [1.6]

E-2009-358b Santa Clara County Bar [1.6]

E-2009-361 State Bar Trust & Estates Section [1.6]

E-2009-368b CACJ [1.6]

E-2009-370b LACBA [1.6]



MICHAEL P. JUDGE
PUBLIC DEFENDER

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EXECUTIVE OFFICE

November 3, 2009

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

Re: Proposed Ethical Rules (Rule 1.2 and 1.6)

Dear Ms. Hollins,

We write to express our position to the proposed Rules:

Rule 1.2

~~Rule 1.2 governs the "Scope Of Representation And Allocation Of Authority Between Client And Lawyer." The rule requires that a lawyer abide by a client's decisions concerning the "objective" of the representation, and consult with the client about the "means" by which the objectives are to be pursued.~~

~~The proposed rule is opposed, according to the Discussion Draft provided by the Commission, by a minority of the Commission. We agree with the concern of the minority regarding the intersection of the proposed rule and the provisions of Penal Code section 1018. That concern is set forth in the Discussion Draft and reprinted below:~~

~~[T]he minority observes that, in some cases, a lawyer must be able to disagree with a client's decisions concerning the objectives of the representation and to refuse to "abide by" the client's decision as to a plea in a criminal case. The minority notes that if a lawyer believes there is a valid defense in a death penalty case, the lawyer is required to exercise independent judgment about whether to oppose the client's plea and to advocate against conviction or the death penalty. Penal Code section 1018, states in part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received~~

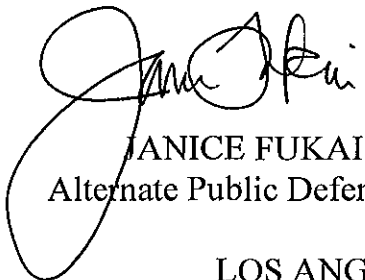
Audrey Hollins
State Bar of California
Re: Proposed Rules
November 3, 2009
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~~without the consent of the defendant's counsel." (See, e.g., *People v. Massie* (1985) 40 Cal.3d 620; *People v. Alfaro* (2007) 41 Cal.4th 1277, cert. denied 128 S.Ct. 1476, 170 L.Ed.2d 300.) The minority concludes that, if the Supreme Court approves Rule 1.2, so a lawyer who does not comply with a client's decision regarding a plea in a criminal case faces discipline, then the validity of Penal Code section 1018 is jeopardized.~~

Rules 1.6

Rule 1.6 is mostly in accord with the protection afforded in present rule 3-100. However, we object to limiting "confidential information" to "relating to the representation" in 1.6(a). The present protection afforded in Business and Professions Code section 6068(e)(1) is "to maintain inviolate the confidence, and at every peril to himself or herself to preserve, the secrets of his or her client." This protection should not be narrowed simply because the exception, which allows but does not require disclosure to prevent a criminal act likely to result in death or substantial bodily harm, in 6068(e)(1) contains the narrower definition of "relating to the representation." The narrower definition in the exception permitting disclosure obviously is an effort to restrict the ambit of information communicated even in the face of a threat of death.

A second objection is to proposed rule 1.6(b) (4), which would allow a lawyer to reveal confidential information "to comply with a court order." Under *People v. Kor* (1954) 129 Cal.App.2d 436, the lawyer is required to resist the court order to disclose, even upon pain of contempt. Thus section (4) should be stricken, as should the part of section 1.6(d) allowing the lawyer to comply with a court order (to disclose confidential information).


JANICE FUKAI
Alternate Public Defender

Sincerely,


MICHAEL P. JUDGE
Public Defender

LOS ANGELES COUNTY, CALIFORNIA

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 1.6 – Confidentiality of Information**

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 comments concerning the subject proposed Rule:

The OCBA generally supports the proposed Rule as drafted. The OCBA agrees with the Commission that adoption of the Enron exceptions would be inconsistent with California's policies regarding confidentiality.

The OCBA recommends one revision to the proposed Rule, and a corresponding change in one of the Comments, in order to emphasize the scope of a lawyer's disclosure under certain circumstances. In paragraph (b)(3) of the proposed Rule, we suggest the following changes:

- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship, *but only to the extent necessary to establish a claim or defense*; or

In addition, we recommend the following changes to the first sentence in Comment [19]:

If a legal claim by a client or the client's representative alleges a breach *of duty* by the lawyer ... paragraph (b)(3) permits the lawyer to respond *only* to the extent the lawyer reasonably believes necessary to establish a defense.

We agree that an "implied authority" exception is not appropriate. We agree with the majority regarding paragraph (b)(3) incorporating Evidence Code section 958. Further, we agree with the majority as to paragraph (b)(4), permitting a lawyer to make disclosures to comply with a court order. Finally, we agree with the majority that it is helpful in Comment [3] to include a definition of the term "confidential information relating to the representation."



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink, reading "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a long, horizontal tail stroke.

Russell G. Weiner
Interim Chief Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 1.6

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 1.6 and offers the following comments.

COPRAC agrees with the substantial minority position and believes the use of the phrase "relating to the representation" is too limited to conform to Business & Professions Code Section 6068(e)(1). This rule should extend the duty of confidentiality to the same extent delineated by Section 6068(e). Comment [3] to the proposed Rule should be revised to reference Section 6068(e).

COPRAC does not favor adoption of the so-called Enron exceptions permitting disclosure in certain situations involving financial harm.

COPRAC also agrees with the Commission that an exception for implied authority to disclose information is too broad, given the importance of protecting confidential information.

We further agree that compliance with a court order addressing disclosure of confidential information should be permitted by the proposed rule, with the proviso set forth in the comment that an appeal should be considered.

COPRAC members are divided on whether the compliance with "other law" should also be included as a scenario in which disclosure should be permitted. A majority of COPRAC members believe that this exception should not be included in the California rule.

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

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

ROBERT K SALL

THE SALL LAW FIRM
A PROFESSIONAL CORPORATION
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JAMES T BIGGS
LARA A S CALLAS
BRANDON N KRUEGER

November 13, 2009

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

RE: Rule 1.6 – Confidentiality of Information

Dear Ms. Hollins:

I am writing as an individual, to express my concerns and comments regarding Proposed Rule 1.6 regarding the Confidentiality of Information:

I am concerned that there is ambiguity in the use of the words “the lawyer reasonably believes” in subsection (b) of the proposed rule. The lawyer’s reasonable belief standard is already incorporated into subsection (b)(1). It is not necessary, and perhaps confusing, to introduce the reasonable belief standard multiple times.

Further, in instances other than prevention of a criminal act, either the disclosure is necessary or it is not. The reasonable belief standard would only make the analysis too subjective. The lawyer should not be making unnecessary disclosures, even if the lawyer might subjectively believe they are reasonable. Thus, we would recommend leaving the subjective belief standard in subsection (b)(1), but removing the words “the lawyer reasonably believes” from subsection (b).

Likewise, in Comment 22, the Commission should consider removing “the lawyer reasonably believes” which appears twice in that comment.

I am also concerned that the permissive disclosure in subsection (b)(3) of the rule may be abused in instances where the client accuses the lawyer of wrongdoing. Information is sometimes publicly revealed in circumstances where the disclosure is not necessary to establish a claim or defense. Although the limitation is further addressed in subparagraph (d) of the proposed rule, I believe that Comment 19 should be revised to make a stronger statement that such disclosure must be limited to be only to the extent necessary to establish such claim or defense, and within the context of a proceeding that exists for such purpose. Potential language might be:

Audrey Hollins
Office of Professional Competence, Planning & Development
State Bar of California
November 13, 2009
Page 2

“Public disclosures of information relating to the representation of a client are ordinarily not necessary to defend against a claim asserted against a lawyer. Therefore, disclosures should be limited to the context of the proceeding in which such claim or defense is being made.”

Regarding subsection (c)(1) of the proposed rule, I believe it is confusing to have the two subsections, (i) and (ii) and the suggestion that the lawyer may “do both”. If the lawyer is going to do this at all, the lawyer *should* do both. The entire disclosure is permissive, not mandatory, so it adds confusion to say that the lawyer shall do this if reasonable under the circumstances and then say that the lawyer “may do both”. This subsection would more readable and understandable if (c)(1) was rephrased as follows:

“(1) make a good faith effort to persuade the client not to commit or to continue the criminal act, *and counsel the client* to pursue a course of conduct that will prevent the threatened death or substantial bodily harm.”

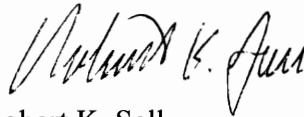
If this suggested revision is adopted, then in Comment 13 it would be necessary to delete the words “or to persuade” and insert the words “and to counsel”.

In Comment 6, I am concerned about the confusion that some lawyers will have about disclosure of information that is in the public record versus information that is generally known in the local community. There should be a better explanation of the “generally known” standard, so that it is not confused with public record.

Thank you for considering these comments.

Very truly yours,

THE SALL LAW FIRM
A Professional Corporation

A handwritten signature in black ink, appearing to read "Robert K. Sall", written over a light blue background.

Robert K. Sall

RKS/jvb



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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James W. Talley

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: 3-100, B&P § 6068(e)

Proposed New Rule No./ Title: 1.6

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 [XX – in part] No [XX – in part]

Given Cal. Bus. & Prof. Code § 6068(e), the Rules Revision Commission very smartly departed from Model Rule 1.6 and adhered more closely to California Rule 3-100 and § 6068(e)’s high level of respect for the protection of client confidences.

The only questionable policy concerns are raised by proposed Rule 1.6(a) and 1.6(b)(3). If the Committee decides against adoption of Rule 1.14(b), then Rule 1.6(b)(5) also should be addressed. Rule 1.6(b)(5) refers lawyers to Rule 1.14(b), and allows disclosures to protect the interests of a client under the limited circumstances identified in Rule 1.14(b). Although Rule 1.6(b)(5) adds a significant exception to the duty to keep client confidences, the policy behind its addition is correct in light of proposed Rule 1.14(b), which allows a lawyer to act on behalf of a client with significantly diminished capacity.

Rule 1.6(a)

The Introduction to Proposed Rule 1.6 notes that the Commission is substantially divided regarding the addition to Rule 1.6(a) appearing in **bold** below:

A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as “confidential information relating to the representation” in this Rule.**

By adding the sentence in bold, the majority of the Commission attempted to harmonize § 6068(e)(2) with § 6068(e)(1). However, this harmonization is unnecessary given the clear statutory language of § 6068(e), and the result of the Commission's attempt at harmonization is to weaken § 6068(e)'s protection for client confidences overall.

Section 6068(e)(1) protects all client confidences, and not just those "related to the representation." Section 6068(e)(2) permits the disclosure of confidences "related to the representation" in a very narrow instance, i.e., to prevent a crime that will result in death or substantial bodily harm. In other words, under § 6068(e)(1), an attorney has a duty to preserve all client confidences, regardless of whether they are related to the representation. Under § 6068(e)(2), an attorney may reveal only those confidences "related to the representation" in a very narrow instance.

The Commission's proposal to define information protected from disclosure by § 6068(e)(1) as "confidential information relating to the representation" could be read to weaken California's traditional protection of client confidences. Given its express wording, the second sentence of proposed Rule 1.6(a) is confusing at best, because it could arguably allow attorneys to reveal confidences not related to the representation. It interprets only confidences "related to the representation" as protected by § 6068(e)(1). The proposed sentence also is confusing as to whether Rule 1.6(b)(2) (exception for attorney to secure legal advice) and 1.6(b)(5) (exception in Rule 1.14(b) circumstances) would apply only when the confidential information of a client was "related to the representation." The wording proposed by the **minority** is preferable and clearer.

Minority Proposal for Rule 1.6(a), (b)(1).

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information" in this Rule.**

(b) A lawyer may, but is not required to, reveal confidential information of a client to the extent that the lawyer reasonably believes the disclosure is necessary:
(1) **when the information relates to the representation of a client,** to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

Rule 1.6(b)(3)

Rule 1.6(b)(3) provides an exception to the duty to keep client confidences when a duty relating to the attorney-client relationship has been breached:

to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client relating to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship;

This paragraph, although intended by the Commission to track Cal. Evid. Code § 958, in fact goes far beyond the statutory exception to the attorney-client privilege in California. The exception set forth in § 958 applies only when a court determines that the exception applies. By contrast, proposed Rule 1.6(b)(3) would allow each individual attorney to make that determination. As a practical matter, it seems impossible for any attorney involved in such a client conflict to make a truly impartial determination of whether the Rule 1.6(b)(3) exception applies. This determination is better left to an impartial court. *See* Evid. Code § 958. California's respect for client confidences should not be lessened by the inclusion of Rule 1.6(b)(3).

Nonetheless, in the interest of uniformity, the recommendation is to replace the proposed paragraph with the provision of the ABA Model Rules, set forth in 1.6(b)(5).

(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 [XX] 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 [XX – in part] No [XX – in part]

Yes, with the exception of sub-part 1.6(a) and (b)(3), as stated 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 [XX] No []

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

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

[XX] We approve the new rule with modifications.* Modify 1.6(a) and 1.6(b)(3) as indicated above.

[] 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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Santa Clara County Bar Association

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name Jil Dalesandro

* City San Jose

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)] 

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) opposes the revisions proposed by the RRC in completely deleting subsections (b) (2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b) (2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application. The exception will allow attorneys in certain limited circumstances to meet the profession's obligation to protect interests greater than that of an individual client, particularly where that client is one who wishes to engage in criminal activity or commit fraud which has the potential of inflicting a substantial injury. Other jurisdictions' experience with the Model Rule shows that the exception does not unduly undermine the attorney-client relationship. Indeed, California's own experience since 2004 with the exception relating to criminal conduct that may result in substantial bodily harm or death demonstrates that these limited exceptions do not erode the important policy of

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

The Santa Clara County Bar Association (SCCBA) opposes the revisions proposed by the RRC in completely deleting subsections (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application. The exception will allow attorneys in certain limited circumstances to meet the profession's obligation to protect interests greater than that of an individual client, particularly where that client is one who wishes to engage in criminal activity or commit fraud which has the potential of inflicting a substantial injury. Other jurisdictions' experience with the Model Rule shows that the exception does not unduly undermine the attorney-client relationship. Indeed, California's own experience since 2004 with the exception relating to criminal conduct that may result in substantial bodily harm or death demonstrates that these limited exceptions do not erode the important policy of protecting the communication between a client and attorney. Having an attorney-client confidentiality rule that allows a client to use an attorney to commit a future crime or fraud really only serves to shield the attorney from making the difficult decision to divulge client confidences. Attorneys' role in society and in the administration of justice is greater than providing services to an individual client who wishes to engage in a future crime or fraud. In these rare situations, attorneys should be free to make a judgment to take action that could prevent substantial harm by a client. To continue to prevent an attorney from making that judgment actually serves to undermine the profession as a whole and impair attorneys' ability to maintain a reputation that ensures the respect for the judicial system. No valid argument has been posited to distinguish California lawyers and the practice of law in California from attorneys in the remainder of the country such that would justify California maintaining its parochial inviolate rule of attorney-client confidentiality. Not one example has been cited from any other jurisdiction to suggest that the exceptions included in the ABA Model Rule erodes the attorney-client relationship to the detriment of clients, the legal profession, society or the judicial system. Simply because California has always had an inviolate rule is not reason enough to continue it.



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Executive Committee of the Trusts & Estates Section of

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name

* City

* State 

* Email address
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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



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

☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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

See attachment.

Proposed comment re Proposed Rule 1.6:

The Executive Committee of the Trusts and Estates Section of the State Bar urges (1) retaining subparagraph (b)(4) of the Proposed Rule which would allow disclosure of confidential client-information when necessary to comply with a court order; and (2) including in subparagraph (a) the Model Rule exception that allows for disclosure of confidential client information when "disclosure is impliedly authorized in order to carry out the representation." Otherwise, the only general exception to the Business & Professions Section 6068 prohibition on disclosure would be for when the client gives informed consent.

Because there is no attorney-client privilege after the client's death for attorney-client communications relevant to a will or other writing executed by the client (Evidence Code sections 959-961), an estate planner who becomes a witness in a will contest or other estate dispute, without the benefit of exceptions for implied authority and a court order, would likely be faced with choosing between risking contempt of court by refusing to disclose non-privileged but confidential communications, or violating a rule of professional conduct by disclosing the communications. The specific policy behind these Evidence Code sections, to enable the use of confidential client communications as evidence respecting the validity of a deceased client's writings, should trump the general ethical policy requiring attorneys to maintain confidential client information free from disclosure even after the client has died. This rule also could have elder abuse implications. Without the attorney's ability to disclose based on implied authority or a court order, an executor who has benefitted from estate planning documents obtained by fraud, undue influence, or manipulation of an elder, likely would not consent to the attorney's disclosure and thereby would prevent the attorney from testifying about the circumstances of the documents' execution.



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  California Attorneys for Criminal Justice (CACJ)

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name Robert Sanger

* City Santa Ynez

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)] 

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.

Proposed Rule 1.6 Confidentiality of Information:

Our proposed modification would be to paragraph (b) (4) to add the following language to say: to comply with a "valid" court order.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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NORMA J. WILLIAMS

ROBIN L. YEAGER

November 12, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.6 –
Confidentiality of Information

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.6 regarding the Confidentiality of Information:

PREC supports the Commission's decision to focus on confidentiality, and therefore supports the general deviations of this proposed rule from the text of Model Rule 1.6.

Regarding Comment 5, PREC is concerned about the broad reference to the State Bar Act at the end of the comment. That is overbroad, and makes the rules difficult to analyze. The comment should refer directly to the specific provisions of the State Bar Act that are intended to be incorporated, such as Section 6068(e).

In Comment 6, PREC is concerned about the confusion that some lawyers will have about disclosure of information that is in the public record versus information that is "generally known" in the local community. There should be a better explanation of the difference. There is sometimes information that is in the public record that should not be disclosed. The "generally known" standard is not sufficiently defined.

In Comment 9, the first line is an incomplete sentence. If this is intended as a title for the comment, perhaps it should be italicized?

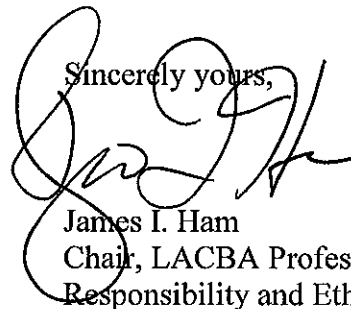
PREC also believes that Comments 23 and 26 do not add anything to interpretation of the rule, and should be deleted in the spirit of removing unnecessary comments. These are simply repetitive of what is stated elsewhere in the comments or the rules. Even though Comment 26 is derived from the ABA Comments, we believe it is unnecessary and duplicative.

In general, PREC believes that the proposed rules have too many comments, and the comments are too lengthy. There may be questions as to whether the comments are controlling. Such lengthy rules create impracticality for purposes of State Bar proceedings and difficulty in counseling clients.

Finally, PREC expresses concern about the characterization being given by the Commission to "California's traditional emphasis on client protection" in connection with this rule. The underlying purpose of this rule is to protect the confidentiality of client information. As such, it serves the important public purpose of maintaining confidence in the integrity of the attorney-client relationship, and encourages clients to provide information to their lawyers. This does not always equate with client protection, and should not be so limited.

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

Sincerely yours,

A handwritten signature in black ink, appearing to read "James I. Ham", is written over the typed name and title.

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

Rule 1.8.2 – Public Comment – File List

E-2009-292c OCBA [1.8.2]

E-2009-293c State Bar OCTC [1.8.2]

E-2009-310e COPRAC [1.8.2]

E-2009-351c SDCBA [1.8.2]

E-2009-358c Santa Clara County Bar [1.8.2]

E-2009-368c CACJ [1.8.2]

E-2009-370c LACBA [1.8.2]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 1.8.2 – Use of Current Client's Information Relating to the Representation**

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 comments concerning the subject proposed Rule:

The OCBA supports the adoption of proposed Rule 1.8.2, subject to the comments set forth below.

The OCBA believes the language "information relating to representation of a client" should be replaced with the language used in proposed Rule 1.6(a), specifically, "information protected from disclosure by Business and Professions Code section 6068(e)(1)." Currently, there is no statement in proposed Rule 1.8.2, as there is in proposed Rule 1.6(a), to explain the correlation between the phrases, nor does proposed Rule 1.8.2 contain the definition included in Comment [3] of proposed Rule 1.6.

Use of the language "information relating to the representation of a client" in both the proposed Rule and Comment [1] is vague, overbroad and potentially confusing for attorneys. The language potentially subjects attorneys to disciplinary action for failing to recognize that information somehow "relates" to the representation of a client. While the duty of loyalty and duty of confidentiality both dictate that an attorney should not use his or her own client's information to that client's disadvantage without informed written consent, expanding the obligation to include within its scope any and all information potentially relating to the representation is not warranted.

While the stated purpose of proposed Rule 1.8.2 is to provide a standard for the use of a current client's information, whether confidential or not, the language "confidential information relating to the representation," as interpreted elsewhere in the Rules and by California case law, has been construed broadly to include any information "gained by virtue of the representation of a client, *whatever its source*, that . . . is likely to be embarrassing or detrimental to the client." See Comment [3] to Proposed Rule 1.6. Adopting the same language as used in proposed Rule 1.6 not only ensures consistency between the two Rules, but also provides lawyers with more

definitive guidance on how to comply with the Rule. Consequently, the OCBA suggests adding to Comment [1] to proposed Rule 1.8.2 a reference to the definition in Comment [3] of proposed Rule 1.6.

Additionally, the OCBA proposes that the Rule be clarified as applying only to a "current" client's information, as indicated in the Commission's introductory statement and in the title of the proposed Rule.

Finally, the OCBA agrees with the Commission's proposed modification to the Model Rule, adopting the "informed written consent" language. The "informed written consent" language is consistently applied in California, and the OCBA does not urge any divergence from that standard here. Thus, the OCBA suggests that proposed Rule 1.8.2 be modified to read as follows:

A lawyer shall not use a current client's information protected from disclosure by Business and Professions Code section 6068(e)(1) to the disadvantage of that client unless the client gives informed written consent, except as otherwise permitted by these Rules or the State Bar Act.



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a long, horizontal tail stroke.

Russell G. Weiner
Interim Chief Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 1.8.2

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 1.8.2 and offers the following comments.

COPRAC generally supports Proposed Rule 1.8.2 concerning use of confidential information.

COPRAC believes that written consent should be required, given the seriousness of the issue addressed by this rule, which involves a lawyer using confidential information of a client to the disadvantage of a client.

COPRAC encourages the Commission to address in the rules, perhaps in the definitions, whether informed written consent includes an email from the client. A majority of the members of COPRAC believe that an email should be sufficient.

Finally, COPRAC recommends one minor change to Comment [1]. In the third sentence, the phrase "in competition with the client" should be moved to the end of the sentence. Recommending that another client make a purchase would not violate the rule unless such a purchase disadvantaged the client.

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

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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November 11, 2009

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: 3-100, 3-310

Proposed New Rule No./ Title: 1.8.2 – Use of Confidential Information

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 [☐]

(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 [☐]

(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 [☐]

(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:

The Commission minority believes that the proposed rule should not require a client’s informed consent to be “written.” The minority distinguishes disadvantageous use from conflicts on the ground that an inexperienced client will readily perceive the adverse effects of the former but not necessarily of the latter. This distinction, however, is an illusion because disadvantageous use is a form of conflict of interest, at least in a broad sense relevant here. Moreover, the adverse effects of a disadvantageous use of information will not always be readily apparent to a client. Finally, the requirement that informed consent be written serves protective and evidentiary purposes that transcend the degree to which adverse effects are perceptible. Given California’s embrace of written consent in other contexts, the minority’s objection should be overruled.

CONCLUSIONS (pick one):

[☒] 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.



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Santa Clara County Bar Association

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name Jil Dalesandro

* 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.8.2 Use of Confidential Information [3-100, 3-310] 

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

☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  California Attorneys for Criminal Justice (CACJ)

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name Robert Sanger

* City Santa Ynez

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.8.2 Use of Confidential Information [3-100, 3-310] 

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

☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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

Proposed Rule 1.8.2 Use of Current Client's Information Relating to the Representation:

Our proposal is to follow precisely the ABA Model Rule 1.8(b).



LACBA

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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

November 12, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.8.2 - Use
of Current Client's Information Relating to the Representation

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (PREC) has reviewed Proposed Rule 1.8.2. PREC supports the Commission for the Revision of the Rules of Professional Conduct's Proposed Rule 1.8.2.

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

Rule 1.8.13 – Public Comment – File List

E-2009-292d OCBA [1.8.13]

E-2009-351d SDCBA [1.8.13]

E-2009-358d Santa Clara County Bar [1.8.13]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 28, 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 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12**

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 comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 1.8.13, which is similar to ABA Model Rule 1.8(k).

This proposed Rule would be the same as the Model Rule with respect to imputation of conflicts of interest to other attorneys in the same law firm, adopting the same substantive exception to the imputation rules as the Model Rules adopt: certain conflicts of a personal nature (*i.e.*, if a lawyer representing another person in the matter is a family member or has a close personal relationship with the other lawyer) would not be imputed to other attorneys in the law firm. The OCBA agrees with this approach; conflicts based on personal relationships between adverse attorneys should not be imputed to associated lawyers who lack the same personal connection with the adversary.



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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California Bar Associations
District Nine Representative**
James W. Talley

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: **N/A**

Proposed New Rule No./ Title: **1.8.13 Imputation of Personal Conflicts**

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 ☐

(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 ☐

(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 ☐

(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:

CONCLUSIONS (pick one):

☒ 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.*



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Santa Clara County Bar Association

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name Jil Dalesandro

* 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.8.13 Imputation of Personal Conflicts [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.

Rule 1.9 – Public Comment – File List

E-2009-292e OCBA [1.9]

E-2009-293d State Bar OCTC [1.9]

E-2009-310d COPRAC [1.9]

E-2009-350b CPDA [1.9 & 1.10]

E-2009-351e SDCBA [1.9]

E-2009-358k Santa Clara County Bar [1.9]

E-2009-370d LACBA [1.9]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
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- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 1.9 – Duties to Former Clients**

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 comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 1.9, which is similar to Model Rule 1.9, subject to the comments set forth below.

The OCBA is concerned that the change from the Model Rule in paragraphs (c)(1) and (2), to substitute "current client" for "client," potentially introduces ambiguity. As former clients continue to enjoy various protections against use and disclosure of their confidential information, it is not clear whether the modified reference to "current client" is intended to narrow the exception to apply only to rules applicable to current clients, to the exclusion of rules permitting disclosures as to former clients. The OCBA accordingly asks the Commission to clarify the meaning and intent behind the reference to "a current client" in the exception.

Comment [1] should be amended to substitute "with respect to" for "in" on line five (with the phrase to read "...will injuriously affect his or her former client with respect to any matter...") so that the Comment is not read as restricted only to the very matter in which the attorney represented the former client.

Comment [4] should be amended to add "in" after "is" in the second line (simply to correct what appears to be a typographical error).

Comment [7] should be amended to substitute "...with respect to any matter in which the lawyer represented the former client" for "in any manner in which the lawyer represented the former client" (in the third sentence, subpart (i)), to clarify the meaning of the Comment, consistent with our suggestions for Comment [1].

Comment [7] also should be amended by substituting "of" for "to" in the last line (simply to correct what appears to be a typographical error).

Thus, the OCBA is opposed to any formal requirement for informed written consent from clients to implement an ethical screen to avoid disqualification.

A properly implemented and scrupulously maintained ethical screen is a proven and effective means of resolving conflicts. The ethical rules should not assume that lawyers migrating in private practice will be dishonest or violate their obligations of confidentiality by disregarding properly imposed screening procedures, while simultaneously assuming the contrary for former government lawyers, paraprofessionals and others. The lawyers involved are already subject to ethical rules pertaining to duties of confidentiality and loyalty. The screen adds additional protections. While screens do involve some level of disclosure risk for clients, there is little in the way of authority or empirical data to suggest that violations will occur, that defective screens have injured clients, or that other ethical problems have arisen where screens have been permitted and applied in federal courts and other states.

Accordingly, the OCBA supports the ABA's approach to screening and, therefore, encourages the Commission to adopt the non-consensual screening provisions of Model Rule 1.10(a)(2). Under the ABA's carefully considered approach, client interests are adequately protected, and the mobility interests of lawyers and law firms are reasonably satisfied as well. These are important issues that should not be disregarded in the rules.



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal.^{4th} 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a distinct "R".

Russell G. Weiner
Interim Chief Trial Counsel



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

November 9, 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 1.9

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 1.9 and offers the following comments.

COPRAC supports the proposed rule. We believe that the language of sub-section (b) is unclear as to what is required to be known.

We also agree with the minority as to the issue involving Business and Professions Code section 6068(e) and proposed Rule 1.6, in that it appears to COPRAC that the definition of confidential information set forth in proposed rule 1.6 is narrower than the scope of Section 6068(e).

The proposed rule references the State Bar Act; Comment [3] references Rule 1.6; Comment [7] then refers to both section 6068(e) and Rule 1.6; and finally Comment [10] then references yet a further iteration, a duty to preserve confidential information "about a client." COPRAC suggests that uniformity of reference would assist practitioners in applying the rule. Reference to section 6068(e) and Rule 1.6 (assuming that rule is re-crafted to address the concerns of the minority) would be appropriate.

In light of these concerns, COPRAC proposes that section (b) be rewritten as follows:

- (b) A lawyer shall not represent a person in a matter which the lawyer knows to be the same or substantially related to a matter in which a law firm with which the lawyer formerly was associated had represented a client:
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former law firm, had acquired information that is protected by Business and Professions Code section 6068(e) and Rule 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.

For grammatical purposes, we changed the word “knowingly” to “knows.” In addition, we dropped the word “previously” as unnecessary and confusing.

Comment [3] appears to have an incorrect reference to the type of work being performed by the lawyer who is the subject of the second example in this comment. The lawyer’s previous representation in a land use matter is compared, first, with a zoning matter (considered to be substantially related) and, second, with an eviction matter (considered to not be substantially related). The example incorrectly concludes by stating “there is no substantial relationship between the *zoning* and eviction matters.” [italics added] The word “zoning” in this phrase should be replaced with the words “land use” in order for the proper comparison to be made.

The last sentence of Comment [5] is confusing and unhelpful as drafted. It should be revised to state “The evidentiary presumption created for disqualification purposes should not apply in a disciplinary context.”

Finally, we note that the rule uses the terms “firm” and “law firm.” COPRAC recommends that a uniform term be used throughout.

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

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, 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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.9 Duties to Former Clients [3-310] 

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

☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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

PLEASE SEE ATTACHED LETTER



CPDA

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
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November 13, 2009

Audrey Hollins

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, CA 94105-1639

Re: Proposed Rules 1.9 and 1.10

Dear Ms. Hollins:

The California Public Defenders Association has concerns about the application of these proposed rules to public defender offices and recommends that certain comments be rewritten to reflect existing California law.

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. Our attorney members act as legal counsel for the vast majority of indigents accused of criminal conduct in California. Established in 1969, CPDA is the state-designated continuing legal education provider for all local public defender offices in California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

CPDA is generally in agreement with Proposed Rules 1.9 and 1.10 except for their failure to follow existing law in recognizing that imputed conflicts of interest must be analyzed differently between criminal cases and civil cases, especially in criminal cases where the clients are represented by a public defenders office or other indigent defense office. The problems with Proposed Rules 1.9 and 1.10 are not so much in the language of the proposed rules but instead arise from certain comments published in conjunction with these rules.

Specifically, CPDA points out that Comments 5 and 6 to Proposed Rule 1.9 are contrary to existing law.

Rule 1.9 generally disqualifies a lawyer or the lawyer's firm from representing a party where the lawyer or the law firm has previously represented another person "in the same or a substantially related matter" and the new potential client's interest is materially adverse to the former client, or the lawyer or law firm has previously obtained confidential information from the former client which is

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material to the present action, without the written consent of the former client. CPDA has no quarrel with this rule, at least in the abstract.

However, Comments 5 and 6 to the proposed rule are problematic, contrary to existing law, fail to take into consideration various factors concerning public defender and other indigent offices, and would result in wasteful expenditures of limited public funds without resulting in any additional protection of the confidences and secrets of former clients (see, Business and Professions Code section 6068 (e)).

While recognizing that “the same or a substantially related matter” will have different applications in different types of proceedings, Comment 5 nevertheless proposes a blanket application of Rule 1.9 to require disqualification of the law firm “when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney”, citing *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454.

But the application of the *Ahmanson* presumption to criminal cases was expressly rejected in *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1575, which observed that “a rigid rule of disqualification can create hardship to the new client and can also be abused as an improper tactical maneuver.” To the contrary, *Rhaburn* relied on a series of California Supreme Court decisions in criminal cases in holding that it was error to disqualify an entire public defender office from representing an indigent criminal defendant over the defendant’s objection simply because the public defender’s office previously represented a prosecution witness, where the individual attorney assigned to represent the current defendant did not “have a ‘direct and personal’ relationship with the witness [i.e., the former client] . . .” (140 Cal.App.4th at p. 1581.)

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Condemning the application of “a rigid rule of vicarious disqualification”, the court of held that, “[i]nstead, the trial court should evaluate the totality of the circumstances in determining whether there is a reasonable possibility that the individual attorney representing defendant either has obtained confidential information about the witness collected by his or her office, or may inadvertently acquire such information through file review, office conversation, or otherwise.... We also stress in a case that does not involve ‘direct and personal’ representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so.” (*Ibid.*)

Comment 6 suffers from the same problem; it relies on *Ahmanson* and ignores *Rhaburn*. As held in *Rhaburn*, a conflict of interest should not be found on the basis of the public defender’s office previous representation of a former client unless “there is a reasonable possibility that confidential information may be acquired and used by counsel.” (140 Cal.App.4th at p. 1582.) Further, the establishment and maintenance of procedures by the public defender which prevent any attorney representing a client in a present case from gaining access to information obtained from a former client in a previous case is a significant factor tending to eliminate any “possibility that confidential information may be acquired and used” in the representation of the present client.

Thus, CPDA respectfully suggests that Comments 5 and 6 must be modified to limit their application to civil cases, or at least recognize that the vicarious disqualification rule must be applied more flexibly in criminal cases. They should be supplemented to expressly acknowledge that the usual rules and presumptions concerning disqualification of law firms from successive representation of different clients concerning related topics do not apply to a public defender’s office. Instead, the comments should expressly provide

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that a public defender's office or other indigent defense office is not disqualified from representing a client in a current proceeding where a former client of the office is an adverse witness in the current proceeding, unless there is a reasonable possibility that confidential information previously obtained from the former client will be acquired and used in the current proceeding. Finally, in making this determination, the court and counsel should consider the factors identified in *Rhabum*, including whether the office has established, and maintains, procedures which ensure that the information obtained from the former client in the previous cases is not accessible to any attorney in the course of representing any other client. Unless Comments 5 and 6 are revised accordingly, they will be in conflict with existing law and prudent public policy.

In addition, since Comment 5 to Proposed Rule 1.10 incorporates Rule 1.9, and applies the same disqualification rules where the former client was represented by a lawyer who is no longer employed by the firm, Rule 1.10, subdivision (b)(1), and Comment 5 must likewise be modified accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bart Sheela', written over the word 'Sincerely,'.

Bart Sheela
President,
California Public Defenders Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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Bonnie M. Dumanis

**Conference of Delegates of
California Bar Associations
District Nine Representative**

James W. Talley

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,



Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: **RPC 3-310(E)**

Proposed New Rule No./ Title: **1.9 - Duties to Former Clients**

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 [☐]

(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 [☐]

(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 [☐]

(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

CONCLUSIONS (pick one):

[☒] 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.



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: NOVEMBER 13, 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@scccba.com

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.9 Duties to Former Clients [3-310] 

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

☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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



LACBA

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ROBIN L. YEAGER

November 12, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.9 – Duties
to Former Clients

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.9 regarding Duties to Former Clients:

PREC is generally supportive of the proposed rule and its comments. However there is some concern that the Comments are too long, give practice pointers, and are suggestive of means to avoid disqualification in a way that may be viewed as attempting to create substantive law for civil proceedings.

Comments 8 and 9 in particular seem directed to provide guidance not just to lawyers but also to Courts on the subject of disqualification. Comments that refer to disqualification are not just for disciplinary purposes – they seem calculated to specifically address how Courts will handle disqualification.

While PREC is concerned that the Rules of Professional Conduct are too often used as tactical weapons in litigation to seek disqualification, the question of resolving that concern is a matter for the Legislature or the Courts. The Comments to the rules are supposed to be interpretive aids to the rules and should not set forth burdens of proof, nor should they state whether a lawyer or a firm will be disqualified. The rule is the rule. It is up to the State Bar to apply the rule to disciplinary proceedings, and it is up to Courts to determine whether or how to apply a rule to civil litigation. The fact that the Commission is including disqualification issues in Comments 8 and 9 makes a policy statement that the rules are to be used and considered in civil proceedings, an issue that is one of much debate. We don't necessarily disagree with the Comments, but we point this out only to be certain that the Commission considers the consequences of taking the step of including such guidance in the context of disciplinary rules. It may be viewed as contrary to the stated purposes of the rules, over which the Commission has struggled for many years.

With respect to Comment 8, the disqualification reference could be avoided by saying that such representation is not a violation of this rule.

With respect to Comment 9, the suggestion that a lawyer may have only limited access to files and no access to information about particular clients seems to approve non-consensual screening, a position that the Commission appears to have resisted in Proposed Rule 1.10. The Commission seems split on the screening issue, and this split appears in the drafting of various rules. Comment 9 of Proposed Rule 1.9 and Proposed Rule 1.10 should be consistent.

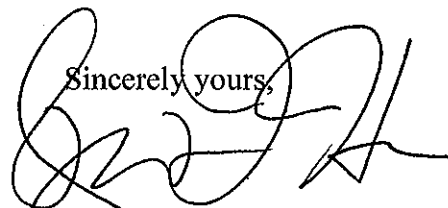
If Comment 9 is to be retained, the last sentence should be modified to make it clear that the burden of proof should rest upon the firm *and the lawyer* whose disqualification is sought. Paragraph (b) of the Proposed Rule is about a lawyer, not just a firm. We note, however, that the disciplinary rules are no place to set civil burdens of proof or regulate disqualification.

PREC also has some concern about the repeated references to the State Bar Act, in subsections (c)(1) and (2). We note that the reference to the State Bar Act in a disciplinary rule is too broad, and carries with it the same lack of clarity that would come with language such as "except as otherwise provided by law."

PREC notes that what appears to be the primary concern by reference to the State Bar Act is Section 6068(e), and if that is the intent, the rule should simply refer to that section. If the Commission has in mind some other provisions of the State Bar Act that are relevant to the Rule, it should state what those are, rather than making wholesale reference to the entire Act.

Finally, regarding Comment 11, we are concerned about the last sentence that seems to convey that a lawyer is free to disclose any information about a former client that is "generally known information." This is not well defined and leaves open the possibility of being construed by lawyers as *carte blanche* to reveal information from the public record. If you are going to retain this sentence, we believe the meaning of "generally known information" should be clarified, and distinguished from public record information.

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

Rule 1.10 – Public Comment – File List

E-2009-290 Sall Law Firm [1.10]
E-2009-292f OCBA [1.10]
E-2009-293e State Bar OCTC [1.10]
E-2009-310c COPRAC [1.10]
E-2009-350b CPDA [1.9 & 1.10]
E-2009-351f SDCBA [1.10]
E-2009-358e Santa Clara County Bar [1.10]
E-2009-370e LACBA [1.10]

ROBERT K. SALL

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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 to Rules of Professional Conduct
Rule 1.10 – Imputation of Conflicts – General Rule

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 1.10, and the issue of screening to avoid disqualification:

The Commission has requested input from the public and the profession on the particular issue of whether any kind of non-consensual screening should be permitted. I am opposed to allowing non-consensual screening of any kind for conflicted lawyers to avoid conflicts.

It is a fact of modern law practice that lawyers will migrate from firm to firm, either taking clients and cases with them or leaving them behind. The imputation conflicts that arise in such situations are not caused by the client. They are typically created by, and therefore, the responsibility of the lawyers and firms involved. Nevertheless, they create significant risk for clients.

I am of the view that clients should not have to worry about whether their present or former lawyers are being loyal. Clients should not be exposed to concerns about the revelation of confidential information, or that persons associated with their team of

lawyers might improperly gain access to files or data that are not supposed to be revealed to particular lawyers within the firm. The client has no effective means to monitor a screen, nor should the client bear the difficulty or expense of monitoring a conflict not of the client's creation. While a properly implemented and scrupulously maintained ethical screen may be one effective means of resolving such conflicts, the risks to the client associated with such an ethical screen should never be imposed without rigorous procedures, full disclosure and informed written consent.

An ethical screen is only as good as the means by which it is implemented, the quality of the established procedures, the diligence by which it is adhered to, and the integrity of the persons responsible for ensuring compliance. Screens may develop leaks. Within the context of a law firm, client files and data are difficult to keep under strict lock and key. Confidential information may be discussed and overheard. No system is entirely foolproof. The consequences of a leak may be devastating to a client, but even if there is no leak, having to be concerned about it potentially impairs the client's trust or confidence in the lawyers.

I am confident that the Commission will receive a wealth of public comment from large firms or the organized bar associations that the Commission's proposed limitations upon screening are too restrictive, will impair lawyer mobility, create conflicts and frustrate law business. I'm not moved by these comments, nor should you be. The nature of law practice has changed over the years, but that is no fault of the average client. Loyalty and confidentiality should not bend to a lawyer's desire to change jobs or to a law firm's goal to generate larger sources of revenue. If things keep moving in that direction, it will only be a matter of time before – conflicts be damned – your partners and associates next door can work on anything they want, because we've entrusted them on their honor that they won't cheat. While the vast majority of lawyers have integrity, unfortunately, in my career I have seen quite a few who do not. And that is why we have ethical rules to guide their conduct. There are certain areas in which clients need protection, and this is one of them. We should not further erode loyalty by permitting law firms to establish non-consensual screens.

In a consensual screening arrangement, the means of implementing the screen may be openly discussed. This should be done in open daylight. The opportunity exists for an affected client to request procedures or methods to verify the screening process or its continued effectiveness. In non-consensual screening no such opportunity exists. Clients will never have access to the internal workings within the law firm or its internal communications and thus have little or no effective means of knowing that the screen works. It is inappropriate to place upon the client the burden of challenging a screening procedure the client may not even know exists, much less while having little or no access to information about it.

I strongly support the Commission's decision to reject the controversial non-consensual screening provisions of Model Rule 1.10(a)(2). Don't be swayed to deviate from this approach.

As to the issue of whether non-consensual screening should be allowed in limited situations to facilitate mobility of lawyers who were only peripherally involved in the matter, a client is far less likely to be concerned that one who had no knowledge or personal involvement in an adverse representation would be motivated to improperly access the client's confidential information. Even so, some of the same concerns will exist, and clients should be informed and have the opportunity to consent to the screening procedures that would be set in place. Screening for lawyers who were not involved or only peripherally involved is something that a firm can address in an appropriately drafted advance waiver describing the screening procedures, but nevertheless obtaining the client's consent. In that situation, the law firm would only need to give notice at the time of the hiring, and implement the screen as previously agreed. I remain opposed to the concept that the lawyer may simply be hired, secretly screened, and that the client is never informed, and never had the opportunity to consider whether it wanted to be exposed to such risk.

Due to the extreme difficulty for a client to monitor or enforce an ethical screen, I believe screening generally should not be permitted in the context of a private law firm without each affected client's informed written consent. A thorough advance waiver may be permissible as to non-involved or peripherally involved persons. A current fully informed consent should be required in all other contexts.

To the extent that the Commission does ultimately conclude that any form of screening is permissible, I recommend that the rule be specific as to minimum required screening procedures and a means of monitoring the compliance with a screen.

Thank you for your consideration.

Very truly yours,

THE SALL LAW FIRM
A Professional Corporation


Robert K. Sall

RKS/jvb

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 1.10 – Imputation of Conflicts – General Rule**

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 comments concerning the subject proposed Rule:

The OCBA is opposed to the adoption of proposed Rule 1.10 as presently drafted, and favors a rule that allows non-consensual screening to avoid disqualification conflicts. The OCBA is of the view that client consent should not be required as it gives the client an unreasonable veto power over lawyer mobility, which is essential in today's legal marketplace, and over other clients' rights to choose their counsel. The concerns over client confidentiality can be satisfied by adoption of the elements of permissive screening, which are stated in ABA Model Rule 1.10(a)(2) and its subparagraphs, to wit:

- (1) that written notice is promptly given to any affected former client to enable the former client to ascertain compliance with this rule;
- (2) that the notice shall include a description of the screening procedures;
- (3) that a statement be provided of the firm's and the screened lawyer's compliance with these rules;
- (4) that a statement be provided that review may be available before a tribunal; and
- (5) that the firm provide an agreement to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
- (6) that certifications of compliance with these rules and with the screening procedures be provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of screening procedures.

Thus, the OCBA is opposed to any formal requirement for informed written consent from clients to implement an ethical screen to avoid disqualification.

A properly implemented and scrupulously maintained ethical screen is a proven and effective means of resolving conflicts. The ethical rules should not assume that lawyers migrating in private practice will be dishonest or violate their obligations of confidentiality by disregarding properly imposed screening procedures, while simultaneously assuming the contrary for former government lawyers, paraprofessionals and others. The lawyers involved are already subject to ethical rules pertaining to duties of confidentiality and loyalty. The screen adds additional protections. While screens do involve some level of disclosure risk for clients, there is little in the way of authority or empirical data to suggest that violations will occur, that defective screens have injured clients, or that other ethical problems have arisen where screens have been permitted and applied in federal courts and other states.

Accordingly, the OCBA supports the ABA's approach to screening and, therefore, encourages the Commission to adopt the non-consensual screening provisions of Model Rule 1.10(a)(2). Under the ABA's carefully considered approach, client interests are adequately protected, and the mobility interests of lawyers and law firms are reasonably satisfied as well. These are important issues that should not be disregarded in the rules.



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a distinct "R".

Russell G. Weiner
Interim Chief Trial Counsel



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

November 9, 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 1.10

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 1.10 and offers the following comments.

A majority of COPRAC members believes that California should not adopt a rule requiring imputation of conflicts of interest. The predominant view is that this issue is adequately addressed by case law in California and should not be the subject of discipline. COPRAC believes that the existing regime, which addresses imputation in the context of disqualification, along with the discipline that is available for actual disclosure of confidential information, is adequate to protect client confidences. COPRAC believes that because imputation rests on a legal fiction, it is not an appropriate subject for discipline.

Acknowledging that the RRC has concluded that imputation is an appropriate subject for discipline, as reflected in proposed Rule 1.10, COPRAC believes that if an imputation rule is adopted, such a rule should permit non-consensual screening for private lawyers. While COPRAC members have a difference of opinion regarding the appropriate scope of screening, there is a broad consensus among COPRAC members that screening is appropriate for lawyers who were peripherally involved in the prior representation. Those COPRAC members who favor screening in such circumstances believe it is a reasonable approach to accommodate lawyer mobility. Many other jurisdictions nationwide have permitted screening for some time without reported incidents of serious problems involving disclosure violations. Given this, COPRAC believes that the risk of adverse impact on the lawyer's duty of confidentiality to the client is negligible, and that this risk is particularly low when the lawyer being screened had minimal or peripheral involvement in the prior matter.

California's case law permits screening for government lawyers, with limited exceptions. COPRAC does not agree with the distinctions that have been drawn between government lawyers and private lawyers. COPRAC does not believe that there is empirical support for the

proposition that government lawyers are inherently more trustworthy than private lawyers. This too supports COPRAC's view that screening should be permitted.

Again assuming that an imputation rule is adopted, a slight majority of COPRAC members favor significantly broader screening for private lawyers. These COPRAC members favor a screening regimen similar to that set forth in current ABA Model Rule 1.10. There is a significant difference of opinion, however, and no consensus among COPRAC members, regarding whether certain specific provisions from the ABA Model Rule should be included, particularly the specific notification and certification requirements.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner". The signature is written in a cursive, flowing style.

Carole J. Buckner, 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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.9 Duties to Former Clients [3-310] 

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

☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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

PLEASE SEE ATTACHED LETTER



CPDA

California Public Defenders Association
10324 Placer Lane
Sacramento, CA 95827
Phone: (916) 362-1690 x 8
Fax: (916) 362-3346
e-mail: cpda@cpda.org

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Gary Mandinach, 2005-2006
Barry Melton, 2006-2007
Kathleen Cannon, 2007-2008
Leslie McMillan, 2008-2009

November 13, 2009

Audrey Hollins

Office of Professional Competence, Planning and Development

State Bar of California

180 Howard Street

San Francisco, CA 94105-1639

Re: Proposed Rules 1.9 and 1.10

Dear Ms. Hollins:

The California Public Defenders Association has concerns about the application of these proposed rules to public defender offices and recommends that certain comments be rewritten to reflect existing California law.

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. Our attorney members act as legal counsel for the vast majority of indigents accused of criminal conduct in California. Established in 1969, CPDA is the state-designated continuing legal education provider for all local public defender offices in California, and also represents the interests of CPDA's criminal defense attorney members in legislative sessions and on significant issues in the appellate courts.

CPDA is generally in agreement with Proposed Rules 1.9 and 1.10 except for their failure to follow existing law in recognizing that imputed conflicts of interest must be analyzed differently between criminal cases and civil cases, especially in criminal cases where the clients are represented by a public defenders office or other indigent defense office. The problems with Proposed Rules 1.9 and 1.10 are not so much in the language of the proposed rules but instead arise from certain comments published in conjunction with these rules.

Specifically, CPDA points out that Comments 5 and 6 to Proposed Rule 1.9 are contrary to existing law.

Rule 1.9 generally disqualifies a lawyer or the lawyer's firm from representing a party where the lawyer or the law firm has previously represented another person "in the same or a substantially related matter" and the new potential client's interest is materially adverse to the former client, or the lawyer or law firm has previously obtained confidential information from the former client which is

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rules 1.9 and 1.10
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material to the present action, without the written consent of the former client. CPDA has no quarrel with this rule, at least in the abstract.

However, Comments 5 and 6 to the proposed rule are problematic, contrary to existing law, fail to take into consideration various factors concerning public defender and other indigent offices, and would result in wasteful expenditures of limited public funds without resulting in any additional protection of the confidences and secrets of former clients (see, Business and Professions Code section 6068 (e)).

While recognizing that “the same or a substantially related matter” will have different applications in different types of proceedings, Comment 5 nevertheless proposes a blanket application of Rule 1.9 to require disqualification of the law firm “when it appears by virtue of the nature of the former representation or the relationship of the attorney to the former client that confidential information material to the current dispute normally would have been imparted to the attorney”, citing *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.* (1991) 229 Cal.App.3d 1445, 1454.

But the application of the *Ahmanson* presumption to criminal cases was expressly rejected in *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1575, which observed that “a rigid rule of disqualification can create hardship to the new client and can also be abused as an improper tactical maneuver.” To the contrary, *Rhaburn* relied on a series of California Supreme Court decisions in criminal cases in holding that it was error to disqualify an entire public defender office from representing an indigent criminal defendant over the defendant’s objection simply because the public defender’s office previously represented a prosecution witness, where the individual attorney assigned to represent the current defendant did not “have a ‘direct and personal’ relationship with the witness [i.e., the former client] . . .” (140 Cal.App.4th at p. 1581.)

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Audrey Hollins
State Bar of California
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Condemning the application of “a rigid rule of vicarious disqualification”, the court of held that, “[i]nstead, the trial court should evaluate the totality of the circumstances in determining whether there is a reasonable possibility that the individual attorney representing defendant either has obtained confidential information about the witness collected by his or her office, or may inadvertently acquire such information through file review, office conversation, or otherwise.... We also stress in a case that does not involve ‘direct and personal’ representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so.” (*Ibid.*)

Comment 6 suffers from the same problem; it relies on *Ahmanson* and ignores *Rhaburn*. As held in *Rhaburn*, a conflict of interest should not be found on the basis of the public defender’s office previous representation of a former client unless “there is a reasonable possibility that confidential information may be acquired and used by counsel.” (140 Cal.App.4th at p. 1582.) Further, the establishment and maintenance of procedures by the public defender which prevent any attorney representing a client in a present case from gaining access to information obtained from a former client in a previous case is a significant factor tending to eliminate any “possibility that confidential information may be acquired and used” in the representation of the present client.

Thus, CPDA respectfully suggests that Comments 5 and 6 must be modified to limit their application to civil cases, or at least recognize that the vicarious disqualification rule must be applied more flexibly in criminal cases. They should be supplemented to expressly acknowledge that the usual rules and presumptions concerning disqualification of law firms from successive representation of different clients concerning related topics do not apply to a public defender’s office. Instead, the comments should expressly provide

November 13, 2009
Audrey Hollins
State Bar of California
Re: Proposed Rules 1.9 and 1.10
Page Four

that a public defender's office or other indigent defense office is not disqualified from representing a client in a current proceeding where a former client of the office is an adverse witness in the current proceeding, unless there is a reasonable possibility that confidential information previously obtained from the former client will be acquired and used in the current proceeding. Finally, in making this determination, the court and counsel should consider the factors identified in *Rhabum*, including whether the office has established, and maintains, procedures which ensure that the information obtained from the former client in the previous cases is not accessible to any attorney in the course of representing any other client. Unless Comments 5 and 6 are revised accordingly, they will be in conflict with existing law and prudent public policy.

In addition, since Comment 5 to Proposed Rule 1.10 incorporates Rule 1.9, and applies the same disqualification rules where the former client was represented by a lawyer who is no longer employed by the firm, Rule 1.10, subdivision (b)(1), and Comment 5 must likewise be modified accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bart Sheela', written over the word 'Sincerely,'.

Bart Sheela
President,
California Public Defenders Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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District Nine Representative**
James W. Talley

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: 3-310

Proposed New Rule No./ Title: 1.10

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]

The commission rejects screening as adopted by the ABA in February 2009. I think the ABA is right and the commission is wrong. Screening is not a battle between lawyers and clients but among two clients, one of whom would like screening if it made available the counsel of their choice, and the lawyer. The sky has not fallen because government lawyers may be screened, nor has it fallen in jurisdictions that allow screening. There are not even little pieces of fallen sky to point to. Government lawyers are not intrinsically more ethical than private lawyers nor are lawyers in screening jurisdictions more ethical than others. Even with screening lawyers remain bound by agency rules and disciplinary rules forbidding improper use or disclosure of confidential information.

Screening will become more important as firm structures alter, with contract lawyers becoming more common and firms ramping up and down more quickly to handle big matters without incurring high fixed costs. In addition to being analytically unsound, therefore, the proposal is on a collision course with economic forces that, in general, benefit clients.

(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 []

Not really different from the current rules in this regard.

(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 [X]

See above

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

I urge that we object to this unreasoned and anachronistic departure from the model rules and do so in unequivocal terms. I would be happy to write a more extensive set of comments for this purpose but will await the sentiments of the group.

Nonetheless, the dissenting opinion follows should you want to consider it:

The RRC is correct in eliminating the screening provisions from the proposed Rule 1.10. California courts have considered this issue in the past, and have unanimously found that in the very limited context of an attorney who has actually received confidential information from the former client, “ethical walls” are incapable of protecting client confidences or the public’s faith in California’s attorneys. The reasoning of those decisions is still correct, and does not change merely because more lawyers change jobs these days.

No matter how you characterize it, all arguments in favor of “attorney mobility” come down to the attorneys’ willingness to put client confidences at risk for the attorneys’ own financial gain. Even the argument that a client should have the freedom to choose their own attorney without having that attorney disqualified is simply a justification for attorneys wanting the freedom to change firms for their own personal benefit. Should one client’s right to the attorney of their choosing really take priority over another client’s right to have his confidences protected? (And since when has the freedom to choose an attorney of your liking become a right that merits the same protection – and in fact would now take priority over – the absolute duty to protect client confidences at every peril to the attorney?)

Ethical walls place the client in the position of being forced to trust not only his/her former attorney, but his/her adversary and his/her adversary’s counsel with respect to the client’s confidential communications. The former attorney’s duty to protect the client’s communications is directly in conflict with the firm’s duty of loyalty to the present client. The disclosure that there has been a breach in screening procedures almost certainly will end up hurting the present client’s interests, e.g. by giving rise to a potentially costly disqualification motion that would not arise if the attorney had not disclosed the breach.

The legal community does not even trust itself to police ethical wall infractions. Having conducted a study of approximately 30 of the biggest firms from the four states whose state supreme courts had promulgated rules allowing screens in the private firm context,¹ Professor Lee A. Pizzimenti surveyed the firms’ views and practices with respect to ethical walls. (Pizzimenti, *supra*, 52 U. Miami L. Rev. 305.) When asked whether the firms polled thought lawyers in opposing firms inform other lawyers in their firms if a breach occurs, 50% of the firms responding declined to even answer the question. (*Id.* at p. 331.) Of those that did answer the question, 35% believed lawyers did not inform their colleagues. (*Ibid.*) Moreover, 87.5%

¹ At the time that study was conducted, the four states whose Supreme Courts had promulgated rules allowing ethical screens were Michigan, Illinois, Pennsylvania and Oregon. (Pizzimenti, *supra*, 52 U. Miami L. Rev. at p. 312, fn. 30.)

believed an opposing party has breached a screen without their knowledge. (*Id.* at p. 332.) Most disturbingly, when asked whether those law firms polled believed lawyers in other firms inform their opponent if a breach occurred, only 19% said they believe they do. (*Id.* at p. 331.)

Attorneys in California are required to protect client confidences at every peril to themselves. Under the ABA Model Rule proposed, that would not be the case. The new rule in California would be that attorneys are required to protect client confidences at every peril to themselves, unless it prevents the attorney from taking the job they want, or the firm from taking the case they want. And yet, these are the very instances, where the attorney has demonstrated his own self interest at the expense of the client's confidences, when we would ask that client to trust the attorney to self-report any disclosures of the client's confidential information. It's a bad Model Rule, and the RRC got the changes right.

[End dissenting opinion]

CONCLUSIONS (pick one):

☐ We approve the new rule in its entirety.

☒ We approve the new rule with modifications.*

Adopt MR 1.10 as amended in February 2009. See Discussion Draft for full text of MR 1.10.

☐ 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: NOVEMBER 13, 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.10 Imputation of Conflicts: General Rule [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.

The RRC proposal is to adopt the ABA Model Rule. However, the ABA Model Rule used by the RRC is the model rule pre-February 2009. On February 16, 2009, the ABA amended Model Rule 1.10 to add provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening. The Santa Clara County Bar Association recommends that the 2009 amended version of Model Rule 1.10 be adopted. The amended version recognizes the reality of modern day law practice, which involves the mobility of attorneys, the lateral movement of attorneys among firms and the practical reality that if certain parameters can be met, attorneys can be screened effectively and timely so that a conflict of interest is not created for the attorney's new firm or legal organization. The 2009 amended Model Rule with the amendments highlighted by underscore is as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by

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

The RRC proposal is to adopt the ABA Model Rule. However, the ABA Model Rule used by the RRC is the model rule pre-February 2009. On February 16, 2009, the ABA amended Model Rule 1.10 to add provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening. The Santa Clara County Bar Association recommends that the 2009 amended version of Model Rule 1.10 be adopted. The amended version recognizes the reality of modern day law practice, which involves the mobility of attorneys, the lateral movement of attorneys among firms and the practical reality that if certain parameters can be met, attorneys can be screened effectively and timely so that a conflict of interest is not created for the attorney's new firm or legal organization. The 2009 amended Model Rule with the amendments highlighted by underscore is as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based upon a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a), (or (b)), and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefore;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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November 20, 2009

Audrey Hollins

Office of Professional Competence, Planning & Development

State Bar of California

180 Howard Street

San Francisco, CA 94105

Re: Comment Regarding Proposed Rule of Professional Conduct Rule 1.10 –
Imputation of Conflicts of Interest – General Rule

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.10.

The Committee believes that Proposed Rule 1.10 concerns itself primarily with issues of disqualification of attorneys in court proceedings. PREC believes that issues relating to disqualification of attorneys in court proceedings is within the jurisdiction of the courts, and is not a proper matter to be included in rules of ethics that are intended to establish rules for the imposition of attorney discipline. Accordingly, PREC recommends that Rule 1.10 not be adopted.

Thank you for the opportunity to comment on this rule.

Sincerely yours,

James I. Ham

Chair, LACBA Professional

Responsibility and Ethics Committee

Rule 1.12 – Public Comment – File List

E-2009-351g SDCBA [1.12]

E-2009-358f Santa Clara County Bar [1.12]

E-2009-371 State Bar ADR Committee [1.12]



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November 11, 2009

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Audrey Hollins
Office of Professional Competence,
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180 Howard Street
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Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
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Rule 1.9	Duties to Former Clients [3-310] APPROVE
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Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: _____None_____

Proposed New Rule No./ Title: 1.12 Former Judge, Arbitrator, Mediator

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]

Proposed Rule 1.12 specifically addresses duties of former judges, arbitrators, mediators, special masters, etc. who subsequently represent clients. Essentially it prohibits them from representing a client when they have previously participated or are participating “personally and substantially” in a matter. “Personally and substantially is intended to include the receipt or acquisition of confidential information that is material to the matter.”

It is unclear whether “personally and substantially” is intended to include anything beside “confidential information that is material to the matter”. If not, then the sentence should read: “Personally and substantially is intended to be limited to the receipt or acquisition of confidential information that is material to the matter.” If so, then the sentence should read: “Personally and substantially is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter.” In any event, see comment (5) below, which renders this objection moot if adopted.

(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 [] Not Applicable; no existing rule.

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

Since the rule is intended to foster confidence in the legal system and clients most likely would be shocked to find a former judge, etc., representing an adversary, client's should not have the burden of proving that a former judge's, etc., participation actually entailed the receipt of material confidential information. Rather, if a former judge, etc., has heard facts about the substantive claims involved in the former or pending matter, the former judge, etc., should be required to obtain written consent from the parties before undertaking any representation. If this recommendation is adopted, the modified language should read:

“Personally and substantially” is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter or participation in a matter that included knowledge of facts related to the substantive claims in that matter.

CONCLUSIONS (pick one):

☐ 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.



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: NOVEMBER 13, 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@sccbba.com

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.12 Former Judge, Arbitrator, Mediator [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.

Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the "negotiating employment" stage. The rule should apply to the interviewing stage though requiring the judges' approval for an interview is not necessary. The following language should be added at the conclusion of subparagraph (b) as it now reads: "In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer."



THE STATE BAR OF CALIFORNIA

– COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

December 4, 2009

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

Re: Proposed Rule 1.12 – Former Judge, Arbitrator, Mediator

Dear Ms. Hollins:

The State Bar of California's Committee on Alternative Dispute Resolution ("the ADR Committee") has studied and discussed Proposed Rule of Professional Conduct 1.12 – Former Judge, Arbitrator, Mediator.

This will communicate the ADR Committee's concern, based on its review, that the absence of a definition of the term "matter," as used in Proposed Rule 1.12, will make the effect and application of the proposed rule uncertain.

Disclaimer

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

Very truly yours,

James R. Madison
Chair, 2009-2010
The State Bar of California
Committee on Alternative Dispute Resolution

cc: Randall Difuntorum
Lauren McCurdy

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E-2009-292g OCBA [1.14]	E-2009-324 R Caspersen [1.14]
E-2009-293f State Bar OCTC [1.14]	E-2009-325 Elizabethanne Angevine [1.14]
E-2009-294 Patricia Uro-May [1.14]	E-2009-326 Richard Pershing [1.14]
E-2009-295 John Foster [1.14]	E-2009-327 Joan LeBlanc [1.14]
E-2009-296 Scott Ross [1.14]	E-2009-328 Joseph Lumsdaine [1.14]
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E-2009-299 Robert Temmerman Jr. [1.14]	E-2009-331 Beverly Hoey [1.14]
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E-2009-302 Kent Thompson [1.14]	E-2009-333 Shirleymae Davis [1.14]
E-2009-303 Michelle Anderson [1.14]	E-2009-334 Connie Yi [1.14]
E-2009-304 Diem Pham [1.14]	E-2009-335 Robert Prior [1.14]
E-2009-305 Victoria Sood [1.14]	E-2009-336 William Hoehler [1.14]
E-2009-307 Laurie Rigg [1.14]	E-2009-337 Kathleen Courts [1.14]
E-2009-310b COPRAC [1.14]	E-2009-338 Gregory Wilcox [1.14]
E-2009-312 Roger Gambatese [1.14]	E-2009-339 Maureen McGowan [1.14]
E-2009-313 Peter Stern [1.14]	E-2009-340 David Smedley [1.14]
E-2009-314 Jean McEvoy [1.14]	E-2009-341 Thomas Craven [1.14]
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E-2009-352 Ann M Robbeloth [1.14]

E-2009-355 Stephen Webber [1.14]

E-2009-356 Linda Kramer [1.14]

E-2009-357 John Rogers [1.14]

E-2009-358g Santa Clara County Bar [1.14]

E-2009-359 Doreen Erenea [1.14]

E-2009-360 Caroline Hinshaw [1.14]

E-2009-362 Jack Anderson [1.14]

E-2009-363 J. Frederick Clark [1.14]

E-2009-364 Shelly Conley [1.14]

E-2009-365 Dara Schur [1.14]

E-2009-366 Ian Sammis [1.14]

E-2009-367 Edward Daniels [1.14]

E-2009-369 Peter Pettler [1.14]

E-2009-370f LACBA [1.14]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 1.14 – Client with Diminished Capacity**

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 comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 1.14 and its commentary. Although the OCBA suggests that proposed Comment [3] be modified as follows, its endorsement is not conditioned upon adoption of the proposed change.

"Significantly diminished capacity" is not defined in the proposed Rule or commentary. Instead, the Rule describes several factors for the lawyer to "consider and balance" in making that assessment. Under the proposed Rule, lawyers would have limited guidance and broad discretion to make, on a case-by-case basis, what in some circumstances may amount to a medical diagnosis of their clients. Proposed Comment [3] currently states that "... the lawyer *may seek* guidance from an appropriate diagnostician...." The OCBA proposes modifying that portion of the Comment to state that "...lawyers *are encouraged to seek* guidance from an appropriate diagnostician...."



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a distinct "R".

Russell G. Weiner
Interim Chief Trial Counsel



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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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  La Raza Lawyers Association; Senior Adult Legal Assis

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Patricia Uro-May

* City San Jose

* State California 

* Email address (You will receive a copy of your comment submission.) p.uromay@sbcglobal.net

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

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[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

This is a much needed change. i often come across seniors who have not only limited capacity but with limited language and education who report outrageous situations in which they are at risk. I have often had to wrestle with the dilemma regarding confidentiality that this proposed change addresses. Thank you to whoever put this forward.

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* Required



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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Attorney, certified specialist Estate planning, trust and p

Commenting on behalf of an organization

☐ Yes

☒ No

* Name John C. Foster

* City Morgan Hill

* State California

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

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[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A]

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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This rule change is long overdue. As an attorney who works in the area of elder law, I frequently meet with clients who have diminished capacity and I am often required to make the call as to whether they have the ability to form an estate plan or to delegate their authority to a third party. What I cannot do, under the current rules, is protect my client's interests if they are threatened in some manner and the client does not have the ability to protect his or her own interests. The fact that I may have to "spurn" a client and put them in risk because I cannot contact the property authorities is contrary to my duty to act in my client's best interest. I believe this rule needs to be modified to allow me to protect my client and make the necessary judgment based upon my experience. To not be able to make that judgment, even if wrong, runs the risk of causing more harm than if I acted on that client's behalf.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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I'm strongly in favor of this rule. The goal of protecting the client trumps the attorney/client confidentiality concern, and the protections on confidentiality are reasonable.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Attorney

Commenting on behalf of an organization

☐ Yes

☒ No

* Name Allan T. Hikoyeda

* City San Jose

* State California

* Email address
(You will receive a copy of your comment submission.) a.hikoyeda@sbcglobal.net

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[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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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As a certified specialist in estate planning, probate and trust law, many of my clients exhibit diminished capacity or impaired judgment as time passes. The proposed rule will allow attorneys greater flexibility to serve and protect the client who may be susceptible to undue influence, fraud, or other physical, mental or emotional abuse.

While I appreciate the comment that attorneys are not necessarily qualified to opine about a client's mental or emotional status, the claimed breach of trust should be viewed from the client's point of view. S/he has retained me to provide the best legal advice I can offer to protect their interests. The present rule prevents me from doing so. Furthermore, insisting that a qualified professional (presumably a psychiatrist or psychologist) be the only decider of impairment burdens the client with costs s/he may be unable to afford.

Allowing the attorney to refer the matter to appropriate agencies will reduce the possibility of litigation among family members.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney, Certified Specialist in Estate Planning, Trust &

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Philip P. Lindsley

* City San Diego

* State California 

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

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[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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I agree with the purpose of the rule, conforming us, subject to necessary modifications, to ABA MR 1.14. As to the proposed rule itself, I question only the inclusion of "relating to the representation" as too limiting and confusing in translation to the real world. For example, assume 3 years after I have completed an estate plan for a client, I am made aware of my client's substantial diminished capacity and current physical or financial harm. Am I in the scope of my representation?. If this statement is to be left, the comments should clarify this. With this caveat, I am in support of the proposed rule. HOWEVER, some of the comments, in attempting to reconcile ABA 1.14 with B&P 6068(e) only muddy the waters. In particular:

Comment [4] should include language that "the enumeration of these factors in balancing the decision to disclose should not be construed to prohibit disclosure if any, or all, of these factors are present." Other wise, the existence, for example, of the likelihood of the disclosure resulting in commitment proceedings could be

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Comment [4] should include language that "the enumeration of these factors in balancing the decision to disclose should not be construed to prohibit disclosure if any, or all, of these factors are present." Other wise, the existence, for example, of the likelihood of the disclosure resulting in commitment proceedings could be seen as requiring non-disclosure.

Comment [6]: Not sure what is meant by utilizing "voluntary surrogate decision making tools such as durable POAs...". One would assume from the context, you are speaking of existing POAs. Does this suggest that it would be appropriate to assist in finding your client incapacitated and bring to life a springing power? I'm not sure this is what is meant...but I am also not clear as to what IS meant be reference to these tools. Comment should omit this reference or further clarify. I'm aware this is part of the ABA rule Model rule...but I never understood it there either. Since the obvious effort has been made to consider ABA 1.14 in light of 6068(e), that exercise should take place for this reference as well.

Comment [8] prohibits taking action adverse to the client. This is comforting to say for those looking for perfect harmony between 6068(e) and ABA 1.14. However, let's not be disingenuous: the model rule invites action adverse to the client after engaging in the section (b) balancing. How can we say calling Adult Protective Services (after, let's assume, I've engaged in full analysis as per 1.14) when we know the likelihood that this will result in conservatorship or other proceedings limiting my clients control over his affairs, is not "adverse to the client." Clearly it is in any definition I understand. To clarify, I'm in support of proposed 1.14 (subject to my comments), but let's have the honesty to admit what we are doing, and why: We are allowing waiver of confidentiality AND the prohibition against taking actions potentially (legally) adverse to our clients to prevent, in our judgment, a greater and more adverse harm to our clients. To say otherwise really only confuses matters, and obscures the scope of this rule. I would imagine this is an opinion I share with more who oppose this rule that support it. Proponents, however, will not help the matter by sophistry.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Senior partner of a 10 person Trust and Estates Firm

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Robert Temmerman Jr.

* City San Jose

* State California 

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

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[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

As a practicing T & E attorney with more than 30 years of experience in estate planning, estate administration, conservatorships, and related litigation, I have seen more than my fair share of elder abuse cases. The current rule prevents me from taking any action that would involve communicating with any 3rd party if I believe, based upon my client's statement and other credible evidence, from disclosing any confidential information to a 3rd party. The proposed rule would allow me to take minimum action necessary to prevent further physical or financial harm to my client. If California truly believes in protecting our elderly, a class most susceptible to physical and financial elder abuse, then this proposed rule should be adopted. I am very much in favor of the proposed rule and consider it to be an insightful, well drafted, and refreshing approach to protecting our elderly clients when they perhaps most need protection.

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* Date

11/07/2009



Period

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Lawyer in private practice

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Paul Gordon Hoffman

* City Los Angeles

* State California 

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

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[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ 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 strongly agree that a lawyer dealing with a client with diminished capacity should have the right to alert some third party or parties (such as Adult Protective Services or a person named as the client's attorney in fact under a "springing" durable power of attorney or the client's successor Trustee under the client's living trust) of the fact that the client is suffering from diminished capacity so that an appropriate investigation may be commenced by those parties.

In some cases, the client's lawyer may be the only person aware that the client is suffering from diminished capacity, and that the client is taking actions that are significantly adverse to the client. For example, I was once involved in a situation where the client was persuaded to turn over her assets to a "con man", and the "con man" warned the client not to discuss this matter with her children because the children were plotting to put her into a nursing home and take away all of her money. Despite our effort to persuade the client to allow us to alert her children or others to what was happening, the client was so fearful of being placed in a

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

I strongly agree that a lawyer dealing with a client with diminished capacity should have the right to alert some third party or parties (such as Adult Protective Services or a person named as the client's attorney in fact under a "springing" durable power of attorney or the client's successor Trustee under the client's living trust) of the fact that the client is suffering from diminished capacity so that an appropriate investigation may be commenced by those parties.

In some cases, the client's lawyer may be the only person aware that the client is suffering from diminished capacity, and that the client is taking actions that are significantly adverse to the client. For example, I was once involved in a situation where the client was persuaded to turn over her assets to a "con man", and the "con man" warned the client not to discuss this matter with her children because the children were plotting to put her into a nursing home and take away all of her money. Despite our effort to persuade the client to allow us to alert her children or others to what was happening, the client was so fearful of being placed in a nursing home that she refused to allow us to take actions to protect her, and instead proceeded to turn assets over to the con man. Fortunately, in this case, an alert bank employee intervened when she attempted to withdraw all of her funds from the bank and deliver the funds to the con man, and the bank employee notified adult protective services. However, it was a matter of great frustration to me that I was prohibited from taking an action that was clearly beneficial to the client, and that the client would have authorized if she had not suffered from diminished capacity.

The client's lawyer should have the ability to notify an appropriate party or parties to the client's situation. Generally, a notification that the client is in jeopardy should be all that the lawyer need disclose. A successor Trustee or an attorney-in-fact under a springing durable power of attorney will generally have the ability to require the client to be evaluated to determine whether the client indeed has such diminished capacity that the relevant estate planning documents can become effective (either removing the client as a trustee of his or her living trust, or effectuating the power of attorney.) Adult protective services may institute conservatorship proceedings. In any case, there exist protections should the client feel that he or she is not suffering from a sufficiently diminished mental capability such that no action should be taken.

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* Date

11/08/2009



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E-2009-300 Paul Hoffman [1.14].pdf

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  35-year practitioner in the area of diminished capacity

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name Kent C. Thompson

* City San Diego

* State California 

* Email address  kctlaw@pacbell.net
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

Attorneys should not be placed in this position. If counsel believes that there is diminished capacity and there is a need for disclosure, utilize either a temporary Conservatorship or have a GAL appointed for the client. A Conservator or GAL can be authorized to undertake the action of the practitioner. Better means, other than the proposed Rule, are available to the practitioner.

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*** Date**

11/09/2009



Period

PC



File :

E-2009-302 Kent Thompson [1.14].pdf

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* Required



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PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Tran Sood Law Firm

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Diem Thinh Pham

* City 12822 Via Aventura

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

I would support the Proposed California Rules of Professional Conduct, Rule 1.14 for Substantially Impaired Clients because the rule permit the attorney to take preventive measure in protecting the client and the risk for abuse is minimized and adequately safeguarded by the limitations imposed on the attorney as discussed in the rule's comments.

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Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.6 \[3-100\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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Attorneys should protect the most vulnerable in society. No one is more vulnerable than those who have diminished capacity and have no one to protect them from being harmed. Attorneys are often the FIRST detectors of harm being done or about to be done to these vulnerable individuals. Attorneys, therefore, should have the necessary tools to initiate a line of defense to protect their clients especially those most vulnerable. The tool the proposed rule 1.14 gives to attorneys is the ability to SEEK help for their clients who have diminished capacity.

Under the current rule, clients with diminished capacity often suffer irreparable harm (house sold, cash looted, deed transferred, etc.) by the time a non-attorney detector (family members, Adult Protect Services, etc.;) finds out and intervenes. At such time the only remedies are to file lawsuits against the perpetrators for damages. Attorney fees and costs will have to be incurred to recover assets, and thus further depleting the estate. Worst of all, most of these perpetrators are judgment proof. The current rule gives the "bad" person a license to do wrong until

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With the proposed rule 1.14, the intervention to prevent or stop the harm is more likely to happen sooner rather than later. As a result, harm and damages to the clients are minimized or prevented. The proposed rule only authorizes attorneys to release the minimal sufficient information in order to SEEK help for their clients who have diminished capacity. The application of the proposed rule is narrow in scope.

I support the proposed rule 1.14 because I believe that it is vital that attorneys have this tool to protect people with diminished capacity. I urge you to make this tool available to attorneys.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  principal, Law Offices of Laurie C. Rigg

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Laurie C. Rigg

* City Rolling Hills Estates

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [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 fills an urgent need for us estate planning attorneys to use our discretion to protect our clients from harm and still be able to preserve their confidences as much as possible. Please pass it as written with NO modifications.

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* Required



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 1.14

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 1.14 and offers the following comments.

COPRAC supports the proposed rule. We are cognizant of California's longstanding commitment to confidentiality. But COPRAC is concerned that the rule does not go far enough in real world terms to effectively permit lawyers to address the needs of clients with diminished capacity. COPRAC believes that seeking the appointment of a guardian ad litem may be appropriate in certain circumstances to protect clients with diminished capacity.

Contacting family members of a client with diminished capacity is often not appropriate, particularly for clients with financial problems that often involve family members. In addition, budget strapped public agencies rarely have the resources to act quickly to assist, and are often especially reluctant to intervene when a legal action is pending. Given such practical considerations, the appointment of a guardian ad litem is sometimes the most realistic alternative to protect the interests of the client with diminished capacity.

COPRAC also recommends that Comments [9] and [10] from the ABA Model Rule be retained, in order to allow a lawyer to take limited action in extreme, emergency situations.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation Member of the State Bar

Commenting on behalf of an organization

☐ Yes

☒ No

* Name Roger Gambatese

* City Davis

* State California

* Email address rlgambat@dcn.org
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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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I strongly support any proposal that moves closer to ABA Model Rule 1.14. I have been a trusts and estates lawyer for many years and have several clients in their 80's and 90's. Many are mentally impaired or becoming impaired. Over the years we have become friends. I know that they have great trust in my judgment to act in their best interests. I have three reasons for supporting the proposal:

1. Friends don't sit idly by and let friends be abused. Just because I am an impaired person's lawyer shouldn't prevent me from acting as a friend.

2. A lawyer's ethical duty of loyalty to the client should be given more weight in these situations. I consider it loyalty to the impaired client to report abuses. I consider it disloyal to sit idly by.

3. In certain circumstances, laws protect Good Samaritans and physicians when taking actions without a person's explicit consent. When an impaired client is

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2. A lawyer's ethical duty of loyalty to the client should be given more weight in these situations. I consider it loyalty to the impaired client to report abuses. I consider it disloyal to sit idly by.
3. In certain circumstances, laws protect Good Samaritans and physicians when taking actions without a person's explicit consent. When an impaired client is being abused, a lawyer should have a similar freedom to act. If this seems a radical idea, consider that the law now imposes on many professions a MANDATE to report abuses when they suspect them.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Private attorney, former chair State Bar Trusts and Est

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Peter S. Stern

* City Palo Alto, CA

* State California 

* Email address (You will receive a copy of your comment submission.) pstern1939@aol.com

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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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I strongly encourage the adoption of Rule 1.14. As one of the participants of the Trusts and Estates Section's drafting team on our version of this project, I have worked for nearly ten years with TEXCOM and five years as co-liaison to the Rules Revision Commission on seeking this exception to the attorney-client confidentiality provisions of the Rules of Professional Conduct. It is ironic that the source of our Rules, as codified in B&PC 6068(e), the Field Code from New York, is no longer applied in the state of its origin.

California's proposed Rule 1.14 goes far toward protecting the core concept of confidentiality while permitting an attorney to take the minimal step necessary to notify someone or an entity when the attorney's client is substantially impaired, cannot act in his or her own behalf, and is at risk of being harmed physically or financially. The Ethics Guide published by the Section in 1997 and revised in 2008, emphasized the commitment of California's trusts and estates lawyers to balance "the duties of confidentiality and loyalty that are the cornerstones of the California

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The modification of B&PC Sec. 6068(e)(2) to allow notification of confidential information where necessary to prevent a criminal act involving death or substantial bodily, and Rule 3-100, created to implement the new code section, mandate that the notification an attorney can give is no more than is necessary to prevent the criminal act. Proposed Rule 1.14 similarly permits only the minimum disclosure of information necessary to get assistance for the substantially impaired client. The rule is in this regard consistent with the existing COPRAC standard set out in Formal Opinion 1989-112, which does not permit an attorney to initiate conservatorship proceedings over his or her own client.

By permitting any action at all, the proposed rule of course goes beyond the COPRAC standard. In the twenty-five years that I have practiced estate planning and conservatorship law in California, working with impaired clients and their families, I have seen many instances where this proposed rule would have saved clients from personal harm and financial exploitation. In some instances, I saw attorneys act notwithstanding the law and the rules of professional conduct, and on occasion to their detriment, to protect the interests of a client who was at risk. I have heard numerous accounts of dilemmas faced by attorneys whose clients were too demented to realize their situation and thus were unable to understand the risks they were confronting. In response to these calls for change in the rules, I have worked both at my local bar level and with the State Bar to try to bring about change.

Proposed Rule 1.14 is overdue. While much of the opposition to it is based on the reasonable desire to preserve the value of absolute confidentiality, that opposition does not provide any measures that would offer protection to an impaired client who is at risk. I believe the proposed rule comes as close as possible to achieving the balance between confidentiality and protection that should be the law in California.

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
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[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

This is a rule that has been needed for a long time. I absolutely agree with this proposed Rule.

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

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[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

This is a well thought-out and crafted rule that is long overdue.

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* Date 11/12/2009 	Period PC 	File : E-2009-315 John Lejnieks [1.14].pdf
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* Required



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

This Rule change is needed. Attorneys who are appointed by the court to represent persons with dementia oft times find themselves in an ethical quandary requiring them to choose between what the client is saying they want and what the attorney knows that they need because the client is significantly impaired and their judgment is abnormal.

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* Date

11/12/2009



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E-2009-316 Ronald Mullin [1.14].pdf

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney, member of Trusts and Estates Section

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Rebekah Jackson Sapirstein

* City San Francisco and San Anselmo

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

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[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

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[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [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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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation ?

Attorney at law; Vice Chair of the Trusts and Estates Se

Commenting on behalf of an organization ?

☐ Yes

☒ No

* Name

Linda C. Roodhouse

* City

Oakland

* State

California

* Email address
(You will receive a copy of your comment submission.)

lcr@llcllp.com

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

- [Rule 1.2 \[n/a\]](#)[Rule 1.9 \[3-310\]](#)[Rule 2.1 \[n/a\]](#)
- [Rule 1.6 \[3-100\]](#)[Rule 1.10 \[n/a\]](#)[Rule 3.8 \[5-110\]](#)
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- [Rule 1.8.13 \[n/a\]](#)[Rule 1.14 \[n/a\]](#)[Discussion Draft \[all rules\]](#)

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- ☒ AGREE with this proposed Rule
- ☐ DISAGREE with this proposed Rule
- ☐ AGREE ONLY IF MODIFIED

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I am certified by the State Bar Board of Legal Specialization as a specialist in estates, trusts and probate law. I have practiced in this area since 1980. I fully support Proposed Rule 1.14.

The proposed change is a welcome acknowledgment of the situation "on the ground" for estates and trusts lawyers. We are from time to time presented with the client who may no longer be able to understand the nature and consequences of a particular transaction, an estate planning wish, or an estate/trust administration fiduciary action, and turning to the named successor fiduciary is necessary to protect the client's assets or to shield the client from potential liability, or both. We see that friends, family members and others insinuate themselves into an unnatural familiarity with a vulnerable client whose need for attention and companionship in later years remains strong and whose ability to discern attempts at undue influence and fraud is severely diminished. We need to be able to contact Adult Protective Services or another interested friend or family member in such a situation.

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Often, only the lawyer can see what is happening. Of course, we try to work with the client as much as possible. But when the client's reasoning and judgment are so impaired that the client is at significant personal or financial risk, or both, I would like to have the authority to act on behalf of the client to get appropriate help. Because modern medicine has extended life expectancy to the point that neurological/mental decline appears more frequently, these situations are becoming more and more common, unfortunately.

I encourage the adoption of this proposed rule as soon as possible.

Linda C. Roodhouse

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Your Information

Professional Affiliation  State Bar of California

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name John Grier

* City El Cajon

* State California 

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

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[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

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[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

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☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

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[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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In general the propopsed rules are good changes, but I am currently involved with a client, who has diminished capacity, although probably not incompetent in the legal sense. Years ago she selected me as her alternate to be successor trustee if her son could not act or failed to act. Her son, who lives on the other side of the country has failed to act on her behalf. She needs a conservator. She has no one to turn to except me and by virtue of these rules, I am powerless to act. My only recourse is to let the situation deteriorate until Adult protective services prods the Public Guardian to act, which will take months. (I have had discussion with the Public Guardian Office).

I believe that the comment 7 should not be deleted, especially in the case where, such as mine, the client has already indicated a desire to have her attorney act on her behalf, in the event of diminished capacity. I believe that the conservatorship proceedings, which include the appointment of an attorney to represent the proposed conservatee, protect interest of the client sufficiently.

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In the real world, our inability to act on behalf of clients in this situation are more damaging to the client than the potential harm from theoretical breaches of client confidentiality and the substitution of the client's interest, which admittedly is clouded by age and infirmity, instead of the client's best interests as determined by his or her long time advisor and the court proceedings.

I realize this is a very sensitive area, but some protection and procedure to move more swiftly that the current system is needed. And I don't feel that the revisions to Rule 1.14 are addressing the real need. It seems that these revisions are addressing solely the needs of the attorneys for specific guidance and protection from subsequent claims, without dealing with the real world problems and protection of clients.

Thank you for your consideration of my comments.

Sincerely,

Edward J. Watson

Watson & Lanctot, LLP

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

This proposed rule would allow me to act on behalf of my client when my client may not be able to fully appreciate or even resist such actions. In 20 years of handling conservatorship, probate and estate planning matters, numerous clients have asked if I will be able to help their family members take care of them should they become disabled. This rule would allow me to say yes I will be able to help their family in caring for themselves and I can even help protect themselves from themselves.

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

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[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

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☐ AGREE with this proposed Rule

☒ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

This rule put the attorney into the position of determining a client's capacity. Most if not all attorneys have no background or training that would allow them to determine whether the client qualified or not. Even though it is permissive, the rule would ultimately be used to create a duty by providing that a reasonably trained attorney should be able to determine the capacity and thus had the power to prevent the undue influence or financial loss. I also adopt the minorities reasoning as sound and as such this rule should be rejected.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Deputy County Counsel for Public Guardian, San Diego

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name JAMES G. BOYD

* City SAN DIEGO

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [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 modification is sorely needed and is consistent with California's Rules of Professional Conduct moving toward consistency with A.B.A. Model Rules. Rule 1.14 (b) could be improved by either modification or clarification to indicate that "an individual or organization that has the ability to take action to protect the client" is either a governmental entity (i.e., Adult Protective Services, Public Guardian, or Public Conservator), or a Professional Fiduciary or Trust Company with whom the reporting attorney has no prior or concurrent attorney-client relationship. Otherwise, there would be a high likelihood of actual conflicts or potential conflicts of interest for which no waiver would be available.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  California Attorney

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name R Frederick Caspersen

* City Saint Helena

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

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[Rule 1.8.13 \[n/a\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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I support this new rule whole-heartedly.

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  bar members since 1986

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name elizabethanne miller angevine

* City whittier

* State California 

* Email address 
(You will receive a copy of your comment submission.) angevine@earthlink.net

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[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

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[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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Those of us who deal with elder law see many vulnerable elders. Sometimes later as their capacity wanes they may reveal that they are being abused financially or physically by people. Under the previous rule without their permission we can do nothing to help avert the continued abuse of our client.

In the past 23 years of practice I have had three cases where I had to wonder about the physical safety of a client through the cast of a non family caregiver. Those clients would not allow me to speak to other family members or any one else about their condition. In all three cases it became clear that the least the client endured was fraud and possibly theft before their death.

I have seen many more cases with family members who who stole from their elders. The elder would in general prefer to be stolen from, then to thought a fool when they have diminished capacity. That fear of the world knowing that they have been taken advantage of by family makes these people an easy victim for the family thief.

CA is the only state that has the elder's attorney protecting a thief who has

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CA is the only state that has the elder's attorney protecting a thief who has stolen from an elder if the elder has diminished capacity in their effort to protect the attorney client relationship. The current CA rule destroys the attorneys ability to protect their client.

This change is needed for CA attorneys.

Elizabethanne Miller Angevine

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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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney Practicing in Estate Planning

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Richard W. S. Pershing

* City Riverside

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

I support the proposed Rule although I remain concerned about an attorney's ability to determine when to avail themselves of the rule on behalf of a client.



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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I completely support this change for several reasons. The old rule put my clients at risk. I like the fact that this new rule gives attorneys a choice. We are not required to act but if we act in our clients' best interests, it is more in keeping with our normal role of making judgment calls. That is what we are trained to do. Sure, I like bright lines, but not when someone is at risk. Do we risk our clients' wrath later? Sure, but that is always a risk no matter what you do for a client.

Joan LeBlanc, Lakin Spears 106421



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Past President, Southeast District Bar Association

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Joseph A. Lumsdaine

* City Downey

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

As an elder law practitioner and member of the Bar these past 33 years, this proposed rule rectifies in large part a recurring problem I, and many I meet in probate court, have struggled with for years. Adopt it. It's about time!



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  attorney; specialist in Est Plng Probate & Trust law

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Steven Penrose

* City Santa Cruz

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation	Trusts and Estates Section of State Bar	Commenting on behalf of an organization
		☐ Yes
		☒ No
* Name	Beverly M. Hoey	
* City	Pleasanton	
* State	California	
* Email address (You will receive a copy of your comment submission.)	bhoey@trustslaw-ca.com	

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

Rule 1.2 [n/a]	Rule 1.9 [3-310]	Rule 2.1 [n/a]
Rule 1.6 [3-100]	Rule 1.10 [n/a]	Rule 3.8 [5-110]
Rule 1.8.2 [n/a]	Rule 1.12 [n/a]	Rule 8.5 [1-100(D)]
Rule 1.8.13 [n/a]	Rule 1.14 [n/a]	Discussion Draft [all rules]

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- ☒ 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.

Highly needed Rule! I have been in several emergency situations and had to intervene in the best interest of the client. Not only financial abuse, but psychological abuse; physical abuse; and the worst was an estranged son attempting to remove dad from dialysis, because the AHCD he fraudulently drafted had said he could. The amount of abuse is astounding! Friends and family do not know how to intervene or are afraid of the abuser. The lawyer is confronted with these situations almost weekly. The mantra is "in the best interest of the client." The proposed rule will give more protection to the lawyer. There are bad acting family members who will attack the lawyer in revenge for intervening. Moreover, and "confidential" information in these situations are usually known by most people already involved and in balancing the benefits and the burdens, intervening for the client's wishes, and best interests outweigh privacy concerns. There will always be exceptions to the rule, and some confidentiality must be maintained. I am just very glad the proposed changes are here, and I enthusiastically endorse them!



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Dara Goldsmith

* City Las Vegas

* State Nevada

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A]

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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This is a good rule to enable attorneys to take action to protect clients. having practiced for almost 20 years in teh area of guardianship and conservarttorship, but mostly in Nevada, I beleive it is important for the attorney to protect the client from loss or harm.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  CA attorney

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Shirleymae Davis

* City La Jolla

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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I strongly support this rule. I have been faced with similar situations all too frequently during my years of practice and have struggled to balance my concern for my client with my responsibility to protect my client's confidentiality. In fact, I have a matter in my office at the present time which presents this very issue.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Trust Attorney

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name Connie Yi

* City Pleasanton

* State California 

* Email address (You will receive a copy of your comment submission.) connieyi@attorney-cpa.com

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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I strongly agree with the proposed rule, it would be consistent with the fiduciary duty we owe to the client.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  attorney

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Robert D. Prior

* City Eureka

* State California 

* Email address (You will receive a copy of your comment submission.) rprior@pacbell.net

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  T&E Practice for 35 + years

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name William J. hoehler

* City San Francisco

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

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California needs this. This is years overdue. It is the balance we need to protect a client and preserve confidentiality.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  I am a long-time estate planning attorney, help my client

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Kathleen Courts

* City Alameda

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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This rule addresses a problem that I, as EP counsel, have wrestled with several times. Currently, I may not report a client's diminished capacity to anyone, including APS, without his or her permission unless actual elder abuse has already occurred. That is often akin to closing the barn door after the horse has disappeared.

The minority's objections suggest that a lawyer will rush in to protect a client even when the situation does not warrant it. Not so: this rule carefully instructs us to consider the client's interests as primary. Comment [3] refers us to PC 811, whose requirements for determining capacity are relatively specific and strict. The other objections are specious, in view of attorneys' continuing duties under the Rules of Prof Conduct and B&P 6068, and California's separate statutory requirements for representing minors and conservatees.

Even if Rule 1.14 is adopted, the EP attorney's job will not be easy. As in most of

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Even if Rule 1.14 is adopted, the EP attorney's job will not be easy. As in most of our interactions with clients, it requires us to make hard judgment calls.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Private elder law attorney, written and spoken on ethics

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name Gregory Wilcox

* City Berkeley

* State California 

* Email address  gregwilcox-atty@comcast.net
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

"The perfect should not be the enemy of the good". It will not be possible to craft a formula of words that is perfect in every case, but that does not mean that we should abandon attempts to adopt a rule that is appropriate in most cases.

As a general matter the law should respond to evolving social conditions. In this context, as medical science has advanced there are ever more people who are living longer but no longer competent to look after their own affairs. As a result, time is overdue for a rule that allows an attorney to protect his or her own client when it is obvious that the client's abilities are compromised and that outside help is needed.



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

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☒ 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 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: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Attorney

Commenting on behalf of an organization

☐ Yes

☒ No

* Name David G. Smedley

* City San Diego

* State California

* Email address
(You will receive a copy of your comment submission.)

dsmedley@sgg-law.com

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [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.

I am in favor of the proposed rule. Although the subject is complicated, I trust the Executive Committee of the Trusts and Estates to have done a thorough analysis. I particularly approve of the exceptions they have made to the Model Rule 1.14.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney in trust & estates private practice; state bar sp

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Thomas A. Craven

* City Sacramento

* State California 

* Email address (You will receive a copy of your comment submission.) tacraven@sbcglobal.net

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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The rule appears to be well-considered in balancing the principle of total confidentiality and the occasional need to strongly advise a client to do what counsel believes is critical in protecting the client's best interests, where there appears to be no defensible objection to the suggestion and no reasonable options. I believe attorneys who practice in this field are often more committed to doing what is in the client's best interests from a more global perspective, not focused just on the one aspect of the client's situation that motivated the client to seek out counsel in the first place. There are certainly reasons why an attorney, being permitted to act under this rule, would choose not to do so - perhaps, as is sometimes the case, where the client sees the attorney as his or her sole "protector" and confidant - and the jeopardy to the relationship that gives the client access to the attorney is too great. It would be comforting, however, to have the option in a case that involves a likely dire consequence which the client does not grasp. I know of no one more likely to avoid abusing this authority than the attorneys who work in the trust and estates field.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

This rule is long overdue in California. It is extremely frustrating to see a client's mental capacity decline to the point where the client is unable to understand that he or she is being "taken to the cleaners" by a financial abuser and to be prohibited, as the client's attorney, from taking the actions that would be necessary to protect the client by putting an end to the abuse. If this rule is passed it will help to protect those people in California who are substantially mentally impaired from serious financial harm.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  practicing attorney (sole practitioner)

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Linda Alden Swanson

* City Larkspur

* State California 

* Email address 
(You will receive a copy of your comment submission.) laslaw@pacbell.net

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

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[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [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.

Although I just learned about the proposed rule and have only read through it once, I would like to support it as a great improvement over having no such rule at all. The one thing that jumped out at me was the omission of any reference to the client's possible subjectivity to undue influence. I practice almost entirely in the trusts and estates area, and find that (not surprisingly) undue influence is the greatest threat to a frail elder. As Section members well know, incapacity often diminishes gradually, and the client may have a pretty good understanding of what he or she ought to do (or not do), but not be able to resist an importunate person. "Of course I didn't want to give her the money, but she made me do it." That is an exact quote from a client whose diagnosis from the Memory Clinic was moderate Alzheimer's. Even in earlier stages of dementia, certain personality types can be more easily influenced than others. Indeed, some people can be influenced even when they have no dementia at all.

All in all, I would like to see the rule, or the comments at least, include some

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All in all, I would like to see the rule, or the comments at least, include some discussion of subjectivity to undue influence.

I am not concerned about shaking the public's confidence in attorney-client confidentiality. This is not an issue that will have hot-button media attention (in my view), and clients who need an attorney's help pursuant to this rule would generally not be in a frame of mind to understand or care about confidentiality. There could be exceptions, of course, but the balancing is in favor of protecting the client from bad people. A good attorney is going to do it anyway, rule or no rule. As one of my departed brethren said once: "Sometimes you have to rise about ethics and do what's right."



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Cristian R. Arrieta

* City Camarillo

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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Under my reading of the current rule of conduct, I must defer to my client's wishes even if, in my professional opinion, she has diminished capacity and is being subjected to undue influence, duress or financial abuse. However, I believe my carrying out my duties to my client, created when she retained me, I should be empowered to act to prevent such abuses during her significantly diminished incapacity. Essentially the rules of professional conduct should enable us to come to our clients' aid in their time of need, not hamper us from so doing.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Private Solo Practitioner

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Scott A. Thompson, Esq.

* City Three Rivers

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☐ DISAGREE with this proposed Rule

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  President of the Silicon Valley Bar Association

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Janis A. Carney

* City Los Gatos

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

This is an extremely important rule change for those of us who practice elder law. It has not been right that we have had to sit back and watch our vulnerable clients, who due to mental incapacity are unable to understand some danger they are in, often from scheming "friends" or even "family". We MUST have this rule change!



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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☒ AGREE with this proposed Rule

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Long overdue to allow attorneys to protect their elderly and other diminished capacity clients. This is a professional and ethical mandate as well as the right action to take. This has waited far too long, twelve years from the 1997 first proposal to now. Approve this so the frail and diminished client is protected. It does not matter if the rule is perfect: just get it done. Approve something to protect these unprotected people!



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.12 \[n/a\]](#)

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[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

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I believe this Proposed Rule is extremely important because of the increasing age of our client population and the increasing numbers of them that suffer from some form of diminished capacity. Sometimes the person's lawyer is the one who discovers the diminished capacity and allowing the lawyer to act on that information could be crucial to client.



SAN DIEGO COUNTY BAR ASSOCIATION

November 11, 2009

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: California has no comparable rule

Proposed New Rule No./ Title: Rule 1.14 Client with Diminished Capacity

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 [☐]

(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 [☐]

(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 [☐]

(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:

This moderately controversial Rule 1.14 generally tracks the language of Model Rule 1.14 with six principal differences: 1) it makes an exception for minors, criminal defendants, and persons subject guardianship or conservatorship proceeding which are separately regulated by California statutes; 2) establishes a stricter standard for when a lawyer may reveal confidential information to protect the client’s interests, namely, “significantly diminished capacity”; 3) provides more detailed guidance regarding what constitutes “significantly diminished capacity”; 4) provides that this is a last resort, and enumerates factors the lawyer should consider before taking such action; 5) emphasized the nature and extent of any disclosure is strictly circumscribed, and 6) clarifies that taking action is permissive, not mandatory, and a lawyer is not subject to discipline for failing to take such action.

Some people, such as a minority of the Commission (and I suspect at least a minority of our Legal Ethics Committee), might reasonably believe the policy of abrogating confidentiality here is wrong because it impairs the trust relationship between clients and lawyers. I, however,

agree with the underlying policy of Rule 1.14 of allowing the lawyer to act competently on behalf of the client with significantly diminished capacity, to further the client's goals in the representation and to protect the client's interests, and believe the Rule is drafted well enough to greatly minimize the occurrence of such impairment of trust, and, that on balance it actually serves to protect the client's interests.

This is one rule I recommend all subcommittee members review because it brings into play significant values that I know many have strong views on.

The Commission's nonlawyer public member asserts the proposed rule wrongly assumes all lawyers possess the psychiatric professional expertise needed to determine whether a client's mental capacity is "significantly diminished" and therefore even well-intentioned lawyers will inevitably breach confidentiality to "protect the client" resulting in serious adverse consequences for the client. While this may possibly occur on occasion, I think the Rule and comments thereto provide reasonable guidance to assist the lawyer in acting when necessary as a last resort and protect the lawyer from discipline whether she or he takes action or not.

CONCLUSIONS (pick one):

☒ **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.

November 4, 2009

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

RE: Proposed RRC Rule 1.14 for Substantially Impaired Clients

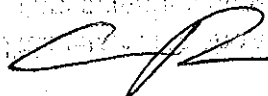
Dear Audrey:

This letter is to show my support of the Proposed RRC Rule 1.14. I work in the fields of estate planning, conservatorship, probate and trust administration. There have been instances in my practice in which it would have been helpful to notify a separate party regarding a client's ability to care for themselves. I appreciate the importance of keeping my client's information confidential; however, keeping them safe is also important.

I work with many clients whose closest relatives are out of the area. When these clients begin to experience dementia, they often have health or safety issues, such as a slip and fall. They are often unable to seek appropriate assistance. Clients have also expressed a desire to protect their children from worry. I am sometimes the first person they notify of a safety issue. Many clients look to me for support, although I am not the appropriate source for that support. It would be very beneficial to ensuring the health and safety of my impaired clients if this rule allows for some openness with client information.

Please contact the office with any questions or concerns.

Sincerely,



Ann Marshall Robbeloth
Attorney at Law





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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Mental Health Attorney

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name STEPHEN E. WEBBER

* City GLENDALE

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

I have represented persons with diminished capacity, mentally ill offenders and mentally ill conservatee's and their conservators since 1981 when, as a deputy Public Defender I was assigned to the L.A. County mental health courts. By the nature of their disease impaired capacity and mentally ill persons are often incapable of properly processing information. Either they do nothing when action is required, such as stopping the pending loss of property, or they make the wrong decision. This results in the person, for example, giving away property, placing themselves in danger, being bilked out of money and assets, or neglecting necessities. A conscientious attorney cannot be expected to either terminate the relationship or follow a fool-hardy course of action dictated by a impaired client. The attorney must act in the client's best interests regardless of what the client dictates, or fails to dictate. Regardless of the current rule, most contact Adult Protective Services, law enforcement, or other appropriate agencies, anonymously if necessary. Attorneys that handle diminished capacity and mentally ill individuals consistently

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I have represented persons with diminished capacity, mentally ill offenders and mentally ill conservatee's and their conservators since 1981 when, as a deputy Public Defender I was assigned to the L.A. County mental health courts. By the nature of their disease impaired capacity and mentally ill persons are often incapable of properly processing information. Either they do nothing when action is required, such as stopping the pending loss of property, or they make the wrong decision. This results in the person, for example, giving away property, placing themselves in danger, being bilked out of money and assets, or neglecting necessities. A conscientious attorney cannot be expected to either terminate the relationship or follow a fool-hardy course of action dictated by a impaired client. The attorney must act in the client's best interests regardless of what the client dictates, or fails to dictate. Regardless of the current rule, most contact Adult Protective Services, law enforcement, or other appropriate agencies, anonymously if necessary.

Attorneys that handle diminished capacity and mentally ill individuals consistently violate the rule of conduct requiring either disassociation from employment or compliance with unreasonable requests. Compassion and the desire that justice be served allows for nothing else. The recommended change takes the rule out of impractical theory and acknowledges the reality of conscientious representation. To do otherwise is the same as leaving a lost child in the wilderness.

The proposed rule's shortcoming is that it does not go far enough, being limited only to those with diminished capacity, primarily the elderly, instead of including all mentally impaired individuals.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  CA State Bar Member

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Linda C. Kramer

* City Los Altos

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

This proposed rule would be a useful tool for an attorney who believes her client is incompetent and thus unable to take steps to defend his/her interests and consequently is unable to take action to protect himself/herself. The steps taken by the attorney should be limited to revealing only that confidential information that is reasonably necessary to protect the client's interest.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney - private practice

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name John T. Rogers, Jr.

* City Los Angeles

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

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[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ 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 practice primarily in the area of trust, estate, and conservatorship law and am a Certified Specialist. I am the current Chair of the Professional Responsibility Committee of the American College of Trust and Estate Counsel (ACTEC), although please note that I am submitting this comment in my individual capacity. I have written and spoken about clients with diminished capacity several times, both in California and elsewhere.

I am strongly in favor of adopting proposed Rule 1.14, subject to some suggested edits of the Rule and one of the proposed Comments as indicated on the pdf file that I have attached. The suggestions are intended to clarify but not change the substance of the proposed Rule and the proposed Comment.

Business and Professions Code Section 6068 should also be amended to enable implementation of paragraph (c) of the proposed Rule.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ 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.

Support the adoption of the rule with one recommendation: Add the following to Comment [10]: The implementation of this rule is not intended to establish an affirmative duty of conduct that would create a new standard of care for attorneys.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Member California Bar

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Caroline K. Hinshaw

* City San Francisco

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

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[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ 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 agree with proposed rule 1.14.



THE STATE BAR OF CALIFORNIA

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Jack Anderson, Esq., APLC - SBN 145308

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Jack Anderson

* City Bodfish

* State California 

* Email address  jackaesq@sbcglobal.net
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

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[Rule 3.8 \[5-110\]](#)

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[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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Rule 1.14 Client with Diminished Capacity [N/A] 

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☒ 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.

Those of us who practice with elders currently have our hands tied if and when we perceive evidence of elder abuse. We are put into a horrible catch-22 situation of choosing between lock-step adherence to the rule requiring protection of confidentiality, and the need to protect our clients' real and immediate needs and well-being. The current state of affairs is detrimental to the safety of our elder population because it prevents the elder's attorney--who is often one of the few people who would gain insight into an elder abuse situation-- from getting his or her elder client the help that the elder truly needs. Balancing the interests, the elder's well-being, financial security and safety are more immediately important than the minimal (and theoretical) intrusion into the elder's privacy that disclosure would cause. Protection from elder abuse should trump confidentiality in these situations. Rule 1.14 only allows the minimum disclosure required to protect the elder from abuse. This should be a no-brainer. PLEASE adopt proposed Rule 1.14, so that we can do our job of protecting our elder clients' interests more effectively and more completely.

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Thank you.

Jack Anderson.



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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In my opinion, the proposed Rule strikes the appropriate, nuanced balance between the attorney's traditional professional duty of protecting client confidences and the attorney's duty as a moral being under circumstances where the client has diminished capacity to help protect the client him or herself.



THE STATE BAR OF CALIFORNIA

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Your Information

Professional Affiliation

Commenting on behalf of an organization

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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[Rule 1.6 \[3-100\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Discussion Draft \[all rules\]](#)

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☐ AGREE with this proposed Rule

☒ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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Proposed Rule 1.14: "...except to the reference in section (a) to diminished capacity due to 'minority' has been deleted because California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes...Family Code Section 3150..."; within Family Code Section 3150 reference is made to Penal Code 11166 which specifically outlines children being taken from their parents..."Child abuse or neglect...includes physical injury...willful cruelty or unjustifiable punishment, unlawful corporal punishment or injury..." In recognition that the Rule 1.14 discusses the client with diminished capacity referring primarily to mental health impairments. I have personally experienced inappropriate crisis intervention for myself and my children that dramatically altered our life. In addition, the juvenile jurisdiction reports stated: "there is no doubt she loves her children...and that I am the most responsible parent in facilitating the responsibilities needed in parenting, education, healthcare, basic needs..." I outlined and presented Discovery to the California Public Inquiry Unit, number 120559 addressing serious issues of concerns that I have had with the

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Proposed Rule 1.14: ..."except to the reference in section (a) to diminished capacity due to 'minority' has been deleted because California law, the rights and duties of lawyers representing minors are regulated by separate, pertinent statutes...Family Code Section 3150..."; within Family Code Section 3150 reference is made to Penal Code 11166 which specifically outlines children being taken from their parents..."Child abuse or neglect...includes physical injury...willful cruelty or unjustifiable punishment, unlawful corporal punishment or injury...." In recognition that the Rule 1.14 discusses the client with diminished capacity referring primarily to mental health impairments. I have personally experienced inappropriate crisis intervention for myself and my children that dramatically altered our life. In addition, the juvenile jurisdiction reports stated: "there is no doubt she loves her children...and that I am the most responsible parent in facilitating the responsibilities needed in parenting, education, healthcare, basic needs...." I outlined and presented Discovery to the California Public Inquiry Unit, number 120559 addressing serious issues of concerns that I have had with the facilitating of crisis intervention in Tulare County, California. I have also communicated directly with the State Bar of California over concerns I had with particular local attorneys involved in the case(s): Attorney Mary C. Jarvis, Attorney Jamie Buttersworth, Attorney Khalil Esat, and additional concerns with Attorney Tom Moholt who represented my children. I communicated directly with Investigator F. Jacobs, and Attorney Henderson; I then filed concerns directly with the California Supreme Court. My children and I received Victims Compensation Claim numbers as my daughter was a direct victim of a violent crime and my son and I were indirect victims of violent crime (and also my son and I were direct victims of a violent crime by the Visalia Police Department). Included in my Discovery I presented an emergency room report and the disposition states: "qualified for an emergency due to threat to patient", which was me, as I had been knocked unconscious by Officer Brian Young, with the Visalia Police Department, furthermore, I have paperwork that cleared me under Title 9 Section 1820.205, which stated I did not qualify for inpatient or outpatient psychiatric care. However, the juvenile jurisdiction child welfare services and affiliated staff continued to harass and coerce my children and I. I am pleased to see that the California State Bar is updating the rules, however, I think that too often children have been wrongfully taken from their parents and the state has had to absorb unnecessary bills as a result of the misconduct of the affiliated staff and their failure to observe the facts that are within the scope of the case. I am a recent graduate from the College of The Sequoias Paralegal program and these issues are very important to me. My children and I were victims of blatant misconduct by the local government officials involved in the case, however, not one person recognized this or worked toward a remedy. In updating rules of court and business and professions codes, it is only worthwhile if the attorneys are held to abide by the rules. For example, I presented a very clearly defined argument of concerns in my complaints to the California State Bar, however, even though the attorneys were in violation, there was no action taken. I was treated as if I had a mental impairment, and I was not given the proper duty of care, for example, Attorney Mary C. Jarvis should have prepared a "motion to traverse" as she established that I was not served with the appropriate paperwork when the local police department and child welfare services took my son. The only mental impairment I was suffering from was clearly documented in my Discovery. As I was cleared under Title 9 Section 1820.205 of the California Code of Regulations. For example, I had made numerous police reports of my concerns with inappropriate behavior by adults toward my children, and I went as far as to file claims with the city of Visalia for monetary damages. One of the claims the city of Visalia did not respond to and this was for 10,000,000.00. Updating rules of court looks good, and can passify the average citizen however, unless the accountability is upheld the rules are just words. (I would hope that the Discovery under Public Inquiry Unit 120559 could be accessed by those who are interested

in seeing the injustices that are done when agency(s) are not held accountable. However, again due to the privacy rules, and the fact that this involves a juvenile jurisdiction case, this may not be possible.) I have given my Discovery to Attorney Brenda Ballew Ward for "safekeeping" as when I am fully able to, I intend to bring this back to court, even if it has to be done in a civil manner because I am not willing to accept the injustices that have taken place to my family. The tort law damage continues and my family and I cannot get the time we lost back. I hold the Attorney(s) involved most accountable because they are held to a strict code of ethics to uphold the truth and support true justice. Instead, they end up being part of a game, with no regard to how their actions are affecting innocent families. (Attorney Jean Bourne of Visalia, California, has many cases that have been wrongfully prosecuted within the Juvenile Jurisdiction Courts, and the child welfare service worker involved in our case seems to be the primary cause of the wrongful prosecution cases.)

I appreciate the opportunity to voice my opinion, for whatever it is worth.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

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DEADLINE TO SUBMIT COMMENT IS: NOVEMBER 13, 2009

Your Information

Professional Affiliation  On Behalf of Disability Rights California, Disability Righ

Commenting on behalf of an organization 

☒ Yes

☐ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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☐ AGREE with this proposed Rule

☒ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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See Attached Letter on behalf of 6 disability rights organizations.



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California's protection and advocacy system

November 13, 2009

Commission for the Revision of the
Rules of Professional Responsibility
State Bar of California
180 Howard Street
San Francisco, California 94105

**RE: Opposition to Proposed Rule 1.14
"Clients with Diminished Capacity"**

Dear Members of the Commission:

Thank you for the opportunity to comment on proposed Rule 1.14. This letter in opposition to the proposed rule is submitted by 6 organizations in California with substantial experience in representing individuals with disabilities throughout the state: Disability Rights California, Disability Rights Education and Defense Fund, Disability Rights Legal Center, Law Foundation of Silicon Valley, Mental Health Advocacy Services, and the National Senior Citizen Law Center. Each of these organizations is deeply involved in representing people with disabilities in California, and elsewhere throughout the country, on a broad range of issues, including civil rights and discrimination issues. Each of the signatories is signing on behalf of their respective organization. A brief description of each organization follows.

Organizations Submitting These Comments

Disability Rights California was founded in 1978 and has provided advocacy services for Californians with disabilities for thirty years. It now has five offices (Sacramento, Fresno, Oakland, Los Angeles, and San

Diego) to serve its constituency. Disability Rights California provides legal counsel and direct representation in administrative and court proceedings to individuals with all categories of disability, including but not limited to physical/orthopedic, sensory, cognitive and psychiatric disabilities. It is designated as a Protection and Advocacy Agency under federal statutes establishing such agencies in every state to advocate for people with disabilities,¹ and has contracts with the State of California to serve people with developmental disabilities and people in state psychiatric hospitals.

Founded in 1979 by people with disabilities and parents of children with disabilities, the Disability Rights Education and Defense Fund (DREDF) is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. For three decades, DREDF has remained board- and staff-led by members of the disability community, pursuing its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for expertise in the interpretation of federal and California disability civil rights laws.

The Disability Rights Legal Center (DRLC) was founded in 1975. It is a private nonprofit organization whose mission is to promote the rights of people with disabilities and the public awareness of those rights by providing legal and related services. DRLC is committed to and has a history of advocacy in support of equal access to justice for people with disabilities.

The Law Foundation of Silicon Valley is a private non-profit based in San Jose, California, that sponsors five free legal services programs. Four of these programs, Health Legal Services, Fair Housing Law Project, Mental Health Advocacy Project, and Public Interest Law Firm have an interest in this matter. Through these programs, the Law Foundation promotes the

¹ Disability Rights California provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001, PL 106-402; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §10801, PL 106-310; the Rehabilitation Act, 29 U.S.C. §794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. §3011,3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. §1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. §300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. §15461-62, PL 107-252.

rights of individuals with disabilities through individual client representation, impact litigation, policy advocacy, and community education.

Mental Health Advocacy Services is a non-profit organization jointly sponsored by the Los Angeles County Bar Association, the Beverly Hills Bar Association, and the Mental Health Association of California. MHAS has been providing free legal services to people with mental disabilities for over 30 years.

The National Senior Citizens Law Center is a non-profit organization that advocates before the courts, Congress and federal agencies to promote the independence and well-being of low-income elderly and disabled Americans.

Comments

We respectfully submit comments in opposition to Rule 1.14 (clients with diminished capacity) as proposed. The proposed Rule adapts ABA Model Rule 1.14 and, if adopted, would allow an attorney to “notify an individual or organization that has the ability to take action to protect the client” when the client has “significantly diminished capacity such that the client is unable to make adequately considered decisions in connection with a representation,” is “at risk of substantial physical or financial harm,” and “cannot adequately act in his or her own interest.”

We recognize the need for ethical guidance for attorneys who represent clients with diminished capacity—especially where such guidance aids attorneys in providing competent representation to the most vulnerable clients and client populations—and we commend the Commission for drafting a proposed Rule that is more protective of client interests than those under Rule 1.14 of the Model Rules of Professional Responsibility. However, we believe that the proposed California Rule is too vague and too broad and would allow attorneys to inappropriately compromise clients’ personal autonomy and confidentiality in situations in which this is not warranted.

We believe that there is no need to revise the existing rules on confidentiality. However, to the extent that the Commission determines that a revised rule is necessary, we recommend that the Commission consider more targeted provisions for identified problems rather than

adopting a broad rule that risks detrimental unintended consequences for people with disabilities, the legal profession, and society as a whole. A more targeted rule could assist attorneys in navigating difficult ethical issues raised by situations in which they question their clients' capacity while at the same time preventing unnecessary disclosure of confidential client information.

Additionally, we believe that an ethical rule regarding clients with diminished capacity should contain a more nuanced and instructive discussion of the appointment of guardians *ad litem*, the obligations to provide reasonable accommodations to individuals with disabilities under state and federal discrimination laws, and attorney training on issues related to representing clients with diminished capacity.

Although we are unable, in this limited time for comment, to propose specific alternatives, we would be happy to participate in further discussions about alternative approaches.

Erosion of Fundamental Right to Personal Autonomy

We have serious objections to the erosion of the fundamental personal autonomy of clients that we believe will result from the proposed Rule. Although the proposed Rule does not allow the attorney to seek conservatorship or other imposition of legal disability on the client, it does create situations in which the attorney's action could indirectly lead to such abridgment of the client's personal autonomy.

For example, if the attorney provides information about the client's diminished capacity to an individual or agency who, in turn, seeks conservatorship of the client, the adverse impacts on the client will extend far beyond the subject of the existing representation. In our experience, diagnostic labels are often substituted for realistic assessments of capacity, and individuals with mental health disabilities or developmental disabilities may face conservatorship or other proceedings that deprive them of their autonomy on the basis of their diagnoses alone.

As a result, they may lose their ability to make decisions about their finances, their living situations, and even their medical care when this is unwarranted. We have even faced arguments that a conservatee's inability to contract means that the person is unable to consent to patient advocacy

assistance in exerting his or her right to be free from involuntary psychiatric treatment.

Necessity of Maintaining Trust in Attorney-Client Relationship

We agree with the minority of the Commission that the policy of abrogating existing State confidentiality obligations is the wrong policy as it impairs the trust relationship between clients and lawyers.

Section 6068(e) of the California Business and Professions Code imposes upon attorneys a very broad duty to maintain client confidentiality, saying: “It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Cal. Bus. & Prof. Code § 6068(e)(1).) The only exception explicitly provided is that an attorney “may, but is not required to, reveal confidential information . . . to the extent that the attorney reasonably believes . . . necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death . . . or substantial bodily harm.” (§ 6068(e)(2).)

Likewise, State Bar of California Rule 3-100 lists only two exceptions to the broad duty of confidentiality. The first allows release of information with “the informed consent of the client,” and the second allows release to prevent a crime as allowed in section 60608(e). (Rule 3-100(A), (B).) The Rule allows the attorney to disclose “no more than is necessary to prevent the criminal act, given the information known to the member at the time of the disclosure.” (Rule 3-100(D).) These provisions poignantly illustrate the importance of protecting client confidences.

The Discussion of Rule 3-100 emphasizes that the ethical duty to preserve confidentiality “applies to information relating to the representation, whatever its source.” (Rule 3-100, Discussion, Paragraph 4.) Confidentiality is essential to the “trust that is the hallmark of the client-lawyer relationship.” (Paragraph 1.)

In contrast to these appropriately strict professional obligations, the proposed Rule would allow attorneys to release, at their discretion, confidential client information. Thus, it could undermine the trust that is necessary for a successful relationship between the attorney and client. The guarantee of confidentiality is especially significant for clients with disabilities, such as psychiatric disabilities, who face ostracism and

disability-based discrimination in our society. We are very concerned that if this Rule is adopted, clients with disabilities may not seek legal advice for fear that their confidences could be divulged despite objections if the lawyer believes the unauthorized disclosure could serve the client's interest. Finally, we are concerned that the proposed rule would constitute the beginning of a slippery slope in undermining general trust in the inviolate nature of the attorney client relationship.

Clarification of Attorney Role in Guardian *Ad Litem*

Based on materials from the Commission, "the proposed Rule does not permit the lawyer to take steps to have a guardian, guardian *ad litem*, or conservator appointed for the client." (RRC – MR 1.14 – Compare – Comment Explanation – DFT3 (09-3-09) p. 7.)

We believe that a rule pertaining to the representation of clients with diminished capacity *should* clarify the circumstances wherein an attorney may assist in the appointment of a guardian *ad litem*. For attorneys who represent seniors and individuals with disabilities in litigation, the ability to seek appointment of a guardian *ad litem* can be an essential tool in advancing those clients' rights if used appropriately. This can be, moreover, an appropriate, protective alternative to the broader abridgement of rights to which the proposed rule may lead (as discussed above).

Client capacity varies according to the nature of the specific task. A client may have the capacity to approve appointment of a substitute decision-maker, such as a guardian *ad litem*, but not be capable of creating a trust document or decision-making in the rapidly changing environment of litigation. (See C. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?" *Journal of the American Academy of Matrimonial Lawyers*, Vol. 16, 2000, 481-505) [emphasis in original].)

Comment One to the proposed rule recognizes that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client's own well-being."

Similarly, in our experience, many clients with severe cognitive impairments are able to communicate their desire to participate in litigation and their

willingness to have a guardian *ad litem* appointed to assist them even if they are not able to fully engage in every aspect of the case. Along similar lines, whether or not a client can consent to the appointment of a guardian *ad litem* or other action may also fall on a continuum; between affirmatively giving consent and affirmatively withholding consent lies a range of scenarios in which the client may be unable to understand what is being asked or to communicate a response. The Rule or its commentary should provide attorneys with guidance in these types of situations.

Need for Adequate Training on Client Communication and Obligations to Provide Reasonable Accommodations

Comment Two provides that a lawyer may be required “to use a manner and means of communication adapted to the client’s ability to comprehend and deliberate.” Clients with disabilities often complain to us about how little time their attorneys spend with them and that their attorneys are failing to provide clear and accessible information. Based on our experience, alterations in communication methods by attorneys could assist in maintaining a traditional client-lawyer relationship. In addition, attorneys have a duty under state and federal discrimination laws to provide reasonable accommodations to maintain the traditional attorney client relationship. Lawyer training on such communication methods and accommodations should be required as part of a lawyer’s mandatory continuing education obligations.

Need for Adequate Training on Determining Client Capacity

We share the concern of the Commission’s nonlawyer, public member that lawyers do not have adequate training to determine whether a client’s mental capacity to make a specific decision in a case is “significantly diminished.” Absent such expertise, even well-intentioned lawyers, emboldened by the Rule, could breach confidentiality to “protect the client,” resulting in serious adverse consequences for the client.

Attorneys who are tasked with assessing client capacity and given some power to act on that assessment at the least should receive training on how to make capacity determinations and on representing elders and clients with disabilities. Comment Three to the proposed Rule directs lawyers to Probate Code section 811 for guidance on deficits in mental functioning that may render a client as having “substantially diminished capacity.”

However, this list of deficits provides insufficient guidance to an attorney who must assess a client's capacity.

Even with training, however, we remain concerned that the Rule places too much burden on attorneys to assess a client's capacity, when they lack expertise to make such an assessment. Attorneys cannot acquire adequate expertise to assess a client's capacity in a few training sessions. Even if training can provide education, it cannot provide the years of practical experience necessary for attorneys to competently assess a client's capacity.

Current state laws regarding conservatorships recognize that determination of capacity is often a highly contested and nuanced matter, and that people can be capable of making some decisions and not others. If judges struggle to make these determinations after contested evidentiary hearings with expert testimony, how can we anticipate that untrained or lightly trained attorneys will make appropriate decisions?

Training, moreover, does not resolve the issue of attorney prejudice towards clients with disabilities in assessing their capacity. Like other minorities, people with disabilities have been historically subject to personal and public prejudice. Having the attorney assess a client's capacity, opens up the client to the attorney's personal prejudices about the client's disability, or whether the client has a disability. This creates the risk that an attorney may assess the client as having "substantially diminished capacity," simply because the client has a disability, or the attorney perceives the client to have a disability. Even if training can warn an attorney about exercising personal prejudice towards client, it cannot wholly eliminate the attorney's prejudice in the decision-making process.

Need for Bright Line on Attorney Action Contrary to Client Wish

If the Commission seeks to diminish the traditional protections of a client attorney relationship it should do so only in the most extreme contexts. Comment Four to the proposed rule provides that "the imminence of the harm is not a prerequisite to disclosure." Contrarily, a lawyer should be permitted to disclose confidential information contrary to the client's expressed interest only when substantial harm is imminent and that there are no less restrictive means of preventing it. Standards equivalent to the

strict standards for disclosure under section 60608(e)(2) and Rule 3-100(B) should apply here as well.

Comment Four also provides that the attorney may proceed under paragraph (b) if “the client refuses [to consent to such action] or is unable to give such permission....” after the attorney has explained the need to take such action to the client. While Comment Four provides factors for the attorney to consider before proceeding under paragraph (b) in such a situation, we have grave concerns that the Rule essentially permits the attorney to substitute her own judgment for the client’s even over the client’s refusal. This presents a false choice for a client; the refusal is meaningless in the event that the attorney perceives the client to have “substantially diminished capacity.”

Additionally, Comment Four leaves open the possibility that the attorney may inform a client that the attorney can proceed under paragraph (b) long after the attorney has undertaken representation of the client. This risks unfair surprise to the client regarding their decision-making capacity during representation. If adopted, the Rule should require that attorneys discuss at the outset of representation the steps the attorney can take under paragraph (b) to protect the client’s interests, in the event that the client has diminished capacity at any point during the representation. However, we have serious concerns that clients will be reluctant to be frank with their attorneys if they believe that their confidences or concerns can, at the attorney’s discretion, result in the disclosure of those confidences and possibly ultimately the loss of their decision making capacity.

Need for Adequate Training on Third Party Assistance

Another training issue is raised by the proposed Rule’s broad provision that a lawyer may “notify an individual or organization that has the ability to take action to protect the client.” (Proposed Rule 1.14(b).) Comment Six expands on this provision, clarifying that a lawyer may consult with family members and refer to “adult-protective agencies or other individuals or entities that have the ability to protect the client.” This presupposes that the lawyer has adequate training about the risks and benefits of notifying these individuals or agencies, or has any knowledge about whether a referral to a third party would be effective or appropriate.

As expressed above, we have grave concerns about lawyers being permitted to release confidential information above a client's objection. Without ignoring this objection, we think it is important to point out that the failure to train lawyers about how and when to use this provision would very likely result in the Rule being overused or misused. For instance, we feel that under this provision, lawyers will often seek third party involvement in a situation where he or she disagrees with a client's decision. Although making a decision that is contrary to his or her attorney's recommendation — or even contrary to his or her own best interest — does not necessarily mean that a client lacks capacity, the proposed Rule might tempt an attorney to take action to protect the client in such situations. In another example, lawyers may not know to ask the client whether he or she would authorize consultation with one third party over another. If the Commission ultimately decides to allow some third party notification, lawyer training and further clarification about the provision's appropriate use should be required.

Similar to Comment Six, Comment Five suggests that an attorney may permit "family members or other persons to participate in discussions with the [attorney]." Additionally, Comment Five suggests to attorneys that the participation of family members and third persons generally will not affect the applicability of the attorney-client privilege when it is "necessary to assist in the representation." We express concern that inclusion of family members and third persons in discussions with an attorney may open the door for inadvertent disclosure regarding confidential client information and waiver of the attorney-client privilege. Training should be provided as to when the participation of family members and third persons are necessary to assist in the representation, e.g., disability accommodation.

Moreover, while Comment Five does provide that the attorney "must keep the client's interests foremost," and generally look to the client for decisions on the client's behalf, the Comment should explicitly lay out common problems that the inclusion of family members and third persons present, e.g., undue influence, self-interest of family members. This will more clearly assist attorneys in determining whether inclusion of family members and third persons in attorney-client discussions is appropriate.

Additional Specific Comments

The language in proposed section (a) is ambiguous and potentially misleading. It is not clear what is meant by a “normal” client-lawyer relationship. If we mean the obligations to act professionally and in the client’s interest, then there is no need to diminish that obligation with language saying “as far as reasonably possible.” If we are saying that the only diminishment is set forth in part (b), then that should be explicit. It would be better to indicate here some of what is included in the comment: i.e. that the attorney has an obligation to provide accommodations in the manner in which the attorney communicates with the client. It is also unclear what I meant by “some other reason.” This is a very broad phrase that encompasses more than disabilities.

The language in proposed section (b)(i) as to “adequately considered decisions in connection with a representation” is also ambiguous. Does this refer to decisions as to the desired outcome of the representation? As to specific litigation decisions?

The language in proposed section (b)(iii) and (c) is equally vague when it refers to the client’s “interest”. Who determines what the client’s “own interest” is? Does this mean the client’s expressed interest? The lawyer’s interpretation of the client’s “best interests”? What if the two conflict? We believe that the fundamental role of the attorney is to carry out the express wishes of the client even if the attorney disagrees with those wishes, so long as the client’s goals are lawful.

We certainly agree with the provisions in Comment 1 that a client with diminished capacity may have the ability to understand, deliberate upon, and reach conclusions about many matters affecting the client’s well-being.

In Comment 2, we are concerned that the inclusion of the term “as far as possible” diminishes the obligations of the attorney in ways that may exceed the specific exceptions at issue, and again we do not know what is meant by a “normal” relationship. We strongly support the language regarding the obligation to “use a manner and means of communication adapted to the client’s ability to comprehend and deliberate,” and believe this should be a specific prerequisite to disclosure in the rule, not just a Comment (and in fact is a component of the attorney’s reasonable accommodation obligations).

In regards to Comments 6 and 7, as stated above we do not believe attorneys should be permitted to take “protective measures” over the objection of a client. However, if the rule were to allow such action, the lawyer should be obligated not just to notify the client but to consult with the client concerning preferences among various measures. This may require the attorney to educate himself or herself about those options before breaching any confidences. Further, in Comment 7, “other harm” is vague. The narrowest rule would be one relating to imminent physical harm.

In Comment 8, we would recommend that the reference to guardianships be deleted, since this applies only to minors and could lead to confusion with the availability of guardians *ad litem*. As discussed above, the use of guardians *ad litem* may, under appropriate circumstances, be an appropriate measure so long as it is not opposed by the client and allows the attorney to more effectively carry out the express wishes of the client.

In regards to Comment 9, we note that circumstances surrounding lawyers appointed by a court to represent a client may in general raise issues that are different from those in which there is a voluntary attorney-client relationship. We also note that the rule appears to apply only to those circumstances in which a client has the capacity to and has entered into an attorney-client relationship.

To the extent the Proposed Rule is adopted in some form, we strongly support Comment 10 and believe the rule should include this provision, not just the Comment.

Incorporation of Comments into a Proposed Rule

Comments to the proposed Rule include important best practice guidance that would be better served in the Rule itself. For example, Comment Six provides that the lawyer may take a variety of protective measures such as “using voluntary surrogate decision-making tools such as durable powers of attorney.” It is recognized “that the best strategy for dealing with capacity issues is a preventative one – one that may avoid the need to take control without client consent or direction.” C. Sabatino, *supra* at 504.

For the above reasons, we urge the Commission to study this Rule further and incorporate amendments that address the concerns laid out here. We stand ready to participate in discussions about how to best improve this Rule. Thank you for the opportunity to comment on this important ethical issue.

Sincerely,

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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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  Attorney at law - sole practitioner

Commenting on behalf of an organization 

☐ Yes

☐ No

* Name Ian M. Sammis

* City San Rafael, cA

* State California 

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

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

Rule 1.14 Client with Diminished Capacity [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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Th rule is needed and seems adequate to protect the client and the attorney.



THE STATE BAR OF CALIFORNIA

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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: NOVEMBER 13, 2009

Your Information

Professional Affiliation  private attorney practicing in trusts & estates field

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Edward Daniels

* City Millbrae

* State California 

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 1.14 Client with Diminished Capacity [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.

I believe the proposed rule is a significant improvement. As attorneys, I believe our first obligation should be to act in the best interests of our clients, and that it is more important that one be able to trust one's attorney to act in the client's best interest than to be able to trust the attorney to remain silent as to matters covered by the rule in ALL circumstances, even if doing so would allow harm to come to the client. I strongly support adoption of the proposed rule.

Hollins, Audrey

From: Pete Pettler [pdpettler@vkfp.com]
Sent: Thursday, November 12, 2009 3:34 PM
To: Hollins, Audrey
Subject: COMMENT ON PROPOSED RULE 1.14
Attachments: pdpettler@vkfp.com.vcf

As an attorney who has practiced Estate Planning and Probate Law for over 35 years, I want to strongly support the proposed rule. Too often we design estate plans for our clients and then our hands are tied about helping them when they have lost capacity and in danger of financial or physical abuse.

Peter D. Pettler
041514

It is our opinion that this communication is not a "covered opinion" within the meaning of Internal Revenue Circular 230 because its principal purpose is not tax avoidance or tax evasion. To ensure compliance with requirements posed by the IRS, we inform you that any tax advice contained in this communication was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties that may be imposed on the taxpayer.

<<pdpettler@vkfp.com.vcf>>



LACBA

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November 20, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.14 – Client
with Diminished Capacity

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.14:

Proposed Rule 1.14 addresses a situation not covered by the existing rules. The issues raised when dealing with a client with diminished capacity often arise in the area of probate and trust law. However, similar issues can arise in all practice areas, particularly with the aging of the population. We believe that the adoption of rule 1.14, along with the necessary amendment to Section 6068(e) of the Business and Professions Code, are appropriate. We particularly commend the Commission for not adopting the ABA version of the rule, which goes much too far in allowing disclosures. We support the proposed rule and related comments, with the exception of the following 3 items:

In 1.14 (a), we suggest that a comment be added to include a specific reference to the obligation of the attorney to comply with the reasonable accommodations provisions of the Americans with Disabilities Act and of the Unruh Civil Rights Act. Both the ADA and the Unruh Act require a lawyer dealing with a client with a disability not just to treat them the same as other clients, but to make reasonable accommodations to ensure that they are able to fully obtain the services of the lawyer. Pointing lawyers to this obligation in the Rule would help to increase lawyers' awareness and compliance with the additional obligations.

We suggest strengthening the language of 1.14(c) to make clearer that the information disclosed must be no greater than the minimum amount necessary to alert the 3rd party of the problem. A comment on this point might also be useful.

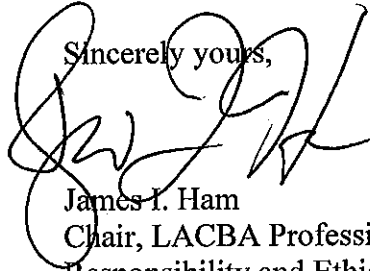
In proposed Comment 3, we are concerned about the listed criteria for disclosing information. After referring to Probate Code sections 811 and 812, which provide very specific criteria for determining whether a person has diminished capacity, the comment then incorporates the criteria listed in the ABA comment. As drafted, we believe the rule could undercut the references to the Probate Code and

Office of Professional Competence, Planning & Development
State Bar of California
November 20, 2009
Page 2

allow a lawyer to base a decision on the ABA factors, which are too broad and too easily met, thus leading to disclosures in cases where it might be inappropriate to breach confidentiality.

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

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. Ham', written over the typed name.

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

Rule 2.1 – Public Comment – File List

E-2009-292i OCBA [2.1]

E-2009-293g State Bar OCTC [2.1]

E-2009-310a COPRAC [2.1]

E-2009-351i SDCBA [2.1]

E-2009-358h Santa Clara County Bar [2.1]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 -- Confidentiality of Information
- Proposed Rule 1.8.2 -- Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 -- Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 -- Duties to Former Clients
- Proposed Rule 1.10 -- Imputation of Conflicts -- General Rule
- Proposed Rule 1.14 -- Client with Diminished Capacity
- Proposed Rule 2.1 -- Advisor
- Proposed Rule 3.8 -- Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 -- Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 2.1 – Advisor**

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 comments concerning the subject proposed Rule:

The OCBA endorses the adoption of the first sentence of the proposed Rule, but recommends that the second sentence be deleted. The proposed Rule should read in its entirety:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

The second sentence should not be part of the Rule because it is not intended to be mandatory and is, essentially, a practice pointer. With modifications to the language, the second sentence should be placed in an appropriate location in the Comments to read as follows:

In rendering advice, a lawyer may refer not only to law, but **also to such other considerations such as moral, economic, social and political factors that may the lawyer deems to be relevant to the client's situation.**

The recommended language reflects that there can be many considerations that are not technically legal considerations, but are important nonetheless in rendering advice to a client. The OCBA believes that it is more appropriate for the language to be as broad as possible, rather than focusing on "moral, economic, social and political" factors. Moreover, the recommended language is consistent with the proposed Rule because it suggests that the lawyer should use his independent judgment in determining what, if any, non-legal considerations may be relevant to the situation.

In addition, the OCBA endorses all of the Commission's recommended deletions from the comments to the ABA Model Rule.

With respect to Comment [1], the OCBA recommends that the language of the second sentence be modified to read as follows:

Legal advice ~~often~~ *may* involve unpleasant facts and alternatives that a client may *find unpleasant and* be disinclined to confront.

There is no need for the word “often,” and whether facts are unpleasant depends on the client’s perspective and not on the facts themselves.

With respect to Comment [2], the OCBA endorses the deletion of the second and third sentences from the comment to the Model Rule, but suggests that the last sentence be modified as follows:

For instance, although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon ~~most~~ *many* legal questions and may ~~decisively~~ influence *the client’s course of action* ~~how the law will be applied~~.

These changes reflect that there are many kinds of non-legal considerations that might be relevant to a lawyer when advising a client and change the focus from how the law might be applied to the impact on the client.



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal.^{4th} 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a distinct "R".

Russell G. Weiner
Interim Chief Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 2.1

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 2.1 and offers the following comments.

COPRAC does not support the proposed rule, because we do not believe that it is appropriate as a disciplinary rule.

While we agree with the commentary in the Introduction as to "the importance of this Rule as guidance to lawyers and clients on a lawyer's duty to exercise independent professional judgment," we do not believe that such guidance – in the form of a Rule of Professional Conduct – should be imposed upon lawyers as a disciplinary rule. Further, we recognize that the Introduction itself acknowledges that "it is anticipated that the terms of the Rule may not be frequently applied as a lawyer disciplinary standard," however, we do not believe the proposed rule should ever be applied as a disciplinary standard.

Should the proposed rule be adopted in some form, notwithstanding the concerns expressed above, we would recommend removing the second sentence of the proposed rule. We are generally in agreement with the concern expressed as the Minority position. We have no objection to the second sentence being included in a Comment to the rule, nor do we object to the disclaimer recommended by the Minority, but we do not believe that this sentence should be included in the rule itself.

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

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

ATT2 - 319



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,


Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 2.1 - ADVISOR

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:

There is a minority that would add a provision stating that the failure to render moral, economic, social, or political advice is not a violation of this Rule (which says a lawyer "may" render such advice). Given the permissive, rather than mandatory, "may" language relating to moral, economic, social, or political advice, the minority's proposed express statement that the failure to give such advice is not a violation seems somewhat duplicative and unnecessary. Additionally, the Commission proposes striking certain language from the Comments to the Rule, which tend to indicate an affirmative obligation to provide such advice. Accordingly, I agree with the majority's opinion that the Rule should be added without the proposed addition.

CONCLUSIONS (pick one):

[X] We approve the new rule in its entirety. (A dissenting opinion was submitted on this matter and is attached as Exhibit 1 for your consideration.)

☐ 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: NOVEMBER 13, 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 2.1 Advisor [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.

This rule is unnecessary and, indeed, encourages an attorney to provide advice to a client that is beyond the scope of the lawyer's expertise.

Rule 3.8 – Public Comment – File List

E-2009-289 DA Ventura [3.8]
E-2009-292j OCBA [3.8]
E-2009-293h State Bar OCTC [3.8]
E-2009-301 DA County of Santa Cruz [3.8]
E-2009-306 Julianne Sylva [3.8]
E-2009-308a George S. Cardona [3.8]
E-2009-309 County of Solano [3.8]
E-2009-351j SDCBA [3.8]
E-2009-353 CDAA [3.8]
E-2009-354 DA Riverside [3.8]
E-2009-358i Santa Clara County Bar [3.8]
E-2009-370g LACBA [3.8]
E-2009-371 COPRAC [3.8]
E-2009-372 Los Angeles DA [3.8]
E-2009-373 Phillip Cline Tulare DA [3.8]
E-2009-374 Ron Calhoun Kings DA [3.8]
E-2009-375 Orange County DA [3.8]



OFFICE OF THE DISTRICT ATTORNEY

County of Ventura, State of California

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Chief Deputy District Attorney
Special Prosecutions

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

ROBERT A. BRINER
Chief Investigator

October 20, 2009

VIA FACSIMILE (415-538-2171) & U.S. MAIL

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

Re: **Proposed Rule 3.8 of the Rules of Professional Conduct**

Dear Ms. Hollins:

I write to express several concerns regarding proposed rule 3.8, which would replace existing rule 5-110 of the Rules of Professional Conduct of the State Bar.

Rule 3.8(a)

Current rule 5-110 prohibits a prosecutor from instituting criminal charges "when the member knows or should know that the charges are not supported by probable cause." "If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the matter is pending."

Proposed rule 3.8(a) broadens the liability of prosecutors in several ways that go beyond both rule 5-110 and ABA Model Rule 3.8. First, it extends the "reasonably should know" standard to the case after filing. This would improperly confuse the issue of competence with the issue of pursuing baseless charges. Prosecutors often have large caseloads and have to prioritize when they will work on each case. Prosecutors also often receive "hand-off" cases that have previously been assigned to another prosecutor. If a prosecutor has received reports that arguably negate probable cause but has not yet read them because he or she was working on other cases, the State Bar could argue that the prosecutor has acted unethically in failing to act on information he "should have known." The current requirement that an attorney act competently (rule 3-110; Model Rule 1.1) is an adequate standard to address this concern.

A recent State Bar Court case demonstrates the way in which the proposed rule could be misused to discipline a prosecutor. In the *Benjamin Field* case, the State Bar Court expanded the law by disciplining a California prosecutor for false statements by a Colorado sheriff's deputy in obtaining a Colorado search warrant. (*In re Benjamin T. Field* (Feb. 10, 2009, 06-O-12344) <http://members.calbar.ca.gov/courtDocs/05-O-00815.pdf>, pp. 18-20 [currently on appeal].) The prosecutor was disciplined for the deputy's statements, even though the prosecutor had no knowledge of the false statements when the warrant was obtained or executed. The *Field* case misconstrued the prosecutor's *disclosure obligations* for the "prosecution team" under *Brady v. Maryland* and created a new rule that prosecutors are legally responsible for the conduct of police officers and may be disciplined for officers' misconduct.¹ If rule 3.8(a) is enacted as proposed, it will further empower the State Bar Court to discipline prosecutors for whatever it deems the prosecutor *should have known*. This would conceivably include facts that had not even been uncovered or investigated by police if the State Bar determines that the prosecutor, or police agency members of the "prosecution team," *should have* found them out.

The proposed language regarding "commencing, or continuing to prosecute a charge" is acceptable, but the application of the rule to "recommending" a charge is problematic and should be deleted. The rule is not clear as to what sort of recommendation is prohibited. The State Bar should not interfere in the internal discussions within a prosecutor's office as to what charges should be prosecuted, and prosecutors should be permitted to voice their opinions openly in such discussions without fear of discipline. Even if "recommending" is limited to the context of a grand jury or court proceeding, it should not penalize good faith advocacy or differences of opinion. For example, the standard of proof at an indictment proceeding or preliminary examination is probable cause. A motion to suppress evidence under Penal Code section 1538.5 may turn on whether the officer had probable cause to arrest. The prosecutor should not be subject to discipline every time a court rules against the prosecution regarding a finding of probable cause.

Even if the language regarding "recommending" a charge is deleted, the rule should be amended to add language similar to the following: "This rule shall not prohibit good faith advocacy on the issue of guilt or probable cause." This is necessary to allow prosecutors to exercise the vigorous advocacy expected of all attorneys. Rule 3.1 of the Model Rules of Professional Conduct requires attorneys to assert positions only if they are "not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." But rule 3.1 provides a special exemption for criminal defense attorneys: they "may nevertheless so defend the proceeding as to require that every element of the case be established." Clearly, a defense attorney is not prohibited from defending a client even if the attorney knows or should know that the defendant is guilty. We do not argue that the law should be otherwise. But a problem arises

¹ The State Bar opinion also imposed discipline on Field for some clear misconduct such as withholding exculpatory evidence from the defense.

when there is a legitimate issue as to whether probable cause exists. The defense can make whatever arguments it wants with impunity. Prosecutors should be able to make good faith arguments without fear that if the court disagrees, the State Bar will discipline the prosecutor.

Rule 3.8(b)

This rule is unnecessary. The court has the duty to advise the defendant of the right to counsel. (Pen. Code, §§ 860, 987.) There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty.

Depending on how the word “accused” is interpreted in proposed rule 3.8(b), it could be read unfairly to allow a prosecutor to be disciplined for *Miranda* violations by police, even if the prosecutor was unaware of them. As discussed above, the State Bar Court in the *Fields* case has taken the unprecedented position that prosecutors have supervisory responsibility for the conduct of police officers, and are subject to discipline for misconduct of the police, even if unknown to the prosecutor. Proposed rule 3.8(b) could improperly expose prosecutors to discipline for *Miranda* violations by police.

Comment 1B states that paragraph (b) is not intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e., to make efforts to assure that the accused is advised of the right to, and procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel. The comment in effect cancels out the rule for California prosecutors. I recommend that 3.8(b) be deleted.

Rule 3.8(c)

The proposed rule allows the prosecutor to seek a waiver of constitutional rights from an unrepresented defendant if the court has approved the appearance of the defendant in propria persona. But in comment 2, the Commission has deleted the language about court approval. As a result, comment 2 appears to impose an absolute prohibition of seeking the waiver of pretrial rights from an unrepresented defendant, and is inconsistent with the language of rule 3.8(c). Comment 2 should be amended to put back the language, “Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal.”

I question the need for this rule. The rule is apparently designed to prevent the prosecution from attempting to take unfair advantage of an unrepresented defendant. But if the case is going to be resolved by way of guilty plea rather than by trial, the defendant *must* waive the rights to jury trial, to confront and cross-examine witnesses, and the privilege against self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) The standard guilty plea forms include these waivers. At arraignment, the court will inquire whether the defendant

will have counsel or represent himself. Whether a defendant is represented by counsel or appears without counsel is the choice of the defendant, not of the prosecution. The only practical effect I can see from the proposed rule is that it may prohibit plea discussions with an unrepresented defendant, or presenting an unrepresented defendant with a guilty plea form, until after a court appearance at which the court approves (or acknowledges) that the defendant is representing himself.²

The application of the proposed rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The proposed rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling “approving” self-representation.

Rule 3.8(d)

The language added by the Commission, “comply with all constitutional obligations, as defined by relevant case law regarding,” is important. Without this language, the rule would overstate the prosecution’s disclosure obligations, and would improperly subject a prosecutor to discipline for failure to disclose even *immaterial* evidence that conceivably might be favorable.

Comment 3 is helpful in clarifying that a prosecutor should not be disciplined for conduct that was lawful at the time it occurred.

Rule 3.8(e)

No comments.

Rule 3.8(f)

The rule would create an imbalance between prosecutors and defense attorneys. Prosecutors would be expected to take reasonable care to prevent “investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution” from making certain extrajudicial statements. But under Model Rule 5.3, a defense attorney would have a comparable responsibility only as to persons over which the attorney has “direct supervisory authority.” Apparently, if a defense attorney hires an investigator or consultant to assist with a case, the attorney has no obligation to take steps to prevent employees or associates of those persons from making statements because the attorney has no “direct supervisory authority” over them. Public release of inflammatory or inadmissible information from the defense can be just as damaging to

² It is not really a question of the court “approving” pro per status since the defendant has the constitutional right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.)

Ms. Audrey Hollins
October 20, 2009
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the cause of justice as such statements from the prosecution. The rule should be modified to impose comparable responsibilities on defense attorneys.

Rule 3.8(g)

No comments.

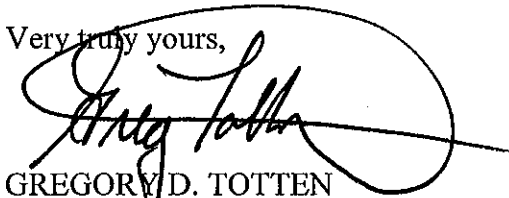
Rule 3.8(h)

No comments.

CONCLUSION

We appreciate the opportunity to comment and hope that these comments will be helpful to the State Bar Commission for the Revision of the Rules of Professional Conduct.

Very truly yours,

A handwritten signature in black ink, appearing to read "Greg Totten", is written over a large, loopy oval shape.

GREGORY D. TOTTEN
District Attorney

GDT:jd

cc: W. Scott Thorpe, Chief Executive Officer, California District Attorneys Association
Kate Flaherty, San Diego Deputy District Attorney, CDAA Ethics Committee

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 -- Confidentiality of Information
- Proposed Rule 1.8.2 -- Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 -- Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 -- Duties to Former Clients
- Proposed Rule 1.10 -- Imputation of Conflicts -- General Rule
- Proposed Rule 1.14 -- Client with Diminished Capacity
- Proposed Rule 2.1 -- Advisor
- Proposed Rule 3.8 -- Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 -- Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 9, 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 3.8 – Special Responsibilities of a Prosecutor**

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 comments concerning the subject proposed Rule:

The OCBA supports the adoption of the proposed Rule with two exceptions.

With respect to paragraph (a), the language of the ABA Model Rule is clear and ensures client protection. The Commission's proposal to include "recommending, commencing, or continuing to prosecute a charge" could have a chilling effect upon discussions preceding the actual filing of a charge. Moreover, the Commission's language is internally inconsistent, in that the introductory phrase that a "prosecutor in a criminal case shall..." connotes that a criminal lawsuit has been initiated, and would therefore exclude the "recommending" phase of the litigation.

The OCBA also opposes the inclusion of the phrase "or reasonably should know" on the grounds it (1) is vague as to whether an objective or subjective test would be applied, (2) would impose disciplinary consequences for potential negligence, and (3) would be impractical as applied, since it would require review of a prosecutor's work product at each stage of the prosecution to determine what the prosecutor should have known regarding whether the charges are supportable.

With respect to Comment [7], the OCBA suggests that the Commission delete the word "genuine" as unnecessary.



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink, reading "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a long, horizontal tail stroke.

Russell G. Weiner
Interim Chief Trial Counsel



BOB LEE
DISTRICT ATTORNEY

County of Santa Cruz

District Attorney's Office

701 OCEAN STREET, ROOM 200, P.O. BOX 1159, SANTA CRUZ, CA 95060
(831) 454-2400 FAX: (831) 454-2227 E-MAIL: dao@co.santa-cruz.ca.us

November 9, 2009

VIA FACSIMILE (415-538-2171) & U.S. MAIL

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

Re: Proposed Rule 3.8 of the Rules of Professional Conduct

Dear Ms. Hollins:

As a district attorney, I appreciate the opportunity to comment on the proposed new Rule of Professional Conduct 3.8 which sets forth special responsibilities for prosecutors. I have several concerns regarding proposed Rule 3.8 as it is currently written. To achieve proper compliance with the State Bar's Rules of Professional Conduct, the State Bar's rules must be sufficiently clear that individual attorneys know what conduct is required of them, they must not conflict with the law, and they must be written so that compliance is feasible. I am aware that Gregory Totten, the District Attorney for Ventura County, has already written a letter which expresses several concerns about the proposed rule and I concur in his concerns. In this letter I will not repeat the concerns he has already articulated, but I wish to make some additional comments on a few of the issues presented by this proposed rule.

Rule 3.8 (a)

The "reasonably should know" standard of proposed Rule 3.8 is vulnerable to a great deal of subjective interpretation and reasonable minds frequently differ as to what constitutes probable cause. Courts, prosecutors and defense attorneys disagree daily as to what constitutes probable cause to support a charge. This is what preliminary examinations in felony cases are for -- to determine whether probable cause exists based on the specific evidence presented. If a judge disagrees with the prosecutor that probable cause has been shown, the Legislature has given the prosecutor various statutory means to challenge the court's ruling. (See, e.g., Pen. Code, §§ 739 [information may charge any offense shown by the evidence presented], 871.5 [prosecutor may move to reinstate the complaint or portion thereof], 1387, and 1387.1 [dismissed felonies may be refiled once, and sometimes twice].) Even in misdemeanor cases, Penal Code section 991 allows the prosecution to refile the complaint after a court has dismissed for lack of probable cause. As

written, proposed Rule 3.8 could serve to deter individual prosecutors from pursuing their legally--authorized statutory remedies and thus from effectively advocating on behalf of the People of the State of California. A prosecutor should not be subject to discipline every time a court rules against the prosecution on the issue of probable cause. If the "reasonably should know" standard is to be included in the Rule, the Rule must also include an express provision that a prosecutor's independent judgment, made in good faith, that probable cause exists will not violate the Rule. This exemption would be similar to the one set forth in Comment [13] relating to subdivisions (g) and (h) of the proposed rule.

In addition, the term "recommending" is unclear and overbroad. The word "recommending" should either be deleted from the proposed Rule or the Rule needs to be expressly limited to recommendations made to a court or grand jury. Such recommendations should, of course, also be subject to the good faith exemption discussed above.

Rule 3.8 (d)

The added language of the proposed rule "comply with all constitutional obligations" is important. Brady v. Maryland (1963) 373 U.S. 83, 87, held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added.) In subsequent decisions, the United States Supreme Court held that favorable evidence is material, and constitutional error results from its suppression, only if there is a "reasonable probability" that, had the evidence been disclosed, the outcome of the trial or proceeding would have been different. (See, e.g., Kyles v. Whitley (1995) 514 U.S. 419, 433-434; United States v. Bagley (1985) 473 U.S. 667, 682, 685.) This definition of materiality encompasses a requirement of a reasonable probability of prejudice to a defendant before a constitutional violation will be found.

The first sentence of Comment [5] is helpful because it clarifies that the law in existence at the time the prosecutor acted will be applicable. However, the second sentence of this comment should be deleted because it appears to go beyond the constitutional standard set by the rule and could lead to discipline for nondisclosure of even the most inconsequential and immaterial items of favorable evidence.

Rule 3.8 (f)

Under proposed Rule 3.6, Trial Publicity, only a lawyer's own extrajudicial statements can subject the lawyer to discipline. However, the proposed Rule 3.8 (f) for prosecutors appears to subject a prosecutor to discipline for the extrajudicial statements of other government employees over whom the lawyer has no direct supervisory responsibility. Worse yet, it can be read so as to subject a prosecutor to discipline for statements made by personnel of independent outside law enforcement agencies who are "assisting or associated with the prosecutor in a criminal case." The term "reasonable care" is not clearly defined. Comment [9] indicates that the reasonable care standard will "ordinarily" be satisfied if the prosecutor issues the "appropriate cautions" to law enforcement personnel and other relevant individuals. However, what an "appropriate caution" might be is not spelled out. This rule could potentially be interpreted to require a prosecutor to caution each and every individual assisting with each one of the prosecutor's many cases. An individual prosecutor may not even know who all of the personnel assisting in a given case are, particularly those in other outside law enforcement agencies. As written, this is an unclear

unworkable, and unfair rule to the extent that it seeks to hold individual prosecutors responsible for the actions of other government employees who are not under the prosecutor's direct supervision.

Rule 3.8 (g) and (h)

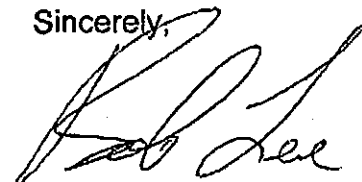
As the Commission's minority apparently recognizes, a prosecutor cannot be expected to know what constitutes "new, credible and material evidence" creating a reasonable likelihood that a convicted defendant did not commit a crime for purposes of proposed subdivision (g) (1) unless the crime occurred within the prosecutor's own jurisdiction. The prosecutor must be familiar with the evidence in the case in order to make such an assessment.

In addition, Rule 3.8 (g) apparently seeks to expand a court's legal authority to take action in a criminal case after conviction and judgment. The rule appears to assume that there is an appropriate court to which evidence regarding an out-of-jurisdiction conviction may be disclosed and a court which may authorize delayed disclosure for convictions within the prosecutor's own jurisdiction. However, once a defendant had been convicted and sentenced to prison, a trial court generally loses jurisdiction after 120 days to take any further action in the matter, with a few limited exceptions. (See Pen. Code, § 1170 (d).) Absent legislation giving the courts continuing jurisdiction to act, or the pendency of another post-conviction proceeding before a particular court, it would accomplish little to give a court new information regarding a previous judgment of conviction.

Finally, from the Commission's own materials it appears that subdivisions (g) and (h) are based on recent model ABA rules which have yet to be widely adopted in other states. These proposed provisions set forth prosecutorial duties to investigate and remedy previously-imposed judgments. If subdivisions (g) and (h) are adopted, Comment [13] must also be incorporated into the new rule because reasonable minds frequently differ as to the credibility and materiality of newly discovered evidence.

I appreciate the opportunity to comment and hope that these comments will be helpful to the State Bar Special Commission for the Revision of the Rules of Professional Conduct.

Sincerely,



BOB LEE
DISTRICT ATTORNEY



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation 

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Discussion Draft \[all rules\]](#)

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

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

☐ AGREE with this proposed Rule

☒ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

I have been an attorney in this state for 20 years and a prosecutor for 19 years. I disagree with this rule for two reasons.

First, I disagree with proposed rule 3.8 because the substitution of the "ordinary negligence standard" in this rule is a completely subjective standard and would subject prosecutors to years of litigation anytime that they make a disputable decision.

Criminal cases are not always cut and dry and witness statements can vary depending on the circumstance and crime. For example, in gang cases and domestic violence cases it is not uncommon to have witnesses recant, change their statement or even be afraid to come forward early in the case. This rule may cause prosecutors to only file criminal cases against defendants who confess to the crime (hard to penalize the prosecutor when a defendant confesses...) Or, prosecutors could use overbroad statutes for fear that they will make a mistake.

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

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Furthermore, it is great concern to me that the Commission is promoting this rule to "increase client protection" without considering the need to promote public safety or even due process as defined in the Fifth and Fourteenth Amendments of the United States Constitution.

Please do not adopt this rule as it stands.

And PLEASE, get a prosecutor on your Committee to be sure that you have representation from all angles: defense attorneys, who represent their client's interest first and foremost, and prosecution attorneys, who protect the public and work to promote public safety.

OFFICE USE ONLY.

* Date 11/09/2009 	Period PC 	File : E-2009-306 Julianne Sylva [3.8].pdf
Commented On: 	Specify: 	Submitted via: Online 

* Required

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

FROM: George S. Cardona
Acting United States Attorney
Central District of California

Karen P. Hewitt
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 3.8(c), (g) and (h) and 8.5(b)

DATE: November 10, 2009

As an initial matter, we want to thank the Commission for all the hard work it has done in arriving at its proposed revisions to the California Rules of Professional Conduct and for its willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors. We write to provide additional comments on three subsections of Proposed Rule 3.8, Special Responsibilities of a Prosecutor, that we believe could have a substantial negative impact on the work of the prosecutors in our offices, and a subsection of Proposed Rule 8.5, Disciplinary Authority – Choice of Law, that we believe could negatively impact Department Of Justice attorneys, including attorneys in our offices, working on national investigations that only tangentially involve events occurring in California.

A. Proposed Rule 3.8(c)

The text of Proposed Rule 3.8(c) is substantially the same as ABA Model Rule 3.8(c), with the addition of a clause specifying that its prohibition on soliciting waivers of “important pretrial rights such as the right to a preliminary hearing” from an unrepresented “accused” does not apply where the court has “approved the appearance of the accused *in propria persona*.” ABA Model Rule 3.8(c) contained this same exception to application of the rule in ABA Comment [2], and we have no objection to moving this exception from the comment to the rule itself. We do, however, seek an addition to Proposed Comment [2] to clarify that the rule is not to be interpreted to preclude prosecutors and law enforcement agents from seeking waivers of the time for initial appearance and/or preliminary hearing, an interpretation we believe unwarranted and one that would negatively impact both law enforcement investigations and attempts by arrested

individuals to improve their own positions through cooperation with law enforcement investigations.

In the federal system in particular, it is not uncommon for individuals arrested as part of an ongoing investigation, whether on probable cause or on a warrant premised on a criminal complaint, to be offered an opportunity to cooperate in the ongoing investigation. This may occur before the arrested individual has made an initial appearance in court and so before counsel has been retained or appointed. In many circumstances, the ability of such an arrested individual to cooperate and gain the benefits of that cooperation may be time sensitive (for example, if a shipment of drugs is anticipated, the individual may have only a short period of time in which he or she will be able to assist law enforcement agents in recording conversations relating to the shipment of drugs) and may not be available if a public court appearance is made (which would reveal that the individual has been arrested and had contact with law enforcement). Thus, in many instances, law enforcement agents, often in consultation with an Assistant United States Attorney (“AUSA”), may ask arrested individuals to waive their rights (conferred by statute, rule, and/or the Constitution) with respect to the time periods specified for both initial appearance and preliminary hearing.¹ The waiver does not result in the individual being denied either an initial appearance or a preliminary hearing, but rather, delays those events to enable the individual to cooperate in an ongoing investigation.

We do not believe that Proposed Rule 3.8(c) should be interpreted as precluding this practice. First, interpreting the proposed rule in this way could in many instances, harm those the Rule is intended to protect by depriving arrested individuals of a beneficial option that might otherwise be available, namely, the option of electing to cooperate in anticipation that benefits might later flow from that cooperation. See Ohio Rules of Professional Conduct, Rule 3.8, Comparison to ABA Model Rules of Professional Conduct (“Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs.”). Second, interpreting the proposed rule in this way would run contrary to federal court opinions that have held reasonable delays in presentment to secure a defendant’s cooperation, and waivers taken to accomplish this, to be lawful. See, e.g., United States v. Torres-Rodriguez, No. 08-cr-30126-JPG, 2009 WL 1372975 at * 8 (S.D. Ill. May 14, 2009) (“the Court believes it is reasonable to delay presentment to a magistrate in order to continue an interview of a cooperating suspect begun within the safe harbor

¹ Federal Rule of Criminal Procedure 5(a) specifies that a “defendant” arrested on a federal charge within the United States must be brought “without unnecessary delay before a magistrate judge” for an initial appearance. Federal Rule of Criminal Procedure 5.1(c) specifies that, absent the defendant’s consent and a showing of good cause, or the intervening return of an indictment, a preliminary hearing must be held “no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.” In the federal system, preliminary hearings are a rarity, as the overwhelming majority of cases are pursued through indictments obtained either prior to arrest or, if post-arrest, within the time specified under Rule 5.1(c) or a time period extended with the consent of the defendant.

period so long as the interview is not unreasonable in length or conditions.”); United States v. Berkovich, 932 F. Supp. 582, 588 (S.D.N.Y. 1996) (recognizing that a “defendant may waive his right to be presented promptly” and finding that defendant “agreed to waive his right to a speedy presentment in an attempt to obtain the benefits of cooperating with the Government”); United States v. Pham, 815 F. Supp. 1325 (N.D. Cal. 1993) (“A criminal suspect *may* waive his Rule 5(a) right to be brought promptly before a magistrate.”) (emphasis in original). Third, to the extent the concern underlying the proposed rule is that prosecutors will unfairly take advantage of unrepresented individuals to obtain waivers of the time for initial appearance and/or preliminary hearing, that concern is appropriately addressed by a court’s ability to impose a remedy in any subsequently-filed criminal case should it find the waiver of time to have been coerced or otherwise invalid and the resulting delay to be unreasonable. See Alaska Rule of Professional Conduct 3.8, Comment (explaining that “Alaska Rule 3.8 does not include paragraph (c) of the model rule” in part because “[i]f a court determines that a prosecutor has taken unfair advantage of an unrepresented suspect or defendant legal remedies are already available”); United States v. Corley, 129 S. Ct. 1558, 1570-71 (2009) (recognizing availability of exclusionary remedy if delay in presenting defendant to magistrate judge is unreasonable); United States v. Pena Ontiveros, 547 F. Supp. 2d 323, 339-40 (S.D.N.Y. 2008) (recognizing that “a defendant may also waive his or her right to be presented promptly” but suppressing confession after finding “insufficient evidence in the record from which to conclude that defendants voluntarily, knowingly, and intelligently waived their rights to speedy presentment in a timely manner”).

For all these reasons, we ask that the following sentence be added to Proposed Comment [2] to make clear that the proposed rule is not to be interpreted to bar prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing:

“Nor does paragraph (c) forbid prosecutors from seeking from an unrepresented arrestee a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the arrestee’s voluntary cooperation in an ongoing law enforcement investigation.”

B. Proposed Rule 3.8(g), (h)

As you know, our offices prosecute all federal crimes in California. As prosecutors, we and the United States Department of Justice support the goal of Proposed Rule 3.8(g), (h). We and the Department have always held our attorneys to the highest standard of professional conduct and expect, whenever exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed as soon as possible. Moreover, neither we nor the Department would countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant’s innocence, therefore, we and the Department expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained—pre-trial, during trial, or after conviction.

Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, which is identical to that of ABA Model Rule 3.8(g), (h). The Department previously provided to the ABA, and we previously provided to the Commission, modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission’s revisions to Proposed Comment [7] attempt to address this issue, and we appreciate this effort, but we do not believe it goes far enough. Accordingly, we feel obligated to object to Proposed Rule 3.8(g), (h) as drafted. The reasons underlying our objection are as follows:

1. Few states have followed the ABA’s lead in adopting Model Rule 3.8(g), (h). Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.

2. There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger. There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. As the minority objectors have recognized, if a prosecutor learns of evidence tending to show the innocence of a defendant previously convicted in a prosecution by an office in which the prosecutor has never served, then he is in the same position as any other lawyer who learns such information. Like any other lawyer, such a prosecutor will not be aware of the evidence presented to obtain the conviction, the relative credibility of the witnesses who testified, or the issues already raised and addressed by the court, and so will have no more meaningful basis than any other lawyer for assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that a convicted defendant did not commit an offense. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on such a prosecutor, and not on any other member of the bar.

3. Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants. Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure

loses all signaling capacity it might have had – the disclosure will be interpreted not as representing a prosecutor’s judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor’s decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.

4. Proposed Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein. First, the term “knows” is undefined in the proposed rule. It is defined elsewhere in the California Rules to mean “actual knowledge of the fact in question.” California Rule of Professional Conduct 1.0(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does “knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted” require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings in which the defendant was convicted and asserting that the prosecutor who obtained the conviction engaged in misconduct by concealing from the defendant clear exculpatory evidence of which the defendant has just become aware, for example, through a conversation with another inmate who has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant’s asserted alibi for the time of the crime. Does a prosecutor receiving this letter “know” of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor is on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant’s asserted alibi. But without further investigation, the prosecutor simply cannot “know” whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant’s alibi. (And, in furtherance of point 2 above, without even more extensive investigation, a prosecutor outside the jurisdiction of the case of conviction is in no position to evaluate whether if this evidence in fact exists it is new, credible, material, or creates a reasonable likelihood that the defendant did not commit the crime of conviction.)

Second, we are concerned by the use of the term “material” without a correlating definition. While not defined in ABA Model Rule 3.8 or its comments, the term “material” or “materiality” is used elsewhere in the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., ABA Model Rules

1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer’s duty to correct material false statements made to court, “materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation.”). This meaning of “material” is referenced in Proposed Comment [6A], which cross-references to Proposed Rule 3.3. In the criminal context, however, the term “material” is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being “material” only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence “material” if it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”). In the context of Rule 3.8(g), that “materiality” should be subject to this latter interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]” We believe this is the proper interpretation of “material” for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term “material” is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.

Third, we believe the proposed rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule’s ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is “new, credible, and material.” Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently “promptly.”

Fourth, we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.” Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of “new, credible and material” evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available

resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. Proposed Rule 3.8(h) is also unclear in many respects which affect the obligations set forth therein. First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post-conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. Proposed Comment [9]'s undefined "good faith" exception. We appreciate the inclusion of a good faith exception, and believe that such an exception is appropriate. Proposed Comment [9], however, which purports to protect prosecutors who have acted in "good faith" in deciding not to act under Rule 3.8(g) or (h), leaves it unclear whether this is intended to be a subjective standard based on an analysis of the individual prosecutor's intent, or an objective standard based on what

a reasonable prosecutor would do in similar circumstances. This is particularly problematic given the ambiguities, discussed above, as to what it means to “know” of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not “know” of such evidence.

7. Potential conflict with other Rules of Professional Conduct and other applicable laws.

The duties imposed by Proposed Rule 3.8(g), (h) may conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and California Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client’s confidences. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(1), and the Department of Justice to civil liability, 5 U.S.C. § 552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws, and should make clear that the obligations it imposes are subject to a prosecutor’s compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.

8. Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.

Prosecutors and their resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction), will be diverted from prosecuting crime to investigating convicts’ claims of “new” evidence in order to ensure that they do not run afoul of this rule. The Committee needs to understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of “new” evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted “new” witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Committee should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert prosecutorial resources.

~~C. Proposed Rule 8.5(b)(2).~~

~~Proposed Rule 8.5(a) establishes California disciplinary authority over California lawyers, where ever their conduct occurs, and over non-California lawyers if they “provide[] or offer to provide any legal services in California.” As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney’s Offices, even if not admitted in California, may be subject to discipline in California if even a part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California) even if that action is only a small part of the overall case or investigation. We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we believe that it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing disciplinary rules that would put lawyers working multi-jurisdictional investigations in the often impossible position of reconciling different disciplinary rules that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)’s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts our attorneys and DOJ attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconcilable. We do not believe this is appropriate, and urge the Commission to adopt ABA Model Rule 8.5(b)(2), or some similar provision, as a means of providing uniformity in choice of law rules and ensuring that lawyers working multi-jurisdictional investigations are not whipsawed by potential application of multiple rules.~~

~~For conduct in connection with a matter pending before a tribunal, Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) in providing a clear choice of law rule—the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal’s own rules provide otherwise. Thus, DOJ lawyers working on a case pending before a tribunal (typically, post-investigation) and subject to disciplinary authority in both California and some other jurisdiction, will know that in both disciplinary proceedings the same set of rules will apply, and can comport their conduct to these rules. The same will not be true if these same lawyers are working a multi-jurisdictional investigation that is not yet pending before a tribunal. For such an investigation, the text of Proposed Rule 8.5(b)(2) substantially differs from the ABA Model Rule in rejecting the “predominant effect of the conduct” standard and the “safe harbor” provision. The substitute standard, subjecting lawyers to the California rules except where the lawyer “is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules” will create confusion and uncertainty for those federal government lawyers admitted in California whose investigations are outside of California or encompass multi-jurisdictional practice.~~

~~Under Proposed Rule 8.5(b)(2), the California rules are adopted as the choice of law unless a California admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of that jurisdiction to follow a different set of rules. As stated in Proposed Comment [4], this rule is intended to apply to those cases in which the lawyer's conduct is in anticipation of a proceeding that is likely to be, but not yet before a tribunal, in other words, during the pre-indictment or pre-litigation phase of a case. This would appear to mean that a DOJ lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-litigation investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct, even though the case has no nexus to California and no California resident's interests are at stake. However, as soon as the indictment is issued or the lawsuit is filed in Pennsylvania, then the Pennsylvania Rules will apply to that same lawyer's conduct. Arguably, under this proposed rule, the California admitted federal government lawyer, practicing outside California, will have to tailor his or her investigation, including the supervision of law enforcement officers or investigators, differently than his non-California licensed colleagues in the same case, merely because he is licensed in California. Moreover, if the state in which the lawyer is practicing, in our example, Pennsylvania, has adopted ABA Model Rule 8.5(b)(2), the lawyer may also have to comply with the Pennsylvania rules, which would apply during the investigatory phase under ABA Model Rule 8.5(b)(2) based on application of the "predominant effect" standard. The difficulties posed may be particularly significant in those instances where California's Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California's Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another") and 1.6(b)(3) ("to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used") or where an issue concerning the lawyer's implied authority for disclosure is at issue, a concept that has also been rejected in California's Proposed Rule 1.6. It would also not appear to be in the interests of either California or its residents to subject federal lawyers overseeing investigations to different rules of professional conduct in the same case, where the protection of California's interests are not at issue.~~

~~For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.~~

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Conclusion

For the foregoing reasons, we request that additional language be added to Comment [2] to Proposed Rule 3.8(c) to make clear that the rule does not preclude prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing as a means of enabling the arrestees voluntary to cooperate in an ongoing investigation. We also oppose the proposed incorporation of the text of ABA Model Rule 3.8(g), (h) into the California Rules of Professional Conduct. If the Committee ultimately concludes that adoption of some variation of these provisions is warranted, we believe that these provisions should be substantially redrafted along the lines we previously proposed. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Commission either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

Exhibit A

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

- (g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:
- (1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
- (i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or
- (ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).
- (2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

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[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained -- pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows¹ “new, credible and material” exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is “new, credible and material.” Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is “new, credible and material.” We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor’s subjective intent should be used in determining adherence to this rule.

“Material”

Secondly, we are concerned with the use of the term “material” in the rule. . Neither the proposed Rule nor the Comments defines the term “material.” In a criminal context, the term “material” is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.”

However, the term “material” or “materially” is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be “materially limited” by the lawyer’s own interests or the interests of a third person); ABA Model Rules of Prof’l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct “material” false statements made to a court); ABA Model Rules of Prof’l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a “material” false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term “material” may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm’n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer’s duty to correct material false statements made to a court, “materiality encompasses matters represented to a tribunal that the judge would

¹ The term “know” is defined in the Model Rules to mean “actual knowledge of the fact in question[.]” Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.”).

We would believe that this confusion could be remedied by making clear that the term “material” is used in the Brady sense of the term.

“Promptly”

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must “promptly” disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor’s jurisdiction, the prosecutor must “promptly” disclose the evidence to the defendant and undertake further investigation. Although the term “promptly” is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.4(a) (2007) (requiring a lawyer to “promptly” consult with clients about certain matters and “promptly” comply with a client’s reasonable request for information); ABA Model Rules of Prof’l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to “promptly” notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof’l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to “promptly” notify the sender). Based upon the construction of the term “promptly” when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ’g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel’s firm “promptly”; the attorney was not screened until ten days after he started working at the new firm; court discounted firm’s description of administrative delays in light of the fact that the firm knew prior to the attorney’s arrival that he was working as opposing counsel on the case).

When the term “promptly” is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is “new, credible and material,” particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term “promptly” was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and “know” that the evidence is “new, credible and material.”

“Seek to remedy the conviction”

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor “shall seek to remedy the conviction.” Proposed Comment [8] states,

Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to “seek to remedy the conviction” may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. See, e.g., Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);¹ Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to “remedy” a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

¹Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a) ("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.>").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial “if the interests of justice so require.” There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.² Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to “remedy” a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people’s desire for finality of criminal convictions is an equally compelling interest to be served. “[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, “No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.” Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

²Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion “[n]otwithstanding any law that would bar a motion under this paragraph as untimely.” 18 U.S.C. § 3600(g)(1) (Supp. 2007).

languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Margolis', with a long horizontal flourish extending to the right.

David Margolis
Associate Deputy Attorney General

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SOLANO

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November 11, 2009

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FAX 415-538-2171

RE: Public Comment on Proposed Changes to
Rules of Professional Conduct Rule 3.8 (Responsibilities of a Prosecutor)

Dear Commission Members:

The proposed changes to Rule 3.8 (Special Responsibilities of a Prosecutor) will greatly inhibit the ability of the executive branch to prosecute violent crime throughout California. Therefore, I strongly urge the Commission not to implement these changes and the attendant chilling effect they have on the elected District Attorneys and their agents.

Specifically, proposed rule 3.8 (a) changes the existing rule from: "The prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. . ." to A prosecutor in a criminal case shall: (a) refrain from recommending commencing or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause."

The implementation of this knew "or should have known" standard places the prosecutor's license in jeopardy every time that prosecutor puts on a preliminary hearing. A preliminary hearing by definition is a probable cause hearing, and there are countless instances where prosecutors put on these hearings with the good faith belief there is enough evidence to go forward with the case, and yet the magistrate ultimately comes to a different conclusion. In these instances, the magistrate's discharge of the defendant would become almost a *prima facie* case for an action against that prosecutor with the State Bar under this new standard. Furthermore, the prosecutor can still file dismissed charges in the information notwithstanding the magistrate's ruling, and the defendant can challenge them under Penal Code Section 995. Faced with the new rules of conduct, a prosecutor is less likely to proceed with dismissed charges in an information given the possibility a lost PC 995 motion would be used against him or her in a bar complaint. Since the State Bar is essentially an administrative arm of the Judicial Branch, this chilling effect of this new rule essentially acts as an impingement on the legislative and executive branches.

Please reply to:

Solano County Government Center, 675 Texas Street, Suite 4500, Fairfield, CA 94533-6340

Phone: (707) 784-6800 FAX: (707) 784-7986

ATT2 - 372

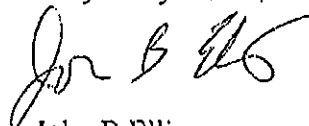
The "knew or should have known standard" will likely have a significant impact on the way domestic violence cases are prosecuted. Currently, many domestic violence cases are prosecuted notwithstanding the fact the victims recant or are uncooperative. These victims of domestic violence often recant because many are trapped in what is referred to as a "cycle of violence". This cycle occurs because the victims are often financially dependant on their abuser. These victims will call the police and provide a truthful statement when faced with the immediate threat of abuse, but once the situation is diffused by an arrest, the victims frequently recant in court. These cases are notoriously difficult to prosecute. The "knew or should have known" will surely inhibit prosecutors from aggressively pursuing these cases when it can be easily argued the prosecutor "should have known" there was no "probable cause" since the victim was uncooperative. However, if these cases are not prosecuted, the amount of violence against women will surely increase.

Likewise, cases involving criminal street gangs often have proof problems due to uncooperative witnesses. Changes to Rule 3.8 will likely curtail the number of gang prosecutions because prosecutors again will fear being reported to the State Bar if these cases are dismissed. Gang cases often involve reluctant witnesses who fear retaliation if they testify. Thus, when these witnesses fail to provide evidence, the prosecutor will be open to a charge he or she "should have known" there was no probable cause to proceed with the case.

The change in the rule's language regarding who must refrain from bad prosecutions from "the prosecutor" to include "a prosecutor who [recommends, commences or continues] to prosecute a case will significantly change the way Assistant District Attorneys and their supervisors interact. It is common in most DA's offices for newer prosecutors to seek advice on cases from more experienced lawyers. If the standard under which a licensing action may be taken is extended to include anyone who "recommends" a case be prosecuted, experienced lawyers will refrain from advising new prosecutors. This likely will have the unintended consequence of increasing the number of bad prosecutions by decreasing the amount of advice new lawyers will receive.

In summary, the changes suggested to Rule 3.8 will inhibit prosecutors, who act in good faith, from serving the public in the manner the legislature intended. These changes will certainly decrease public safety by decreasing the number of prosecutions of violent crimes where witnesses are intimidated. Thus, the proposed changes to Rule 3.8 are not in the public's interest.

Very Truly Yours,



John B Ellis
Chief Deputy District Attorney
County of Solano



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,



Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: __RPC 5-110

Proposed New Rule No./ Title: 3.8 Special Responsibilities of a Prosecutor

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 [☐]

(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 [☐]

(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 [☐]

(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:

The proposed rule is acceptable except (1) the omission of the ABA language on pretrial publicity described in Approach #1 below and (2) objection was voiced with respect to subparagraphs (d) and (f) to the extent noted in Approach #2 below. Therefore, no position was taken on the proposed rule. The two approaches are set forth below for your consideration:

Approach #1: Approve but modify to include the ABA Rule on pretrial publicity that is currently excluded in the proposed rule

This is a wholesale addition to the Rules as the closest current rule 5-110 only concerns the probable cause issue. Recently the State Bar recommended discipline of a district attorney and utilized 5-220 regarding the suppression of evidence. The adoption of this provision would have provided a more specific basis for the decision. You can view the lengthy decision of the State Bar Judge at: In the Matter of Benjamin T. Field #168197

http://members.calbar.ca.gov/search/member_detail.aspx?x=168197

The providing of discovery in a timely manner is probably one of the most contentious issues between prosecution and defense. The California Commission on Fair Administration of Justice identified failure to provide discovery by the prosecution as a reason for wrongful convictions. You can view their report on the issue at the link below.

**CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE:
OFFICIAL REPORT AND RECOMMENDATIONS ON PROSECUTORIAL DUTY TO
DISCLOSE EXCULPATORY EVIDENCE**

<http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20BRADY%20COMPLIANCE.pdf>

Personally, I would like to hear a discussion among the committee concerning the exclusion of the ABA language on prosecutorial pretrial publicity which states:

except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and . . .

I can't disagree, necessarily, with the commission's statement that 3.6 takes care of it. It comes down to a difference between the language of 3.6: "have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" and the 3.8 ABA language (now proposed for exclusion) "substantial likelihood of heightening public condemnation of the accused"

I believe the language of sometimes over-zealous or just excited prosecutors wanting to get on the Nancy Grace show (no names mentioned) does often heighten public condemnation of the accused which might not necessarily be considered to materially prejudice the matter.

[sic]

Interestingly, mentioned in the commentary are the ABA Standards of Criminal Justice Relating to the Prosecution Function which is available here:

http://www.abanet.org/crimjust/standards/pfunc_blk.html. There the language "substantial likelihood of prejudicing a criminal proceeding" is used.

In the comments (I note that on page 1 it states that only prosecutors appeared at Commission meetings):

[1] I am not sure why they exclude the language about the ABA Standards which could be useful to attorneys looking at these sections and the language about rectifying the convictions of innocent persons.

[5] Same arguments as above.

Reasoning behind Approach #1:

Blagojevich: Did The United States Attorney Cross the Line?

On December 9, 2008, in a press conference broadcast to millions of viewers, United States Attorney Patrick Fitzgerald announced the arrest of Illinois Governor Rod Blagojevich on federal corruption and bribery charges. Citing examples from a 76-page criminal complaint, Fitzgerald detailed the wide ranging criminal pay-to-play conspiracy in which Blagojevich is accused of participating. But he did not stop there. In a speech that has raised eyebrows and drawn charges of its own, Fitzgerald offered his personal opinion on Blagojevich's "political corruption crime spree," asserting that Blagojevich "has taken us to a truly new low," characterizing his behavior as "cynical" and "appalling," and remarking "[t]he conduct would make Lincoln roll over in his grave."

According to some in the legal community, these extrajudicial comments crossed the line. In a New York Times Op-Ed column, former prosecutor Barry Coburn wrote that "Mr. Fitzgerald's expressions of revulsion, use of hyperbolic rhetoric and implicit assertion of his personal belief that the charges have merit clearly run afoul of the rules." The "rules" to which Mr. Coburn refers are rules of professional responsibility governing trial publicity.

Most states, including California, have enacted rules restricting the right of lawyers to make public statements about pending cases. California Rule of Professional Conduct ("CRPC") 5-120 (modeled after American Bar Association Rule of Professional Conduct Model Rule ("ABAMR") 3.6) provides that an attorney who is participating in the litigation of a matter "shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if [the attorney] knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Though the Rule applies to all kinds of cases, it has its most important application in the criminal context where extrajudicial speech has the potential to undermine the presumption of innocence and compromise a defendant's constitutional right to a fair trial by an impartial jury. The obvious purpose of the Rule is to prevent lawyers from making public statements about a pending matter that might taint the pool of prospective jurors and thereby influence the outcome of a case. As Supreme Court Justice Oliver Wendell Holmes wrote more than 100 years ago:

The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence, whether of private talk or public print.

Patterson v. Colorado, 205 U.S. 454 (1907). Justice Holmes's comments, of course, were made before the invention of broadcast media and the internet. Today, given the volume and variety of "public print" and the ease with which it is created, duplicated, and disseminated, the potential for lawyers to "induce a conclusion" through extrajudicial speech is far greater, particularly in high profile cases.

Notwithstanding the general prohibition against materially prejudicial statements to the media, CRPC 5-120(B) specifically permits extrajudicial speech in a number of limited areas,

including, most significantly, any matters of public record. In Blagojevich's case, the public was entitled to know, and Fitzgerald was authorized to disclose the fact of Blagojevich's arrest and the nature and extent of the charges. There is no violation where a lawyer provides information contained in a criminal complaint or indictment, gives the status of a case, or requests assistance from the public. But when a prosecutor goes beyond the four corners of the complaint offering opinion on the charges or the accused, the speech will likely run afoul of the rules. Comment 5 to ABAMR 3.6 provides that a public statement is "more likely than not to have a material prejudicial effect on a proceeding" when it relates to "the character, credibility, reputation or criminal record of a party" or when it relates to an "opinion as to the guilt or innocence of a defendant or suspect in a criminal case." Fitzgerald's subjective comments arguably fall within these categories.

Though Blagojevich cannot un-ring the bell, his lawyers have some leeway under ABAMR 3.6 and the equivalent Illinois Rule of Professional Conduct 3.6 to publicly respond to the speech without risking a violation. Where an attorney believes that his or her client has suffered "substantial undue prejudic[e]" as a result of extrajudicial statements made publicly by another party, ABAMR 3.6 (and CRPC 5-120(C)) authorizes the attorney to make a statement that a reasonable attorney would believe is necessary to protect the client. The statement, however, must be narrowly tailored to mitigate the harm caused by the adverse publicity.

Given the essential constitutional rights at stake, and the lack of an adequate remedy for violations of the Rule, attorneys, particularly prosecutors, should err on the side of silence. The public record, without hyperbole, is always a safe harbor. But beyond that, the safest bet is to keep quiet.

The information in this column is intended to be informational only and does not constitute legal advice. Shepardize all codes and case law before using.

Approach #2: Disapprove proposed rule 3.8, Special Responsibilities of a Prosecutor, with respect to subsections (d) and (f) to the extent described below:

First, proposed subsection (d) adds the requirement that a prosecutor "comply with all constitutional obligations as defined by relevant case law regarding the" timely disclosure of [discovery]. I believe that a requirement that a prosecutor have knowledge of "all relevant case law" regarding discovery would be unduly burdensome; I am not sure any lawyer could ever find enough hours in the day to comply with that additional requirement, particularly given on how quickly the law changes in this area.

Subsection (f) is another section that could be hard to enforce - regarding prosecutors' duty to "exercise reasonable care to prevent investigators, law enforcement . . . etc. from making an extrajudicial statement that the prosecutor would be prohibited from making . . ." While working with law enforcement agencies often involves cooperation, different agencies handle cases very differently. Prosecutors do not have supervisory responsibilities over the employees of other agencies, and it may be unfair to require prosecutors to exercise control they don't have. While prosecutors can provide training regarding the law, ultimately the employees of other agencies will answer to their own chain of command.

(This statement is made as an individual and not as a representative of any prosecutorial agency.
Thank you for your consideration.)

CONCLUSIONS (pick one):

☐ We approve the new rule in its entirety. (Discussion suggested, see above).

☐ 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.



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Nov. 13, 2009

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

Re: Commission for the Revision of the Rules of Professional Conduct; Proposed Rule 3.8 (Special Responsibilities of a Prosecutor)

Dear Ms. Hollins,

On behalf of the California District Attorneys Association (CDA A), and following my testimony before the Commission this past Tuesday, I am writing to elaborate upon concerns about several provisions of Proposed Model Rule 3.8 (Special Responsibilities of a Prosecutor). The Proposed Rule would essentially adopt ABA Model Rule 3.8 and ostensibly replace California Rule of Professional Conduct 5-110.

The California District Attorneys Association represents 57 elected District Attorneys and more than 2,700 members of the California State Bar who are prosecutors at the city, county and state level.

It is noted in the "Introduction" that Proposed Model Rule 3.8 is intended to clarify and expand the scope of a prosecutor's duties, with the goal of greater certainty to prosecutors and greater procedural protection to the criminal defendant. A careful reading, however, raises the significant concern that the Proposed Rule will instead confuse the issues and lead to increased opportunities for attacks on prosecutors, with no greater safeguard to the criminal defendant than that which presently exists.

CDAA also has concerns over the standard “**reasonably should know.**” Again, current Rule 5-110 states simply, “knows or should know.” The intent in the Explanation of Changes is to “lower the standard...so that a prosecutor’s negligent ignorance will not excuse compliance.” Current Rule 5-110 is adequate; the addition of the word “reasonably” only expands the opportunities to assail a prosecutor if, in hindsight, it could be argued that a prosecutor was negligently ignorant. For example, in any case in which there is an acquittal, a complaint of “negligent ignorance” could arise. The fact remains that some cases need to be tried before a jury, and some cases will be lost for any number of reasons that have nothing to do with what the prosecutor “reasonably should have” believed before the case was issued. Whatever was intended by adding the words **reasonably should know**, our concern is that the addition diminishes rather than enhances the stated goal of greater certainty to prosecutors as to their legal boundaries.

Rule 3.8(b)

Under Proposed Rule 3.8(b), the term “accused” is unnecessarily ambiguous. This could very well, once again, apply to the pre-charging stage of a case. Does this suggest that a prosecutor is responsible for making sure a police officer advises a suspect of his *Miranda* rights upon arrest? If it applies only after the case has been filed, the court has the legal responsibility of advising a charged defendant of his/her right to counsel. This subsection is unclear as to whether the duty extends to overseeing law enforcement agencies. If it does, it assumes a level of control or influence that may not be available between prosecutors and law enforcement in many jurisdictions.

If proposed Rule 3.8(b) envisions that prosecutors are often involved directly with interviewing accused but uncharged defendants, this is a fiction promoted by pseudo-documentary television shows. If the intent is to limit such concerns to those rare circumstances where a prosecutor is present during police interrogation of an accused and a *Miranda* warning is legally required but not given by law enforcement, then the rule should be narrowly stated as such. However, if such advisement is required and not given, the sanction imposed by the court striking the use of any such admissions by the prosecutor would seem to already satisfy this concern as to the rights of the accused being fully protected.

It is CDAA’s position that Rule 3.8(b) is unnecessary and creates more ambiguity than clarity. CDAA would respectfully request that Rule 3.8(b) be thereby deleted.

Rule 3.8(c)

This subsection appears to highlight the importance of the right to a preliminary hearing in a manner that could easily lead to confusion on the issue. There are many reasons a defendant may want to waive a preliminary hearing, and to emphasize an

apparent prohibition on suggesting this course of action is unreasonable interference in the judicial process and negotiations between the People and a defendant. Further, if this rule is extended to all misdemeanors, it would completely thwart the timely administration of justice as many persons so charged appear *in propria persona* and courts simply do not have the time to individually approve the appearance of each defendant *in propria persona*. Courts expect prosecutors to speak to unrepresented defendants if they so request and discuss any potential plea negotiation. Should the unrepresented person choose to enter a no contest plea, they must complete a waiver of rights form including giving up their right to counsel. Certainly courts have the initial duty of advising all defendants, regardless of misdemeanor or felony, that they have a right to counsel including appointed counsel if they cannot afford their own. The issue arises as described above, however, once they state they do not wish to have counsel. Rule 3.8(c) is not clear what procedure is required to "approve the appearance of the accused *in propria persona*". We believe existing law and practice more than adequately protects the rights of the defendants and that proposed Rule 3.8(c) is thereby unnecessary.

Rule 3.8(d)

We believe that the proposed rule is extremely important and a necessary aspect of the responsibilities of a prosecutor.

Rule 3.8(e)

Although not a common issue for most prosecutors, we have no objection to this rule.

Rule 3.8(f)

We have major concerns with this proposed rule that prosecutors would be expected to be able to control what law enforcement officials might say publicly about a case. Law enforcement agencies often hold news conferences on cases before the cases are submitted to a prosecutor's office. Those comments remain in the journalistic domain to be repeated potentially as often as an editor demands throughout the prosecution of a case. If the phrase "exercise reasonable care" means to send a letter to the local chief of police asking him or her to refrain from inflammatory remarks, would that protect a prosecutor from discipline, even if the request was completely ignored? In reality, unfortunately, there are jurisdictions within our state where a police chief or sheriff is at odds with the elected prosecutor and the best efforts of the prosecutor are not given credibility by the law enforcement agency.

Prosecutors are well aware of their duties to try their cases in the courtroom rather than the media. Unfortunately, although some similar duties are placed upon defense attorneys, the scales are rarely balanced as sanctions by the court and the State Bar rarely

fall upon the defense. CDAA believes that the same standards should apply to both prosecutors and defense counsel; that is, that neither should engage in extrajudicial statements during the pendency of a filed criminal case nor should they allow anyone directly under their supervision to do so. However, once the duty of the prosecutor is extended to apply to statements by law enforcement, usually during a time when the prosecutor does not yet have jurisdiction over a case because it is still under police investigation, would be to set up an unrealistic standard of responsibility that a prosecutor in many cases would not be able to achieve. In stark contrast to the responsibilities of defense counsel, there simply is no similar comparison. Such a proposed rule, in this light, is unwise and unfair.

Rule 3.8(g)

CDAA agrees wholeheartedly with the Minority Opinion explained in Rule 3.8(g). If the majority believes this disclosure requirement description will "encourage prosecutors to err on the side of disclosure in close cases," that standard already exists in numerous cases following *Brady v. Maryland* and its progeny. It would be extremely difficult to evaluate a piece of information that may come up in one jurisdiction as to its credibility and materiality in a case in another jurisdiction. Imposing discipline on a prosecutor who incorrectly (in hindsight) evaluates such material would also be patently unfair.

In review of all the proposed rules, CDAA believes that Comment 13 should be applied throughout any of the new rules. That is, that there be a "good faith" exception to holding the prosecutor liable for violation. Further, most all of the comments with other than Comment 11 which is addressed above, are very fair and clear statements of existing laws and responsibilities for prosecutors. Unfortunately, some of the proposed new rules are at odds with or lack clarity when compared to the comments which follow.

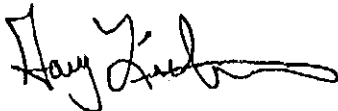
While it is true that the State Bar will likely only take action in the most egregious situations, many of the new proposed rules will give fuel to some defense attorneys to bring baseless accusations for political or other unethical reasons that could have the potential of interfering with the daily discretion process lawfully applied by prosecutors. To the extent that this Commission expands or seeks to clarify existing Rule of Professional Conduct 5-110, we would ask that it be done so in the most fair and effective manner respecting the rights and responsibilities of both prosecutors and defense counsel as well as protecting the innocent.

It is a prosecutor's highest ethical duty to seek justice and to do the right thing for the right reasons. On behalf of CDAA and prosecutors throughout California, I thank you for the opportunity to share our comments and concerns with you and hope that you will give them your most serious consideration. While the intent to improve

understanding of prosecutorial obligations is a most worthy goal, the expansive language in many subsections would not likely improve the function of the prosecutorial process. It would, however, allow complaints about prosecutors to increase in number drastically. It is our position that current Rule 5-110 is completely adequate, and should remain the basis for attorney discipline on the referenced matters. Should the Commission proceed with the process of implementation of some, or all, of the new proposed Rule 3.8, we respectfully request that they be amended or modified with our concerns in mind.

Please do not hesitate to contact myself or other members of CDAA should you wish our counsel or assistance in reviewing proposed new language or any other related issues.

Respectfully submitted,



Gary Lieberstein

Napa County District Attorney and CDAA President



**ROD PACHECO
DISTRICT ATTORNEY
COUNTY OF RIVERSIDE**

November 13, 2009

Via Facsimile (415-538-2171) & U.S. Mail

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

Re: *Proposed Rule 3.8 of the Rules of Professional Conduct
(Special Responsibilities of a Prosecutor)*

Dear Ms. Hollins:

I am writing to express concern regarding several provisions of Proposed Rule 3.8 (Special Responsibilities of a Prosecutor).

The Proposed Rule substantially adopts with some material deviations ABA Model Rule 3.8, and would replace current California Rule of Professional Conduct 5-110. Many sections of the Proposed Rule stem from pre-existing constitutional, statutory, or ethical duties of prosecutors, and as such, I endorse their adoption.

However, some sections of the Proposed Rule create new affirmative duties for prosecutors – duties which would provide little if any further safeguards to criminal defendants, yet unfairly expose our prosecutors to increased disciplinary action. While I fully support the adoption of professional rules of conduct that encourage prosecutors to abide by the highest of ethical standards, these particular sections instead create unnecessary obligations that will unjustly target prosecutors for disciplinary action. I will reserve my comments to these sections.

Rule 3.8(b)

Proposed Rule 3.8(b) creates an affirmative duty upon prosecutors to ensure that an “accused” is advised of and given the opportunity to obtain counsel. I strongly oppose this rule as vague, unnecessary, and unfair.

Proposed Comment 1B states that Proposed Rule 3.8(b) is not intended to expand the obligations imposed on prosecutors by applicable law, but neither federal nor California law imposes the affirmative duties outlined by the Proposed Rule. Rather, prosecutors have a pre-existing duty not to “act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel,” (*Maine v. Moulton* (1985) 474 U.S. 159, 171), and it is the court’s duty to advise a criminal defendant of the right to counsel (Pen. Code, §§ 860, 987). The rule as proposed shifts the court’s responsibilities to prosecutors, and as such, unnecessarily and unfairly subjects prosecutors to discipline for the court’s failure to comply with its statutory duty. One can envision a situation where the court fails to properly advise a

Audrey Hollins
November 13, 2009
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pro per defendant of his *Faretta v. California*, (1975) 422 U.S. 806, rights, or fails to conduct the proper inquiry per *People v. Marsden* (1970) 2 Cal.3d 118. Under the proposed rule, the prosecutor would be subject to discipline for not spotting and properly correcting the court's error. Ironically, the offending judge would not be subject to similar ethics discipline. The absurdity of this result is amplified by the fact that all *Marsden* hearings, and many *Faretta* advisements, are held outside the presence of the prosecutor.

Proposed Rule 3.8(b) is also vague in its use of the term "accused." It is unclear whether "accused" refers only to the post-charging stage, or whether "accused" could also encompass pre-filing, custodial interrogations. If it is the latter, prosecutors could be disciplined for *Miranda* violations by police, even if the prosecutor was unaware of such violations. If it is the former, then prosecutors would be exposed to discipline for a failure of the court. In either instance, the Proposed Rule unjustly exposes prosecutors to discipline for the action (or inaction) of others. By contrast, the existing ethical and constitutional proscription against interference with the right to counsel appropriately limits discipline to cases of affirmative, willful misconduct on the part of the prosecutor.

Accordingly, I recommend deletion of this Proposed Rule.

Rule 3.8(d)

Proposed Rule 3.8(d) sets forth the *Brady* obligation and expands upon it by requiring a prosecutor to disclose to the defense *and the tribunal* all unprivileged mitigating sentencing information. While I concur in the adoption of the rule as it comports with *Brady* and limits discipline to information knowingly suppressed by the prosecutor, and while I applaud the clarifying language added by the Commission (i.e., "comply with all constitutional obligations, as defined by relevant case law"), I am concerned about the rule's apparent requirement that the prosecution *affirmatively advocate* mitigating evidence on behalf of the defense.

The *Brady* obligation requires prosecutors to disclose to the defense all evidence in the government's possession which is "material to guilt or punishment." (*Brady v. Maryland* (1963) 373 U.S. 83, 87, emphasis added.) But the proposed rule expands upon this duty and requires a prosecutor not just to disclose known mitigating evidence to the defense, but also to affirmatively advocate mitigating evidence to the tribunal. In other words, if the prosecutor discloses known mitigating information to the defense (thus complying with its *Brady* obligation), and defense counsel either tactically decides or fails to advocate this mitigating evidence at sentencing (i.e., perhaps defense counsel did not believe it to be persuasively mitigating), a prosecutor could still be subject to discipline if he fails to advocate this evidence before the court. Such a requirement not only unnecessarily shifts what is the defendant's and defense counsel's burden onto the prosecutor, but has the potential to infringe upon defense counsel's tactical advocacy before the court. Not surprisingly, a number of states including New York, Ohio, Utah, Virginia, and the District of Columbia have deleted this "tribunal" language from the ABA Model Rule.

Audrey Hollins
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As such, I recommend removing the language "and to the tribunal" from Proposed Rule 3.8(d).

Rule 3.8(e)

Proposed Rule 3.8(e) prohibits prosecutors from subpoenaing an attorney in any "criminal proceeding" to present evidence about a past or present client unless certain requirements are met. The prosecutor must "reasonably believe": (1) the information sought is not privileged or work product; (2) the evidence sought is "reasonably necessary" to the successful completion of an ongoing investigation or prosecution; and (3) there is "no reasonable alternative" to obtain the information. I object to requirements (2) and (3) as unnecessary and unfairly exposing prosecutors to discipline.

The first requirement of the rule (i.e., the prosecutor must "reasonably believe" the information sought is not privileged or work product) reaffirms a prosecutor's pre-existing duty not to interfere with the attorney-client privilege and/or right to counsel, and thus I have no objection to this particular requirement. However, requirements (2) and (3) unnecessarily impede a prosecutor's advocacy on behalf of the People. One could envision a situation where the prosecution may have other sources of the information sought, but where the attorney's testimony regarding the unprivileged information would provide the best evidence or would corroborate other evidence already presented. If the prosecution has determined that the information sought is not privileged or work product (and thus there would be no infringement upon the attorney-client privilege), the prosecutor's presentation of evidence and duty to advocate on behalf of the People should not be limited by such artificial constraints.

Requirements (2) and (3) could not only hamper the People's ability to obtain just convictions, but also could prevent prosecutors from eliciting the testimony of defense attorneys when opposing motions to withdraw pleas based upon ineffective assistance of counsel and other similar post-conviction proceedings. Although it is well established that a criminal defendant's claim of ineffective assistance of counsel lifts the attorney-client privilege (as it relates to the defendant's claim), this proposed ethics rule would impose unnecessary, and unfair, obstacles to the People's ability to counter the defendant's assertion.

There is simply no meaningful public policy or rationale to support requirements (2) and (3) other than a desire to shield defense attorneys. In sum, this rule would hamper the ascertainment of truth which is essential to the fair administration of justice.

Accordingly, I propose deleting requirements (e)(2) and (e)(3).

Audrey Hollins
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Rule 3.8(f)

Proposed Rule 3.8(f) requires prosecutors to "exercise reasonable care to prevent . . . other persons assisting or associated with the prosecutor in a criminal case" from making certain extrajudicial statements. I strongly oppose this rule as it is overbroad, ambiguous, and

unfairly subjects prosecutors to discipline for statements of others, even individuals over which the prosecutor has no direct supervision.

The Proposed Rule is far-reaching in its "guilt by association" provision – the rule exposes prosecutors to discipline for not just statements of "law enforcement personnel" or "employees," but also any "other persons assisting or associated with the prosecutor in a criminal case." These "other persons" would include police, victims, and even witnesses "associated" with a criminal case but not under the prosecutor's direct control or supervision. To the extent this rule requires prosecutors to prevent members of the community (i.e., victims and witnesses unassociated with law enforcement) from making extrajudicial statements, such a requirement necessarily infringes upon the free exercise of their First Amendment rights.

Further, it is unclear what actions would satisfy the "exercise of reasonable care" and how prosecutors could "prevent" law enforcement personnel, much less victims and witnesses, from making prohibited extrajudicial statements. While the Comment to the Proposed Rule states that the reasonable care standard will "ordinarily" be satisfied by cautionary statements, it also leaves open the possibility that in some cases such "appropriate cautions" will not be enough to avoid discipline. In sum, this Proposed Rule appears to have no outer limits regarding over whom the prosecutor must exercise control and the steps the prosecutor must take to avoid discipline. As such, it creates an untenable landscape of ethical landmines.

Accordingly, I recommend deletion of this Proposed Rule.

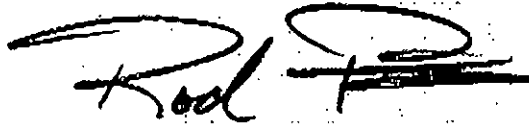
Rule 3.8(h)

Proposed Rule 3.8(h) sets forth a heightened degree of responsibility for prosecutors when they know of "clear and convincing evidence" of a defendant's innocence. While the Proposed Comment cites examples of steps a prosecutor may take to "remedy" a conviction, the outer limits of this proposed affirmative obligation remain ambiguous and the Proposed Rule leaves prosecutors with little guidance as to the specific actions they must take in order to avoid discipline under this section. I recommend the Commission clarify the obligations proposed by this rule.

Audrey Hollins
November 13, 2009
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I appreciate the opportunity you have provided to comment on Proposed Rule 3.8. I hope these comments will assist the Commission in its efforts to improve the ethical standards governing our legal community.

Respectfully,

A handwritten signature in black ink, appearing to read "Rod Pacheco", with a stylized flourish at the end.

ROD PACHECO
District Attorney

RP:wsc

cc: Scott Thorpe, Director CDAA
Kate Flaherty, Co-Chair CDAA Ethics Committee
District Attorney Vern Pierson, Co-Chair CDAA Ethics Committee
All California District Attorneys



ROD PACHECO
DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF RIVERSIDE

FACSIMILE TRANSMITTAL COVER SHEET

TO: Ms. Audrey Hollins
The State Bar of California

FAX NO.: 415-538-2171

FROM: Wendy for District Attorney Rod Pacheco

Number of pages sent 6 (including cover sheet).

If you do not receive the number of pages listed above, please call the operator listed below.

OPERATOR: Wendy

OPERATOR TELEPHONE NUMBER: 55467

FACSIMILE TELEPHONE NUMBER: 951-955-5469

COMMENTS: To follow, correspondence from District Attorney Rod Pacheco, dated Nov. 13, 2009, regarding Proposed Rule 3.8 of the Rules of Professional Conduct (responsibilities of a prosecutor). Original will follow via U.S. Mail. Thank you. Wendy

The information contained in this transmission is privileged, confidential, and intended solely for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any reading, dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original communication to us at the address printed above, via the United States mail. We will reimburse you for the mailing costs. Thank you.

4075 MAIN STREET • RIVERSIDE, CA 92501
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ATT2 - 391



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: NOVEMBER 13, 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 3.8 Responsibilities of a Prosecutor 

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) fully supports a rule that addresses the special responsibilities of a prosecutor but not the ABA Model Rule as proposed. The SCCBA Professional Rules Revision Task Force spent considerable time discussing this proposed rule over the course of three meetings, two subgroup meetings and one full Task Force meeting. These meetings included representatives from the District Attorney's Office, the Public Defender's Office, and County Counsel's Office, which represents the District Attorney's Office as well as written comments on the rule from other District Attorney Offices around the State. These discussions made clear that the RRC proposal to adopt the ABA Model Rule without substantial change either to the substance of the rule or the comments to the rules needs additional input with a more in-depth discussion that includes criminal defense lawyers, prosecutors, public defender's and other criminal justice experts.

The ABA Model Rule provides a universal framework for setting out the responsibilities of a prosecutor but that there needs to be specifics within that

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

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The ABA Model Rule provides a universal framework for setting out the responsibilities of a prosecutor but that there needs to be specifics within that framework, which reflect the specifics of the jurisdiction where it is being adopted. Very few, if any, states have adopted the ABA Model Rule without adopting fairly significant changes that comport with that jurisdiction's statutes, case law and practices. Unlike most of the other proposed RRC rules, this Model Rule seems not to have had the kind of input from prosecutors and other criminal lawyers or criminal justice experts that has been afforded other rules that affect particular classes of attorneys, such as those that have impacted the public attorney sector of city attorneys and county counsel. The vetting that this rule needs is too expansive for the SCCBA Task Force to undertake in order to suggest amendments to the Model Rule.

As further support for the SCCBA's position that there should be a rule on the special responsibilities of prosecutors but that the rule should be carefully drafted to include the type of conduct that is critical to California prosecutors, see, e.g., *Pottawattamie County, Iowa, et al., Petitioners v. Curtis W. McGhee, Jr., et al.*, No. 08-1065. This case addresses an issue dealing with the scope of immunity for prosecutorial misconduct during the course of the investigation of a case that ultimately went to trial. The 8th Circuit Court found that prosecutorial immunity did not extend to the conduct in question. In arguing on appeal in an amicus brief for the reversal of the court's holding, the National Association of Assistant United States Attorneys and the National District Attorneys Association note that civil liability is not necessary as a remedy for prosecutorial misconduct, noting that "prosecutors who engage in misconduct may be subject to discipline by a variety of institutions, including the prosecutors' offices themselves, state bar associations, and the judges before whom they appear. And in the most extreme

cases, prosecutors may themselves face criminal sanctions for their misconduct. "For the entire brief go to: <http://www.scotusblog.com/wp/wp-content/uploads/2009/03/naausa-amicus-final.pdf>.

Consequently, the SCCBA strongly recommends that the RRC pull proposed Rule 3.8 from Batch 5 to take further time and public input from the appropriate criminal justice participants to draft a rule that makes more sense for this jurisdiction. The Model Rule is much too broad and undefined in major respects to be of benefit in its current form. The proposed rule that results from that effort should then be distributed with a future batch of proposed rules for public comment.



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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November 20, 2009

Audrey Hollins

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

Re: Comment Regarding Proposed Rule of Professional Conduct Rule 3.8 --
Responsibilities of a Prosecutor [5-110]

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 3.8 [Rule 5.110]:

Comments to Rule 3.8

Section (d) pertains to prosecutors' disclosure obligations. PREC recommends that the Section include both statutory and constitutional obligations. For this reason, the words "statutory and" should be inserted before the word "constitutional" in line one.

Section (e) implicates prosecutors' use of lawyers as witnesses against their current or former clients. This issue implicates prosecutors' ethical obligations in criminal cases as well as related civil matters, such as *habeas corpus* cases and extradition proceedings, which also are handled by prosecutors. PREC recommends that the Section explicitly encompass civil proceedings that are related to criminal matters.

Section (g) describes prosecutors' obligations with respect to "new, credible and material evidence creating a reasonably likelihood" of the innocence of a convicted person. The Section also distinguishes between such convictions occurring inside and outside "the prosecutor's jurisdiction." PREC recommends that no geographic limitation be placed on prosecutors' obligation to "promptly disclose that evidence to the defendant unless a court authorizes delay" (presently in (g)(2)(A)). Accordingly, PREC recommends that the Rule read:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority;

(2) promptly disclose that evidence to the defendant unless a court authorizes delay; and

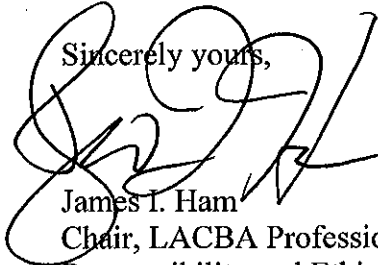
(3) if the conviction was obtained in the prosecutor's jurisdiction, undertake further investigation or make reasonable efforts to cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

Comment Section

The Comment section to this Rule should be modified to reflect the preceding changes.

Thank you for the opportunity to comment on this rule.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. Ham', with a large, stylized flourish extending upwards and to the left.

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



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 3.8

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 3.8 and offers the following comments.

We approve of the majority of the proposed Rule and would like to offer our suggestions in several areas:

First, some members of the Committee prefer the adoption of paragraph (a) of ABA Model Rule 3.8 rather than proposed Rule 3.8(a). They are concerned that it would be difficult to fairly judge whether, given all of the facts and circumstances relating to the case, the prosecutor reasonably should have known about the evidence.

Second, paragraph (f) should be revised to read "not use investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6." Prosecutors often have cooperation with other agencies, but usually do not have the control implied by this proposed rule, given that law enforcement officials answer to their own chain of command. We also recommend the deletion of the last two sentences of Comment [9] (in the clean draft) for the same reason.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Shawn Harpen".

Shawn Harpen, Vice-Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE

STEVE COOLEY • District Attorney

JOHN K. SPILLANE
Chief Deputy District Attorney

November 16, 2009

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

Dear Ms. Hollins:

OPPOSITION TO PROPOSED RULE 3.8 OF THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT ["SPECIAL RESPONSIBILITIES OF A PROSECUTOR"]

On behalf of the elected District Attorney of Los Angeles County, I urge the Commission for Revision of the Rules of Professional Conduct not to adopt, as presently drafted, proposed Rule 3.8. While this Department supports many of the requirements contained in the proposed rule, there are provisions which are unclear and may inhibit prosecutors' obligations to enforce the law. The District Attorney asks the Special Commission for the Revision of the Rules of Professional Conduct to consider the suggestions presented by the Los Angeles County District Attorney's Professional Responsibility Unit in the enclosed memorandum.

Very truly yours,

STEVE COOLEY
District Attorney

By

JOHN K. SPILLANE
Chief Deputy District Attorney

caf

Enc.

PROPOSED RULE 3.8 AMENDING RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

INTRODUCTION

The California State Bar Commission for the Revision of the Rules of Professional Conduct has proposed adopting an amended version of the American Bar Association's Model Rule of Professional Conduct 3.8. While most of the revisions are meritorious, there are some which inject confusion into the law and may impinge on legitimate law enforcement activities.

DISCUSSION

Background

The Los Angeles County District Attorney's Office (LADA) is the largest local prosecutorial office in the United States, serving over 10 million people, and is responsible for all felony prosecutions in the county. (LADA Legal Policies Manual (Apr. 2005), p. 1.) The office prosecutes all misdemeanor violations in 78 of 88 incorporated cities and all of the unincorporated areas of the county. (*Ibid.*) Yearly, LADA prosecutes nearly 60,000 felonies, 200,000 misdemeanors and approximately 30,000 juvenile petitions. (LADA Office Overview, <<http://da.co.la.ca.us/oview.htm>> (as of Nov. 10, 2009).) These cases are prosecuted in the Central Operations Bureau in downtown Los Angeles as well as at 30 local offices and nine juvenile courts. (*Ibid.*)

The policy of LADA is that every employee "shall adopt the highest standards of ethical behavior and professionalism." (LADA Office Overview, <<http://da.co.la.ca.us/oview.htm>> (as of Oct. 11, 2006).) To accomplish that goal, LADA has three deputies, who as part of their duties, are assigned to Professional Responsibility Unit (PRU) with the responsibility of advising deputy district attorneys facing ethical issues. The PRU deputies, along with other prosecutors, provide ethics training on a regular basis and publish a quarterly office-wide newsletter, Ethicsline.

DISCUSSION

Proposed Rule 3.8(a)

ABA rule 3.8(a) in simple and direct language provides that a "prosecutor in a criminal case shall: refrain *from prosecuting* a charge that the prosecutor knows is not supported by probable cause." (Emphasis added.) This language is a succinct distillation of California's present rule which states, "A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause." (Rules of Prof. Conduct, rule 5-110.) Both rules prohibit a prosecutor from filing or continuing to prosecute a case without probable cause.

The proposed rule, however, alters the lucid language of the ABA rule and introduces confusion and, perhaps, unintended consequences. The drafters propose that rule 3.8(a) say:

A prosecutor in a criminal case shall: refrain from recommending, commencing or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause[.]

(Proposed Rule 3.8(a).) The explanation for this alteration is “to increase *client* protection in two ways...”¹ (Emphasis added.) The first is to inhibit a prosecutor’s involvement in cases not supported by probable cause “*before the prosecution is commenced...*” (Explanation of Changes to the ABA Model Rule (hereafter Explanation), Proposed Rule 3.8(a), emphasis added.) Unfortunately, this language raises the question as to whether a prosecutor would violate the rule by advising police officers conducting an investigation into criminal conduct prior to the development of probable cause. Likewise, would a prosecutor directing a District Attorney investigation into a complex fraud or officer involved shooting, at a pre-probable cause stage, violate the rule?

California law is clear that prosecutors play an important role in criminal investigations. As the Attorney General has noted:

Public prosecutors are frequently involved in the conduct of investigations, including the creation of investigative plans, the supervision of investigative personnel, the execution of search warrants, as well as the interview of witnesses. The investigation of criminal and criminal-related conduct constitutes an inherent aspect of prosecution which is clearly authorized.

(75 Ops.Cal.Atty.Gen. 223, 227 (1992); see also *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 241 [“Investigation and the gathering of evidence relating to criminal offenses is a responsibility which is inseparable from the district attorney’s prosecutorial function. That the district attorney is charged with the duty of investigating as well as prosecuting criminal activity has been recognized by an unbroken line of California cases.”].) Would the proposed rule inhibit a district attorney’s investigatory function? The drafters’ response will likely be that was not their intent, but unfortunately the vague language in the proposal does not dispel the preceding questions from being asked or likely litigated in the future.

No such concern exists with the current ABA or California version of the rule. Similarly, it should be noted that no other state has adopted a provision limiting a prosecutor’s investigatory actions prior to a case being filed. (Gillers, Simon & Perlman, *Regulation of Lawyers: Statutes and Standards* (2009).)

The second purpose for modifying ABA rule 3.8(a), according to the drafters, is to prohibit prosecutors from prosecuting cases that they “reasonably should know” are “not supported by probable cause.” (Proposed Rule 3.8(a).) The explanation for this alteration from the ABA rule is that “lowering the knowledge standard to ‘knows or reasonably should know’” bars prosecutors

¹ The use of the word “client” is telling in a rule regulating the conduct of prosecutors and not defense counsel. The protections, if any, should be provided to *defendants*.

from employing their “negligent ignorance” to excuse compliance with the rule. (Explanation, Rule 3.8(a).)

While there is merit in disciplining prosecutors for failing to fully investigate a case, the addition in the explanation of the purported, and non-existent, “negligent ignorance” standard adds nothing and, may actually confuse, anyone trying to enforce or comply with the rule.

Rule 3.8(g)

Proposed rule 3.8(g) is a “verbatim” adoption of the same rule promulgated by the ABA. (Explanation, Rule 3.8(g).) The rule imposes an obligation on prosecutors “to take certain steps when they know of ‘new credible and material evidence’ that indicates a convicted defendant was innocent of a crime for which the defendant was convicted.” (*Ibid.*) No one can object to the ethics underlying this proposal. However, this disclosure obligation applies not only to cases in the local prosecutor’s jurisdiction, but those outside it as well. (Explanation, Rule 3.8(g).)

A minority of the Commission for the Revision of the Rules of Professional Conduct has objected to this extra-jurisdictional provision noting that it is “unclear how a prosecutor *whose jurisdiction did not obtain the conviction* would know if the information is ‘new credible and material creating a reasonable likelihood...’” (Explanation, Rule 3.8(g).) The minority of the committee, as does LADA, is concerned that a prosecutor, to avoid potential discipline, will disclose *all* information because of the difficulty of determining whether evidence on a case outside of his or her jurisdiction is “credible and material[.]” (*Ibid.* see *Kyles v. Whitley* (1994) 514 U.S. 419, 436 - 437 [115 S.Ct. 1555, 131 L.Ed.2d 490] “[T]he Constitution is not violated every time that the government fails or chooses not to disclose evidence that might prove helpful to the defense.”).)

The majority of the Committee, counters that there is no obligation to disclose “all exculpatory information of which the prosecutor might become aware[.]” but the draft language “encourages prosecutors to err on the side of disclosure in close cases[.]” Unfortunately, the language of the proposed rule does not make that point clear, and the determination of what constitutes a “close case” may be more difficult than the drafters assume.



OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF TULARE

Phillip J. Cline
DISTRICT ATTORNEY

November 30, 2009

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

Dear Ms. Hollins:

I am writing to express my deep concerns with several provisions of Model Rule 3.8 (Special Responsibilities of a Prosecutor). It is noted in the "Introduction" that Proposed Model Rule 3.8 is intended to clarify and expand the scope of a prosecutor's duties with the goal of greater certainty to prosecutors. A careful reading, however, raises the significant concern that the Proposed Rule will instead confuse the issues and lead to increased opportunities for attacks on prosecutors.

Rule 3.8(a) changes the Model ABA Rule from "the prosecutor in a criminal case shall (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause" to "refrain from recommending, commencing, or continuing to prosecute a charge that the prosecutor knows or reasonably should know is not supported by probable cause." This change in the language creates two significant concerns for my office. First, by changing the language from prosecuting to recommending to prosecute, it appears that there is an attempt to include any attorney with whom a prosecutor consults in the prosecution of the case. This would not only be extremely unfair and unwarranted, it would have an extreme chilling effect on the consultation and discussion of cases prior to filing. Additionally, by adding the language "reasonably should know is not supported by probable cause" diminishes rather than enhances the stated goal of greater certainty to prosecutors. It is unclear who defines the lowered knowledge standard. Who decides what a prosecutor should "reasonably" know? When does ignorance become negligent ignorance? The concern is that in any case in which there is an acquittal, a complaint of "negligent ignorance" could arise. The fact remains that some cases need to be tried before a jury, and some cases will be lost for any number of reasons that have nothing to do with whether the prosecutor "reasonably should" have believed the probable cause standard was met prior to filing the case. By imposing this burden upon the prosecution, the effect will be that cases that should have been filed and tried will not be prosecuted. The public will not be served and our communities will be a more dangerous place to live.

In addition to the above, one of the most pernicious effects of the proposed rule is the potential chilling effect it can have on the independence of prosecutors. In the exercise of prosecutorial discretion, District Attorneys have historically been entitled to absolute immunity for decisions made in the exercise of the prosecution function. This rule has been recently upheld by the United State Supreme Court. The proposed state bar rule is an end run. It is a regulation designed to undermine prosecutor's independence and make immunity an empty promise. Its impact would be to insulate the powerful and wealthy from the same vigorous standards of prosecution that the powerless and poor have in our society. There is a reason prosecutors have absolute immunity. It is to insure they have the independence necessary to hold persons from all levels of society accountable for their criminal acts.

If prosecutors have to face attacks on their professional licenses and, therefore, their livelihood because of case filing decisions then they will be deterred from filing cases that should be filed. It is no different than if they had to face being sued for the filing decisions they make. Bringing a case against a powerful individual or corporation who so often victimize the less fortunate of our society or to bring cases against political office holders who take advantages of positions of trust is not simple and never easy. And when such individuals or entities are challenged they hit back anyway they can. How many prosecutors would avoid bringing such cases, if they faced the prospect that batteries of lawyers hired by such individuals and entities would be filing complaint after complaint with the state bar? In an era where the unscrupulous seek to have politics criminalized and crime politicized, it is not only conceivable but inevitable that such tactics will be used in an attempt to intimidate and deter prosecutors from challenging these powerful interests. The ultimate loser will be the consumer, the victim, and the person without influence or friends in powerful places.

Rule 3.8(f) imposes an obligation to "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement." This has two concerns for our office. First, it implies that prosecutors are able to control what law enforcement officials might say publicly about a case. Law enforcement agencies hold their own press conferences and are not subject to the control of the prosecutor. Secondly, we recognize the duty to try our cases in the courtroom rather than the media. We feel that the same obligations should be imposed upon the defense bar. Since this rule does not attempt to apply the same standards to both the prosecution and the defense, we feel that is unwise and unfair.

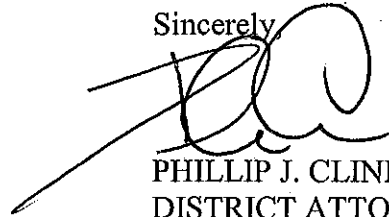
Rule 3.8(g)(h) requires a prosecutor to initiate an investigation when they know of "new, credible and material evidence" that points to the innocence of a convicted defendant, regardless of jurisdiction. I agree with the minority on this rule. If the conviction did not occur in my jurisdiction, how am I to know when information is "new, credible and material creating a reasonable likelihood...." This imposes an obligation on us to step outside of our role as prosecutor and conduct investigations into criminal cases outside of our jurisdiction in order to protect ourselves from accusations of misconduct.

Audrey Hollins
November 30, 2009

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I appreciate you taking in consideration my deep concerns dealing with these changes. Please do not hesitate to contact me should you wish to discuss my concerns dealing with the proposed language or any other related matters.

Sincerely,

A handwritten signature in black ink, appearing to be "PJC", written over the word "Sincerely,".

PHILLIP J. CLINE
DISTRICT ATTORNEY

PJC:ss

cc: W. Scott Thorpe
CDAA, Chief Executive Officer



Office of the District Attorney County of Kings



Ronald L. Calhoun
District Attorney

November 30, 2009

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

Re: Proposed Rule 3.8 of the Rules of Professional Conduct

Dear Ms. Hollins,

I was going to write to you separately regarding the Rules change you have sent out for comment however after reviewing Mr. Rod Pacheco's response to your Office he appears to have said it all. Therefore any further response from me would be duplicative.

Please include me in supporting Mr. Pacheco's letter to you addressing these proposed actions.

Thank you

A handwritten signature in black ink that reads "Ron Calhoun". The signature is written in a cursive, flowing style.



TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY

ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
401 CIVIC CENTER DRIVE WEST • SANTA ANA, CA 92701 (714) 834-3636

December 2, 2009

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

Dear Ms. Hollins:

I have recently received and reviewed the November 13, 2009 letter to your office from the District Attorney of Riverside County, Rod Pacheco, a copy of which I have attached. I also referred the letter to our legal staff for analysis and comment. Based upon these reviews I must state that both my reviewing legal staff and I are in complete agreement with the arguments advanced by Mr. Pacheco. I therefore respectfully urge, as he did, the deletions of the following proposed rules: Rule 3.8(b), Rule 3.8(e)(2), Rule 3.8(e)(3) and Rule 3.8(f). I also likewise respectfully urge that the language "and to the tribunal," be deleted from Rule 3.8(d) and clarify a prosecutor's affirmative obligations under Rule 3.8(h).

Respectfully,

Tony Rackauckas
District Attorney
County of Orange

TR:ru

Attachment



**ROD PACHECO
DISTRICT ATTORNEY
COUNTY OF RIVERSIDE**

November 13, 2009

Via Facsimile (415-538-2171) & U.S. Mail

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

*Re: Proposed Rule 3.8 of the Rules of Professional Conduct
(Special Responsibilities of a Prosecutor)*

Dear Ms. Hollins:

I am writing to express concern regarding several provisions of Proposed Rule 3.8 (Special Responsibilities of a Prosecutor).

The Proposed Rule substantially adopts with some material deviations ABA Model Rule 3.8, and would replace current California Rule of Professional Conduct 5-110. Many sections of the Proposed Rule stem from pre-existing constitutional, statutory, or ethical duties of prosecutors, and as such, I endorse their adoption.

However, some sections of the Proposed Rule create new affirmative duties for prosecutors – duties which would provide little if any further safeguards to criminal defendants, yet unfairly expose our prosecutors to increased disciplinary action. While I fully support the adoption of professional rules of conduct that encourage prosecutors to abide by the highest of ethical standards, these particular sections instead create unnecessary obligations that will unjustly target prosecutors for disciplinary action. I will reserve my comments to these sections.

Rule 3.8(b)

Proposed Rule 3.8(b) creates an affirmative duty upon prosecutors to ensure that an “accused” is advised of and given the opportunity to obtain counsel. I strongly oppose this rule as vague, unnecessary, and unfair.

Proposed Comment 1B states that Proposed Rule 3.8(b) is not intended to expand the obligations imposed on prosecutors by applicable law, but neither federal nor California law imposes the affirmative duties outlined by the Proposed Rule. Rather, prosecutors have a pre-existing duty not to “act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel,” (*Maine v. Moulton* (1985) 474 U.S. 159, 171), and it is the court’s duty to advise a criminal defendant of the right to counsel (Pen. Code, §§ 860, 987). The rule as proposed shifts the court’s responsibilities to prosecutors, and as such, unnecessarily and unfairly subjects prosecutors to discipline for the court’s failure to comply with its statutory duty. One can envision a situation where the court fails to properly advise a

As such, I recommend removing the language "and to the tribunal" from Proposed Rule 3.8(d).

Rule 3.8(e)

Proposed Rule 3.8(e) prohibits prosecutors from subpoenaing an attorney in any "criminal proceeding" to present evidence about a past or present client unless certain requirements are met. The prosecutor must "reasonably believe": (1) the information sought is not privileged or work product; (2) the evidence sought is "reasonably necessary" to the successful completion of an ongoing investigation or prosecution; and (3) there is "no reasonable alternative" to obtain the information. I object to requirements (2) and (3) as unnecessary and unfairly exposing prosecutors to discipline.

The first requirement of the rule (i.e., the prosecutor must "reasonably believe" the information sought is not privileged or work product) reaffirms a prosecutor's pre-existing duty not to interfere with the attorney-client privilege and/or right to counsel, and thus I have no objection to this particular requirement. However, requirements (2) and (3) unnecessarily impede a prosecutor's advocacy on behalf of the People. One could envision a situation where the prosecution may have other sources of the information sought, but where the attorney's testimony regarding the unprivileged information would provide the best evidence or would corroborate other evidence already presented. If the prosecution has determined that the information sought is not privileged or work product (and thus there would be no infringement upon the attorney-client privilege), the prosecutor's presentation of evidence and duty to advocate on behalf of the People should not be limited by such artificial constraints.

Requirements (2) and (3) could not only hamper the People's ability to obtain just convictions, but also could prevent prosecutors from eliciting the testimony of defense attorneys when opposing motions to withdraw pleas based upon ineffective assistance of counsel and other similar post-conviction proceedings. Although it is well established that a criminal defendant's claim of ineffective assistance of counsel lifts the attorney-client privilege (as it relates to the defendant's claim), this proposed ethics rule would impose unnecessary, and unfair, obstacles to the People's ability to counter the defendant's assertion.

There is simply no meaningful public policy or rationale to support requirements (2) and (3) other than a desire to shield defense attorneys. In sum, this rule would hamper the ascertainment of truth which is essential to the fair administration of justice.

Accordingly, I propose deleting requirements (e)(2) and (e)(3).

Audrey Hollins
November 13, 2009
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I appreciate the opportunity you have provided to comment on Proposed Rule 3.8. I hope these comments will assist the Commission in its efforts to improve the ethical standards governing our legal community.

Respectfully,

A handwritten signature in black ink, appearing to read "Rod Pacheco", with a stylized flourish at the end.

ROD PACHECO
District Attorney

RP:wsc

cc: Scott Thorpe, Director CDAA
Kate Flaherty, Co-Chair CDAA Ethics Committee
District Attorney Vern Pierson, Co-Chair CDAA Ethics Committee
All California District Attorneys

Rule 8.5 – Public Comment – File List

E-2009-292k OCBA [8.5]

E-2009-293i State Bar OCTC [8.5]

E-2009-308b George S. Cardona [8.5]

E-2009-310h COPRAC [8.5]

E-2009-351k SDCBA [8.5]

E-2009-358j Santa Clara County Bar [8.5]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 -- Confidentiality of Information
- Proposed Rule 1.8.2 -- Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 -- Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 -- Duties to Former Clients
- Proposed Rule 1.10 -- Imputation of Conflicts -- General Rule
- Proposed Rule 1.14 -- Client with Diminished Capacity
- Proposed Rule 2.1 -- Advisor
- Proposed Rule 3.8 -- Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 -- Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

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

MEMORANDUM

Date: October 16, 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 8.5 – Disciplinary Authority; Choice of Law**

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 comments concerning the subject proposed Rule:

The OCBA endorses the adoption of proposed Rule 8.5, with certain proposed revisions. The proposed Rule makes clear that these Rules apply to all conduct, except if a California lawyer is lawfully practicing in another state where the other state's rules require something different. The ABA Model Rule has a "predominant effect of the conduct test," but proposed Rule 8.5 deletes that because the Commission finds the concept ambiguous. The OCBA agrees with this change. The proposed Rule, however, also deletes a "safe harbor" provision, which provides that a lawyer is not subject to discipline if that lawyer reasonably believes that a different jurisdiction's rule governs. The OCBA questions whether the "safe harbor" should be deleted. Although the "Explanation of Changes to the ABA Model Rule" notes that reasonable belief may be a mitigating factor, the OCBA believes, in some situations, it should and could serve as a complete defense. This would seem more consistent with the Commission's approach, namely, that California's rules govern unless another jurisdiction's rules require otherwise. If a lawyer reasonably believes another jurisdiction's rule governs, and complies with that rule, then subjecting that lawyer to discipline in California seems problematic. The Commission's deletion of the safe harbor provision also affects the language proposed in Comment [3] to the proposed Rule, as well as comment [5] to the ABA Model Rule, which the Commission has deleted. Finally, the OCBA agrees with deleting comment [6] to the Model Rule.



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal.^{4th} 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping "W" and a distinct "R".

Russell G. Weiner
Interim Chief Trial Counsel

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

FROM: George S. Cardona
Acting United States Attorney
Central District of California

Karen P. Hewitt
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 3.8(c), (g) and (h) and 8.5(b)

DATE: November 10, 2009

As an initial matter, we want to thank the Commission for all the hard work it has done in arriving at its proposed revisions to the California Rules of Professional Conduct and for its willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors. We write to provide additional comments on three subsections of Proposed Rule 3.8, Special Responsibilities of a Prosecutor, that we believe could have a substantial negative impact on the work of the prosecutors in our offices, and a subsection of Proposed Rule 8.5, Disciplinary Authority – Choice of Law, that we believe could negatively impact Department Of Justice attorneys, including attorneys in our offices, working on national investigations that only tangentially involve events occurring in California.

~~A. Proposed Rule 3.8(c)~~

~~The text of Proposed Rule 3.8(c) is substantially the same as ABA Model Rule 3.8(c), with the addition of a clause specifying that its prohibition on soliciting waivers of “important pretrial rights such as the right to a preliminary hearing” from an unrepresented “accused” does not apply where the court has “approved the appearance of the accused *in propria persona*.” ABA Model Rule 3.8(c) contained this same exception to application of the rule in ABA Comment [2], and we have no objection to moving this exception from the comment to the rule itself. We do, however, seek an addition to Proposed Comment [2] to clarify that the rule is not to be interpreted to preclude prosecutors and law enforcement agents from seeking waivers of the time for initial appearance and/or preliminary hearing, an interpretation we believe unwarranted and one that would negatively impact both law enforcement investigations and attempts by arrested~~

~~individuals to improve their own positions through cooperation with law enforcement investigations.~~

~~In the federal system in particular, it is not uncommon for individuals arrested as part of an ongoing investigation, whether on probable cause or on a warrant premised on a criminal complaint, to be offered an opportunity to cooperate in the ongoing investigation. This may occur before the arrested individual has made an initial appearance in court and so before counsel has been retained or appointed. In many circumstances, the ability of such an arrested individual to cooperate and gain the benefits of that cooperation may be time sensitive (for example, if a shipment of drugs is anticipated, the individual may have only a short period of time in which he or she will be able to assist law enforcement agents in recording conversations relating to the shipment of drugs) and may not be available if a public court appearance is made (which would reveal that the individual has been arrested and had contact with law enforcement). Thus, in many instances, law enforcement agents, often in consultation with an Assistant United States Attorney (“AUSA”), may ask arrested individuals to waive their rights (conferred by statute, rule, and/or the Constitution) with respect to the time periods specified for both initial appearance and preliminary hearing.[†] The waiver does not result in the individual being denied either an initial appearance or a preliminary hearing, but rather, delays those events to enable the individual to cooperate in an ongoing investigation.~~

~~We do not believe that Proposed Rule 3.8(c) should be interpreted as precluding this practice. First, interpreting the proposed rule in this way could in many instances, harm those the Rule is intended to protect by depriving arrested individuals of a beneficial option that might otherwise be available, namely, the option of electing to cooperate in anticipation that benefits might later flow from that cooperation. See Ohio Rules of Professional Conduct, Rule 3.8, Comparison to ABA Model Rules of Professional Conduct (“Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs.”). Second, interpreting the proposed rule in this way would run contrary to federal court opinions that have held reasonable delays in presentment to secure a defendant’s cooperation, and waivers taken to accomplish this, to be lawful. See, e.g., United States v. Torres Rodriguez, No. 08-cr-30126-JPG, 2009 WL 1372975 at * 8 (S.D. Ill. May 14, 2009) (“the Court believes it is reasonable to delay presentment to a magistrate in order to continue an interview of a cooperating suspect begun within the safe harbor~~

[†] ~~Federal Rule of Criminal Procedure 5(a) specifies that a “defendant” arrested on a federal charge within the United States must be brought “without unnecessary delay before a magistrate judge” for an initial appearance. Federal Rule of Criminal Procedure 5.1(c) specifies that, absent the defendant’s consent and a showing of good cause, or the intervening return of an indictment, a preliminary hearing must be held “no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody.” In the federal system, preliminary hearings are a rarity, as the overwhelming majority of cases are pursued through indictments obtained either prior to arrest or, if post-arrest, within the time specified under Rule 5.1(c) or a time period extended with the consent of the defendant.~~

~~period so long as the interview is not unreasonable in length or conditions.”); United States v. Berkovich, 932 F. Supp. 582, 588 (S.D.N.Y. 1996) (recognizing that a “defendant may waive his right to be presented promptly” and finding that defendant “agreed to waive his right to a speedy presentment in an attempt to obtain the benefits of cooperating with the Government”); United States v. Pham, 815 F. Supp. 1325 (N.D. Cal. 1993) (“A criminal suspect *may* waive his Rule 5(a) right to be brought promptly before a magistrate.”) (emphasis in original). Third, to the extent the concern underlying the proposed rule is that prosecutors will unfairly take advantage of unrepresented individuals to obtain waivers of the time for initial appearance and/or preliminary hearing, that concern is appropriately addressed by a court’s ability to impose a remedy in any subsequently filed criminal case should it find the waiver of time to have been coerced or otherwise invalid and the resulting delay to be unreasonable. See Alaska Rule of Professional Conduct 3.8, Comment (explaining that “Alaska Rule 3.8 does not include paragraph (c) of the model rule” in part because “[i]f a court determines that a prosecutor has taken unfair advantage of an unrepresented suspect or defendant legal remedies are already available”); United States v. Corley, 129 S. Ct. 1558, 1570–71 (2009) (recognizing availability of exclusionary remedy if delay in presenting defendant to magistrate judge is unreasonable); United States v. Pena-Ontiveros, 547 F. Supp. 2d 323, 339–40 (S.D.N.Y. 2008) (recognizing that “a defendant may also waive his or her right to be presented promptly” but suppressing confession after finding “insufficient evidence in the record from which to conclude that defendants voluntarily, knowingly, and intelligently waived their rights to speedy presentment in a timely manner”).~~

~~For all these reasons, we ask that the following sentence be added to Proposed Comment [2] to make clear that the proposed rule is not to be interpreted to bar prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing:~~

~~“Nor does paragraph (c) forbid prosecutors from seeking from an unrepresented arrestee a reasonable waiver of time for initial appearance or preliminary hearing as a means of facilitating the arrestee’s voluntary cooperation in an ongoing law enforcement investigation.”~~

~~B. Proposed Rule 3.8(g), (h)~~

~~As you know, our offices prosecute all federal crimes in California. As prosecutors, we and the United States Department of Justice support the goal of Proposed Rule 3.8(g), (h). We and the Department have always held our attorneys to the highest standard of professional conduct and expect, whenever exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed as soon as possible. Moreover, neither we nor the Department would countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant’s innocence, therefore, we and the Department expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.~~

~~Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, which is identical to that of ABA Model Rule 3.8(g), (h). The Department previously provided to the ABA, and we previously provided to the Commission, modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission’s revisions to Proposed Comment [7] attempt to address this issue, and we appreciate this effort, but we do not believe it goes far enough. Accordingly, we feel obligated to object to Proposed Rule 3.8(g), (h) as drafted. The reasons underlying our objection are as follows:~~

~~1. **Few states have followed the ABA’s lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.~~

~~2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. As the minority objectors have recognized, if a prosecutor learns of evidence tending to show the innocence of a defendant previously convicted in a prosecution by an office in which the prosecutor has never served, then he is in the same position as any other lawyer who learns such information. Like any other lawyer, such a prosecutor will not be aware of the evidence presented to obtain the conviction, the relative credibility of the witnesses who testified, or the issues already raised and addressed by the court, and so will have no more meaningful basis than any other lawyer for assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that a convicted defendant did not commit an offense. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on such a prosecutor, and not on any other member of the bar.~~

~~3. **Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.** Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure~~

~~loses all signaling capacity it might have had the disclosure will be interpreted not as representing a prosecutor's judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under or over value the weight to be given a prosecutor's decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.~~

~~**4. Proposed Rule 3.8(g) is unclear in many respects which affect the obligations set forth therein.** First, the term "knows" is undefined in the proposed rule. It is defined elsewhere in the California Rules to mean "actual knowledge of the fact in question." California Rule of Professional Conduct 1.0(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings in which the defendant was convicted and asserting that the prosecutor who obtained the conviction engaged in misconduct by concealing from the defendant clear exculpatory evidence of which the defendant has just become aware, for example, through a conversation with another inmate who has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant's asserted alibi for the time of the crime. Does a prosecutor receiving this letter "know" of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor is on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant's asserted alibi. But without further investigation, the prosecutor simply cannot "know" whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant's alibi. (And, in furtherance of point 2 above, without even more extensive investigation, a prosecutor outside the jurisdiction of the case of conviction is in no position to evaluate whether if this evidence in fact exists it is new, credible, material, or creates a reasonable likelihood that the defendant did not commit the crime of conviction.)~~

~~Second, we are concerned by the use of the term "material" without a correlating definition. While not defined in ABA Model Rule 3.8 or its comments, the term "material" or "materiality" is used elsewhere in the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., ABA Model Rules~~

~~1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer’s duty to correct material false statements made to court, “materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation.”). This meaning of “material” is referenced in Proposed Comment [6A], which cross references to Proposed Rule 3.3. In the criminal context, however, the term “material” is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being “material” only “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence “material” if it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict”). In the context of Rule 3.8(g), that “materiality” should be subject to this latter interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]” We believe this is the proper interpretation of “material” for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term “material” is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.~~

~~Third, we believe the proposed rule’s use of the term “promptly” is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule’s ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is “new, credible, and material.” Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently “promptly.”~~

~~Fourth, we are concerned with the mandate that a prosecutor “undertake further investigation” or “make reasonable efforts to cause an investigation.” Prosecutors do not have general investigative powers (such as the power to issue subpoenas post trial) nor do they have the staff or monetary resources to investigate thousands of claims of “new, credible and material” evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available~~

resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. Proposed Rule 3.8(h) is also unclear in many respects which affect the obligations set forth therein. First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. Proposed Comment [9]'s undefined "good faith" exception. We appreciate the inclusion of a good faith exception, and believe that such an exception is appropriate. Proposed Comment [9], however, which purports to protect prosecutors who have acted in "good faith" in deciding not to act under Rule 3.8(g) or (h), leaves it unclear whether this is intended to be a subjective standard based on an analysis of the individual prosecutor's intent, or an objective standard based on what

~~a reasonable prosecutor would do in similar circumstances. This is particularly problematic given the ambiguities, discussed above, as to what it means to “know” of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not “know” of such evidence.~~

~~7. Potential conflict with other Rules of Professional Conduct and other applicable laws.~~

~~The duties imposed by Proposed Rule 3.8(g), (h) may conflict with prosecutors’ obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and California Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client’s confidences. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(1), and the Department of Justice to civil liability, 5 U.S.C. § 552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See *Touhy v. Ragan*, 340 U.S. 462 (1951); *United States v. Williams*, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws, and should make clear that the obligations it imposes are subject to a prosecutor’s compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.~~

~~8. Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.~~

~~Prosecutors and their resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction), will be diverted from prosecuting crime to investigating convicts’ claims of “new” evidence in order to ensure that they do not run afoul of this rule. The Committee needs to understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of “new” evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted “new” witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Committee should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert prosecutorial resources.~~

C. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over California lawyers, where ever their conduct occurs, and over non-California lawyers if they “provide[] or offer to provide any legal services in California.” As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney’s Offices, even if not admitted in California, may be subject to discipline in California if even a part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California) even if that action is only a small part of the overall case or investigation. We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we believe that it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing disciplinary rules that would put lawyers working multi-jurisdictional investigations in the often impossible position of reconciling different disciplinary rules that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)’s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts our attorneys and DOJ attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconcilable. We do not believe this is appropriate, and urge the Commission to adopt ABA Model Rule 8.5(b)(2), or some similar provision, as a means of providing uniformity in choice of law rules and ensuring that lawyers working multi-jurisdictional investigations are not whipsawed by potential application of multiple rules.

For conduct in connection with a matter pending before a tribunal, Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) in providing a clear choice of law rule – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal’s own rules provide otherwise. Thus, DOJ lawyers working on a case pending before a tribunal (typically, post-investigation) and subject to disciplinary authority in both California and some other jurisdiction, will know that in both disciplinary proceedings the same set of rules will apply, and can comport their conduct to these rules. The same will not be true if these same lawyers are working a multi-jurisdictional investigation that is not yet pending before a tribunal. For such an investigation, the text of Proposed Rule 8.5(b)(2) substantially differs from the ABA Model Rule in rejecting the “predominant effect of the conduct” standard and the “safe harbor” provision. The substitute standard, subjecting lawyers to the California rules except where the lawyer “is specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules” will create confusion and uncertainty for those federal government lawyers admitted in California whose investigations are outside of California or encompass multi jurisdictional practice.

Under Proposed Rule 8.5(b)(2), the California rules are adopted as the choice of law unless a California admitted lawyer, lawfully practicing in another jurisdiction, is required by the rules of that jurisdiction to follow a different set of rules. As stated in Proposed Comment [4], this rule is intended to apply to those cases in which the lawyer's conduct is in anticipation of a proceeding that is likely to be, but not yet before a tribunal, in other words, during the pre-indictment or pre-litigation phase of a case. This would appear to mean that a DOJ lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-litigation investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct, even though the case has no nexus to California and no California resident's interests are at stake. However, as soon as the indictment is issued or the lawsuit is filed in Pennsylvania, then the Pennsylvania Rules will apply to that same lawyer's conduct. Arguably, under this proposed rule, the California admitted federal government lawyer, practicing outside California, will have to tailor his or her investigation, including the supervision of law enforcement officers or investigators, differently than his non-California licensed colleagues in the same case, merely because he is licensed in California. Moreover, if the state in which the lawyer is practicing, in our example, Pennsylvania, has adopted ABA Model Rule 8.5(b)(2), the lawyer may also have to comply with the Pennsylvania rules, which would apply during the investigatory phase under ABA Model Rule 8.5(b)(2) based on application of the "predominant effect" standard. The difficulties posed may be particularly significant in those instances where California's Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California's Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another") and 1.6(b)(3) ("to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used") or where an issue concerning the lawyer's implied authority for disclosure is at issue, a concept that has also been rejected in California's Proposed Rule 1.6. It would also not appear to be in the interests of either California or its residents to subject federal lawyers overseeing investigations to different rules of professional conduct in the same case, where the protection of California's interests are not at issue.

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

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Conclusion

For the foregoing reasons, we request that additional language be added to Comment [2] to Proposed Rule 3.8(c) to make clear that the rule does not preclude prosecutors or those acting at their direction from obtaining from unrepresented arrestees reasonable waivers of the time for initial appearance and preliminary hearing as a means of enabling the arrestees voluntary to cooperate in an ongoing investigation. We also oppose the proposed incorporation of the text of ABA Model Rule 3.8(g), (h) into the California Rules of Professional Conduct. If the Committee ultimately concludes that adoption of some variation of these provisions is warranted, we believe that these provisions should be substantially redrafted along the lines we previously proposed. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Commission either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

Exhibit A

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

- (g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:
- (1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:
- (i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or
- (ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).
- (2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

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[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.



U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained -- pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows¹ “new, credible and material” exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is “new, credible and material.” Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is “new, credible and material.” We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor’s subjective intent should be used in determining adherence to this rule.

“Material”

Secondly, we are concerned with the use of the term “material” in the rule. . Neither the proposed Rule nor the Comments defines the term “material.” In a criminal context, the term “material” is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement “creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.”

However, the term “material” or “materially” is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be “materially limited” by the lawyer’s own interests or the interests of a third person); ABA Model Rules of Prof’l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct “material” false statements made to a court); ABA Model Rules of Prof’l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a “material” false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term “material” may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm’n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer’s duty to correct material false statements made to a court, “materiality encompasses matters represented to a tribunal that the judge would

¹ The term “know” is defined in the Model Rules to mean “actual knowledge of the fact in question[.]” Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.”).

We would believe that this confusion could be remedied by making clear that the term “material” is used in the Brady sense of the term.

“Promptly”

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must “promptly” disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor’s jurisdiction, the prosecutor must “promptly” disclose the evidence to the defendant and undertake further investigation. Although the term “promptly” is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof’l Conduct R. 1.4(a) (2007) (requiring a lawyer to “promptly” consult with clients about certain matters and “promptly” comply with a client’s reasonable request for information); ABA Model Rules of Prof’l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to “promptly” notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof’l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to “promptly” notify the sender). Based upon the construction of the term “promptly” when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ’g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel’s firm “promptly”; the attorney was not screened until ten days after he started working at the new firm; court discounted firm’s description of administrative delays in light of the fact that the firm knew prior to the attorney’s arrival that he was working as opposing counsel on the case).

When the term “promptly” is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is “new, credible and material,” particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term “promptly” was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and “know” that the evidence is “new, credible and material.”

“Seek to remedy the conviction”

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor “shall seek to remedy the conviction.” Proposed Comment [8] states,

Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to “seek to remedy the conviction” may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. See, e.g., Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);¹ Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to “remedy” a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

¹Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a) ("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.>").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial “if the interests of justice so require.” There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.² Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to “remedy” a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people’s desire for finality of criminal convictions is an equally compelling interest to be served. “[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, “No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.” Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

²Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion “[n]otwithstanding any law that would bar a motion under this paragraph as untimely.” 18 U.S.C. § 3600(g)(1) (Supp. 2007).

languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

A handwritten signature in black ink, appearing to read "David Margolis", with a long horizontal flourish extending to the right.

David Margolis
Associate Deputy Attorney General



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 8.5

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 8.5 and offers the following comments.

COPRAC has considered proposed Rule 8.5, and supports the rule as drafted. COPRAC agrees with the deletion of the ABA Model Rule test involving the determination of where the lawyer's conduct has a predominant effect. That concept is ambiguous and subject to misapplication. COPRAC favors the bright line test proposed by the Commission.

COPRAC thanks the Commission for its consideration of COPRAC's comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



SAN DIEGO COUNTY BAR ASSOCIATION

November 11, 2009

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State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,



Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2	Scope of Representation [N/A] APPROVE
Rule 1.6	Confidentiality of Information [3-100, B&P 6068(e)] APPROVE WITH MODIFICATIONS – see comments
Rule 1.8.2	Use of Confidential Information [3-100, 3-310] APPROVE
Rule 1.8.13	Imputation of Personal Conflicts [N/A] APPROVE
Rule 1.9	Duties to Former Clients [3-310] APPROVE
Rule 1.10	Imputation of Conflicts: General Rule [N/A] APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
Rule 1.12	Former Judge, Arbitrator, Mediator [N/A] APPROVE WITH MODIFICATIONS – see comments
Rule 1.14	Client with Diminished Capacity [N/A] APPROVE
Rule 2.1	Advisor [N/A] APPROVE
Rule 3.8	Responsibilities of a Prosecutor [5-110] NO POSITION TAKEN – see comments
Rule 8.5	Choice of Law [1-100(D)] SIMMONS APPROVE

SDCBA Legal Ethics Committee
Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5
SDCBA Legal Ethics Committee Deadline October 8, 2009
Subcommittee Deadline October 26, 2009
State Bar Comment Deadline November 13, 2009

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: CRPC 1-100(D) Geographic Scope of Rules

Proposed New Rule No./ Title: Rule 8.5 Disciplinary Authority; Choice of Law

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:

The essence of the Commission's proposal is to retain the California rule, and yet modify it to fit the Model Rule format, minimizing disruption in modification. Succinctly stated, the California Rules apply to all lawyers licensed to practice in California, without regard to the situs of conduct, and can only be preempted where a lawyer is specifically required by a foreign jurisdiction to follow a different rule.

This differs from the Model Rule, which determines applicable rules by the jurisdiction of "predominant effect" of the lawyer's conduct. As a safe harbor, it allows the lawyer to apply "the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." The "predominant effect" was removed as ambiguous and unnecessary.

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.



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: NOVEMBER 13, 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 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

Rule 8.5 Choice of Law [1-100(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.

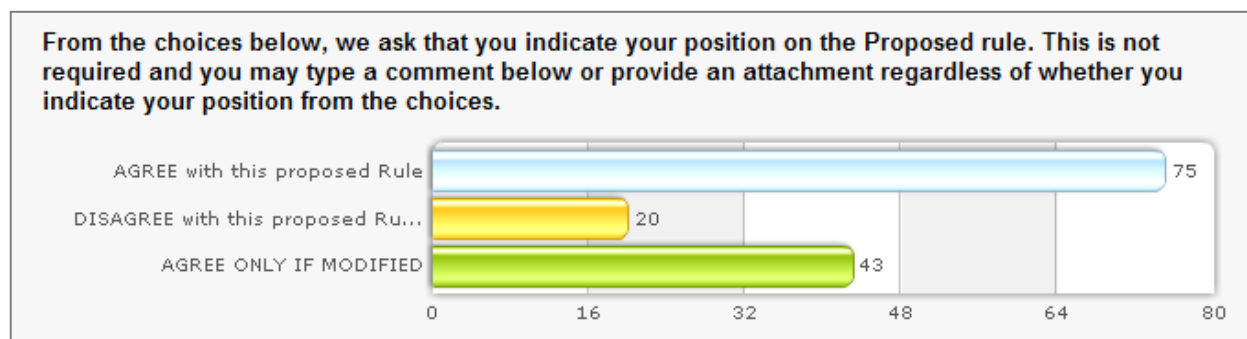
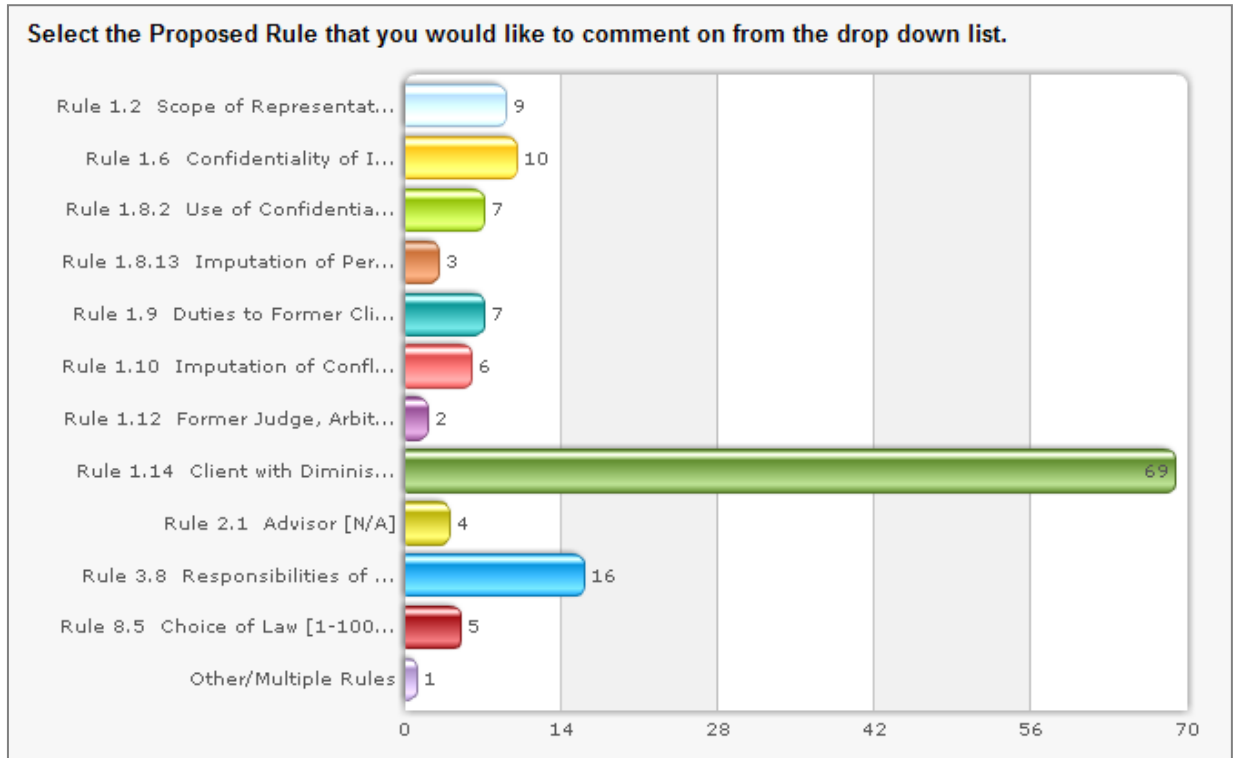
☒ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

BATCH 5



Total Number of Responses: 138

PUBLIC COMMENTS [1.7] ~ FILE LIST

C-2008-191 Carol M. Langford [1.7]

C-2008-199 David McGowan [1.7]

C-2008-213b SDCBA [1.7]

C-2008-214c Robert Sall [1.7]

C-2008-216 David McGowan [1.7]

C-2008-230b OCBA [1.7]

C-2008-232b COPRAC [1.7]

C-2008-239 Douglas Hendricks [1.7]

C-2008-242a Richard Zitrin [1.7]

C-2008-245 Carol M. Langford [1.7]

C-2008-246 Margaret Lodise [1.7]

C-2008-248b LACBA [1.7]



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  Law Office of Carol M. Langford

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Carol M. Langford

* City Walnut Creek

* State California 

* Email address (You will receive a copy of your comment submission.) langford@usfca.edu

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

Rule 1.7 Conflict of Interest: Current Clients [3-310] 

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

☐ AGREE with this proposed Rule

☒ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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

SEE ATTACHMENTS

Attachments

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

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Carol M. Langford Comment on Proposed Rule 1.7: Consent to Future Conflict

The following is a comment on proposed rule 1.7 regarding conflicts of interest. Of particular concern is comment 33, which authorizes advance waivers of future conflicts of interest. The comment states that there must be informed consent for a waiver to be valid, which may be satisfied even in the absence of specific facts and circumstances surrounding the potential conflict. In addition, where the party giving consent is an experienced user of the type of legal services involved, even a “general and open-ended” advance consent may satisfy the “informed” requirement.

This commentator believes that the proposed rule is overly broad as written and that more specific guidelines should be included to determine whether there was informed consent. Additionally, this commentator recommends that blanket waivers should be treated with caution and only permitted where there is some type of limitation on scope. One suggested limitation which courts have approved is the identification of the potentially adverse parties in the waiver. To support my arguments relevant California case law will be set forth, as well as the accounts of several experienced practicing lawyers.

A brief overview of California case law on the issue helps establish the appropriate scenarios in which advance waivers of conflicts of interest should be permitted. In Zador Corp. v. Kwan, 31 Cal. App. 4th 1285 (6th Dist. 1995), plaintiffs brought suit against Zador and its agent Kwan. The owners of Zador had been represented by Heller for ten years and hired the firm to defend in the action. Kwan then asked Heller to represent him in the action as well, and Heller agreed on condition that Kwan sign a waiver and consent form. The form stated that in the event that a conflict

arose between Zador and Kwan, Kwan should seek new counsel and that Heller could continue to represent Zador “notwithstanding any adversity that may develop.” Id. at 1300. Kwan studied the form for 20 minutes and signed it. After a conflict arose between the two parties, Kwan retained new counsel and reaffirmed his consent to Heller’s continued representation of Zador. Heller followed up by sending a written confirmation of this agreement. The court held that the detailed consent form along with Kwan’s multiple expressions of consent showed that he had executed a valid waiver. Zador Corp. v. Kwan, 31 Cal. App. 4th at 1301. In that case, the scope of the waiver was limited by identifying the adverse party and referring to conflicts arising out of present litigation, and the client was sophisticated in business matters.

In Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (N.D. Cal. 2003), Visa, represented by Heller, sued First Data for trademark infringement. Prior to this action, First Data had asked Heller to represent it in an unrelated suit. Heller agreed to represent First Data on the condition that it signed a waiver, consenting to Heller’s representation of Visa in future disputes against First Data. Heller explained that it had an ongoing relationship with Visa and represented it in large-scale commercial litigation. Since both Visa and First Data are major competitors in the credit card business, Heller explained the possibility of future conflicts between the two companies. First Data agreed and signed the waiver. In holding that First Data made a valid waiver, the court noted that Heller had explained the potential conflict in detail, that Visa was identified as the potentially adverse client, and that First Data was a sophisticated user of legal services. Id. at 1107-1109. The court also stressed that First Data actually knew of potential antitrust claims between it and Visa before signing the waiver. Id. at 1108.

In both Zador Corp. and Visa, the waiving party had some present knowledge about the kinds of conflicts it was waiving. In Zador Corp., the party knew that the future conflicts would relate to the present litigation he was involved in. In Visa, the party knew of potential antitrust claims that the adverse party might have against it. This knowledge also amounted to a durational limit on the waiver, referring to conflicts that arose out of a particular litigation rather than all conflicts occurring at any time in the future. In Zador Corp. and Visa, the waivers were also limited by referring to conflicts between the waiving party and an identified adverse party. An identified adverse party seems to play an important role in the courts' decisions to uphold the waivers. In fact, in another California case, the court refused to uphold the validity of an advance waiver where there was no identified adverse party. Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796 (N.D. Cal. 2004) involved a dispute over the intellectual property rights of chemicals. Before suit was filed, the owners of Concat, the Winchell family, hired the Morgan, Lewis law firm to plan their estate. Unilever was an existing client of Morgan, Lewis at the time.

Unaware of the connection between Concat and Unilever, Morgan, Lewis agreed to provide services to the Winchell family if they signed an advance waiver. The waiver referred to all future conflicts involving existing or new clients. The court found that this type of "generalized boilerplate waiver" was insufficient to obtain informed consent and in "stark contrast" to both Visa and Zador Corp., where named adverse parties were given. Id. at 821.

In addition to the courts, practicing lawyers have struggled with advance waivers and when they should be enforced. Advance waivers can be beneficial to the client by preserving his right to select the counsel of his choice. If advance waivers were

prohibited, counsel would be required to decline the party's request for representation, even if the client was willing to take the risk of the same counsel opposing him in a future suit.

In situations where a party is knowingly executing a waiver, he is bargaining for something – the special talent or expertise of the lawyer, or in co-defendant situations, economic or tactical advantages. In his experience, an attorney notes, “I have been involved in many instances . . . where a GC is willing to accept advance waivers in order to have access to a particular expertise.” E-mail from William Schuman, to APRL listserv, Advance Waivers (Feb. 26, 2008).

On the other hand, broad and sweeping advance waivers pose the danger of a client unknowingly waiving all future conflicts, without a meaningful choice on his part. This would clearly violate the fiduciary duty owed to clients by lawyers. Many attorneys are concerned with “blank check” waivers because “the client is being asked to waive the unknown and unknowable.” E-mail from Kurt Melchior, to APRL listserv, Advance Waivers (Feb. 28, 2008). As one attorney puts it, “So long as they are blank, no one, not even sophisticated GCs, can tell for sure what they are waiving. And they are, at least in my close experience, not so sophisticated that they are not shocked at what can happen . . . when the conflict comes down the pike.” E-mail from Richard Zitrin, to APRL listserv, Advance Waivers (Feb. 26 2008).

I was an expert recently in a matter involving the Paul, Hastings law firm. They had asked the client, a GC from a financing company in New York, to waive any conflicts involved from the firm continuing to represent them even after the firm had clearly committed malpractice in the matter they were handling for the GC. The GC had

no real idea what he was waiving; the firm told him they would “handle the matter and take care of it” and he thought that meant they would both handle the case and pay any damages resulting from their failure to file proper UCC papers. When the time came to pay, the firm balked, stating that as a GC he must have clearly understood what he was waiving even if it was not in a written waiver. I testified about my low opinion of the firm’s conduct and the next day the firm rapidly settled, likely fearful that the jury would agree with me.

That is not the first time I have dealt with GCs who may not be as sophisticated as lawyers think they are. GCs are busy and often can’t pay attention to vague documents put in front of them. In my experience they rely heavily on the friendships they develop with their lawyers over the years and count on the lawyers not to do anything that would hurt their interests. An advance waiver of the type contemplated by the comment opens the door for law firms to abuse their clients.

The concern is magnified when the client is a relatively unsophisticated user of legal services: “These folks not only cannot understand the advance waiver explanation sufficiently for it to ever be ‘informed,’ they haven’t remotely got the knowledge, background, or experience to evaluate such a waiver.” E-mail from Seth Rosner, to APRL listserv, Advance Waivers (Feb. 26, 2008).

Proponents of the proposed comment on advance waivers argue that informed consent can be obtained by educating clients about the business practices of the firm. For example, informing the client of how the firm checks for conflicts and what types of clients the firm represents. However, busy attorneys constrained by billable hours seldom have the time to fully explain the complex business practices of the firm to all of their

potential clients. I was a partner in a mid-sized San Francisco law firm – it had around 90 lawyers. Never once did we fully explain our business practices. Also, cases often come in suddenly, needing urgent attention, and cannot be delayed by a lengthy explanation of the firm’s practices. Yet even when lawyers take the time to explain how conflicts of interest may arise, they are likely to leave out important unfavorable information, such as how often conflicts of interest have arisen in their firm or the number of times the firm has been disqualified or sued for conflicts violations.

Advance waivers are also problematic because many potential conflicts may remain undetected and undisclosed to clients. At large firms with several branches and thousands of clients, it is impossible for attorneys to keep track of every single client on a daily basis. Large firms maintain a database through which they run conflicts of interest checks. However, these systems are not sophisticated enough to catch all conflicts, and some may fall through the cracks. For example, if an attorney runs an individual’s name through the database, subsidiaries of a company he owns might not show up. Or take for example a recent case in New York, in which Milbank, Tweed, Hadley, and McCloy represented Bucyrus Erie Company in a bankruptcy proceeding. During the proceeding, it was discovered that the law firm had also represented the principal of Bucyrus’ largest creditor. The firm asserted that it was unable to detect a connection between the two businesses during its search for conflicts of interest.

Recognizing the problems set forth above, California courts and many attorneys support advance waivers, but only those that are very limited in scope. In Zador Corp. and Visa, the waivers were limited in scope by identifying the adverse party and establishing durational boundaries. In Zador Corp., the conflicts involved were those

arising from a present litigation. In Visa, the conflicts were those relating to antitrust claims that the waiving party was aware of.

In addition to limitations on scope, it is important to consider the particular facts of each case to ensure that the consent was informed and a waiver knowingly made. The sophistication of the client and whether he was bargaining for something specific in signing the waiver is important. It is not enough that the GC merely be a GC. Specific guidelines should be incorporated into rule 1.7 to act as safeguards against uninformed and unintended waivers.

Absent some real guidelines, this comment should be taken out and advance waivers only addressed by the courts. This comment goes way beyond current case law and almost ensures powerful GCs will one day lobby Sacramento to regulate advance waivers when they get burned by one.

If you have any questions about my comment, or want further explanation, please do not hesitate to call me.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

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DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation  Professor of Law, University of San Diego

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name David McGowan

* City San Diego

* State California

* Email address (You will receive a copy of your comment submission.) dmcgowan@sandiego.edu

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

Rule 1.7 Conflict of Interest: Current Clients [3-310]

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

☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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Proposed Rule 1.7(a) is confusing and, read literally, would change both current California law and depart from the Model Rules. I propose deleting the references in proposed 1.7(a) to the "matter." The rule then would read:

(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which if the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents, in another matter, without informed written consent from each client.

If 1.7(a) is amended, then 1.7(c) is unnecessary, and should be deleted to make the rule simpler and clearer. Subsection (c) simply prohibits a particular type of direct adversity, in which client B has an interest in the matter in which the

[CONTINUED...]

[SEE ATTACHMENT FOR FULL TEXT]

Attachments

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6/5/2008 	PC 	C-2008-199 David McGowan [1.7]	Rule Section(s) Only 
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FULL TEXT OF COMMENTS SUBMITTED BY DAVID MCGOWAN

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Proposed Rule 1.7(a) is confusing and, read literally, would change both current California law and depart from the Model Rules. I propose deleting the references in proposed 1.7(a) to the "matter." The rule then would read:

(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client in a matter in which if the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents, in another matter, without informed written consent from each client.

If 1.7(a) is amended, then 1.7(c) is unnecessary, and should be deleted to make the rule simpler and clearer. Subsection (c) simply prohibits a particular type of direct adversity, in which client B has an interest in the matter in which the lawyer represents client A, and B's interest in that matter is directly adverse to A's interest. But if we strike out the language I have suggested, (a) becomes a flat prohibition on all concurrent representation of directly adverse interests, including the type specified in proposed subsection (c).

Another way of looking at it is simply to compare the titles of the sections: (a) is "Representation directly adverse to current client" and (c) is "Representing a client's adversary." When you represent a client's adversary your representation is adverse to your client.

I hope the commission finds this suggestion useful.

DM

MEMORANDUM

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the
State Bar of California

Subject: Proposed Rule 1.7 -- Conflicts of Interest
[Existing CRPC Rule 3-310]

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.7 but modify to delete entirely Comment 34 regarding class representation.

Rationale For Comment 1: Proposed Rule Comment 34 is too complicated a subject to be addressed in any manner other than a separate rule on class representation, which is why the ABA did not include class representation in its Model Rule 1.7.

Comment 2: Approve Proposed Rule 1.7 but modify to delete entirely the 4th sentence from the end of Proposed Rule Comment 33 regarding advance consent.

Rationale For Comment 2: Proposed Rule Comment 33 does not accurately state the status of current law.

THE SALL LAW FIRM

A PROFESSIONAL CORPORATION

ROBERT K SALL

32351 COAST HIGHWAY
LAGUNA BEACH, CALIFORNIA 92651-6703
(949) 499-2042
TELECOPIER (949) 499-7403

JAMES T BIGGS
LARA A S GALLAS
BRANDON N KRUEGER

June 6, 2008

Via Facsimile & U.S. Mail

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

Re: Public Comment on Proposed Rules of Professional Conduct

Dear Ms. Hollins:

I am submitting public comment on the current set of Proposed Rules of Professional Conduct. I am a member of the Orange County Bar Association's 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

Audrey Hollins
The State Bar of California
June 6, 2008
Page 2

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)

Audrey Hollins
The State Bar of California
June 6, 2008
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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

Audrey Hollins
The State Bar of California
June 6, 2008
Page 4

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 known, is 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

Audrey Hollins
The State Bar of California
June 6, 2008
Page 5

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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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation  University of San Diego School of Law

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name David McGowan

* City San Diego

* State California

* Email address (You will receive a copy of your comment submission.) dmcgowan@sandiego.edu

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

Rule 1.7 Conflict of Interest: Current Clients [3-310]

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

☐ AGREE with this proposed Rule

☐ DISAGREE with this proposed Rule

☒ AGREE ONLY IF MODIFIED

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

I would like to suggest that the commission consider promulgating a relatively detailed safe harbor for advance conflict waivers. It could either be done in the text of the rule, as suggested below, or in comments. I believe sophisticated firms are already doing substantially what is described in this proposal, and that practitioners who are relatively unfamiliar with advance waivers could use detailed, concrete guidance.

Here is the suggestion:

1. Add Proposed Revised Rule 1.7(e), as follows:

(e) A lawyer may ask a client to consent to the lawyer's representation of interests that conflict with the client's interests, or the lawyer's future representation of interests that would conflict with the client's interests. Such

Attachments

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FULL TEXT OF COMMENTS SUBMITTED BY DAVID MCGOWAN

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I would like to suggest that the commission consider promulgating a relatively detailed safe harbor for advance conflict waivers. It could either be done in the text of the rule, as suggested below, or in comments. I believe sophisticate firms are already doing substantially what is described in this proposal, and that practitioners who are relatively unfamiliar with advance waivers could use detailed, concrete guidance.

Here is the suggestion:

1. Add Proposed Revised Rule 1.7(e), as follows:

(e) A lawyer may ask a client to consent to the lawyer's representation of interests that conflict with the client's interests, or the lawyer's future representation of interests that would conflict with the client's interests. Such consent is effective only if the lawyer obtaining it demonstrates that he or she disclosed to the client information sufficient for the client to make an informed decision regarding the request. A lawyer may make such a showing by satisfying either of the following sections.

(1) Consent is presumptively effective if the lawyer provides in writing to the client: (i) a concrete description of the scope of the requested waiver, including but not limited to whether it would allow the lawyer to oppose the client in litigation or negotiations; (ii) explanations of (a) why the lawyer is asking for the waiver; (b) what benefits the lawyer expects to receive from it; (c) what risks it presents for the potential client; (d) the lawyer's best estimate of the probability that those risks will occur; and (iii) a statement that because the request benefits the lawyer the client should consider asking other, disinterested counsel for advice on whether to agree to the request. With respect to waivers of future conflicts, such disclosure also must include a statement that such conflicts might arise in a context, and raise issues, the client could not presently anticipate.

(2) Failure to provide any element of disclosure specified in section (1) renders consent to a conflict or future conflict presumptively invalid. A lawyer may overcome this presumption only by showing by clear and convincing evidence that (i) the lawyer was unable to provide the disclosure required by that section; and (ii) the client nevertheless had sufficient information to make an informed decision regarding the waiver request.

2. Delete current comment 29, and replace with Proposed New Comment 29, as follows:

Under either section (e)(1) or (e)(2), to obtain valid consent to a present or future conflict a lawyer must provide the client an adequate basis for deciding whether to agree to the waiver. The lawyer must disclose such information in the way most likely to assist the particular client in understanding his or her stake in the request. To the extent possible, the lawyer must relate each category of information to the circumstances that led the client to employ the lawyer.

Whether a client's decision was informed depends heavily on the client's general sophistication and sophistication regarding legal services. Information sufficient for a

FULL TEXT OF COMMENTS SUBMITTED BY DAVID MCGOWAN

sophisticated client might be meaningless jargon to an unsophisticated client, and it may be unnecessary to provide a sophisticated client the full extent of explanation needed to inform an unsophisticated client.

When representing multiple clients in a single matter, the lawyer must disclose the risk that circumstances might create incentives for the lawyer to favor one client over another, and the implications of joint representation for the confidentiality and lawyer-client privilege issues described in Comment [13]

If a lawyer shows by a preponderance of evidence that he or she provided the information required in section (1), a client's corresponding consent will be presumed to have been informed, and therefore to be effective. If, in particular circumstances, a client needs additional information to make a decision, then the client's consent is effective only if the lawyer provided such information. The client, however, would bear the burden of demonstrating that disclosure specified in Section (1) did not provide an adequate basis for his or her decision.

If a lawyer fails to provide the disclosure specified in Section (1) to a client in requesting a conflict waiver, the client's consent is presumptively invalid. In some unusual cases, lawyers who fail to provide such disclosure may be able to demonstrate by clear and convincing evidence that a client's consent was adequately informed. In such a case, the client's consent would be valid. Any such showing must include an explanation of why the lawyer was unable to provide such to a client. A lawyer may not make the necessary showing if the lawyer was able to provide the disclosure required by Section One but chose not to do so. This rule is intended to void all consents in cases where a lawyer withheld information for strategic reasons.

"Open-ended" waivers, which by definition do not specify in advance the scope of the requested waiver, by definition, cannot be supported by the disclosure required by Section (1). They therefore are presumptively invalid. Such waivers are therefore valid, if at all, only if the requirements of section (e)(2) are met.

3. Delete current comment 33

The presumption structure differs from the current and proposed rules, but would provide greater assurance that clients were properly informed before agreeing to waive future conflicts.

My thanks for considering these comments, and best wishes for your deliberations.

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

MEMORANDUM

Date: June 6, 2008

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.7 – Conflicts of Interest: Current Clients**

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

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

COMMENT:

I. DIRECT AND INDIRECT ADVERSITY

We have concerns about the distinction between "direct adversity" as that term is used in the rule, and the concept of indirect adversity which appears only in the comments. We are also concerned about the use of "Client's adversary," a term that appears in the subtitle of subsection (c), but not in the body of the rule. There can be many permutations of what constitutes a client's adversary, yet the proposed rule attempts to limit that context to only one situation.

These concepts, including "direct adversity," "client's adversary," and especially "indirect adversity," are not adequately defined. We believe the average lawyer will have difficulty applying them. Further, the use of the term "Client's Adversary" in the subtitle adds confusion because that term is not used within the text of that rule.

Even an indirect adversity can be severe enough to cause a client to lose confidence in the lawyer. Assume that Client A consults lawyer for assistance in a land use planning matter in which a proposed road will take a particular path that would be injurious to the Client A. The lawyer assists Client A to attempt to persuade the government agency to relocate the road. At the same time, the lawyer's partner represents Client B in seeking entitlements for B's development project nearby. B favors the road taking that path that Client A does not like, because it will bring more traffic to Client B's commercial location. They are different matters. They are different clients. They are not suing each other, yet their goals are in conflict. Each lawyer is negotiating

with the agency for a different route for the same road. Does that make A and B Client Adversaries for purposes of the heading in subsection (c)? Does it make them “directly adverse” for purposes of either subsection (a) or (c), or is it merely indirect?

Comment 6 suggests that because they are not parties in the “same matter” (which is itself indefinite) their adversity would merely be “indirect.” If so, it is not governed by either subsection (a) or (c) which require direct adversity. Would they be considered clients with actually or potentially conflicting interests in a single matter, under subsection (b) because, while they are different projects, the matters both pertain to the same road? They are certainly not joint clients. They are both interested in the same road from different goal orientations. They have a common interest in the road with conflicting goals and they are not working together.

One could posit several conflicting fact patterns within the same scenario, each with differing degrees of adversity. Without going through all possible examples, one must ask: Is this kind of conflicting representation permitted by the rule? The above may be a fact pattern that the members of the Commission could easily discern and apply the rule, thus you may have a quick answer. Our concern is that the average lawyer won’t. The rule needs to be drafted for the average lawyer.

As written, there are uncertainties as to what constitutes a single matter or a different matter, what is directly adverse versus merely indirectly adverse, and when the clients are adversaries. It is not always as simple as one being a plaintiff and the other being a defendant, and competitors may certainly be adverse. Comments 5, 6 and 7 suggest that the poorly defined indirect adversity in many instances is not going to be a conflict at all. However, it is still possible for a client to be harmed even if the adversity is merely indirect. Even the examples you have provided in Comment 7 recognize this risk.

Perhaps the Commission is attempting to draft a rule that will accommodate some types of conflicting representations to minimize the use of disqualification motions as an offensive tool in litigation. While this may be a useful goal, it should not be to the sacrifice of basic notions of loyalty to clients, or create confusion by artificial attempts to define the difference between direct and indirect conflicts.

We believe the proposed rule lacks the certainty necessary to guide the lawyer to ethical decision making, especially with respect to the determination as to whether the adversity is direct or merely indirect. Comment 5 is unhelpful in its warning that there is no single definition for indirect adversity.

Further, because the draft rule deviates significantly from the Model Rule, lawyers seeking to resolve a conflict are denied the guidance they may find in authorities from other states in which the rules have been interpreted. Since discipline is the price paid for violating the rule, these terms should be better defined. If you are going to maintain these distinctions from the Model Rule, we also believe that interpretation of the

proposed rule would be better aided by a series of specific examples of direct and indirect adversity.

We also believe it would be helpful for the Rule to better explain or define the distinctions between the same matter and different matter contexts that are fundamental to Subsections (a), (b) and (c). As may be seen in our example above, the distinction is not always easy to discern.

It is noted that the Commission has stayed away from adopting certain concepts of adversity defined in the Model Rules, such as the standard based upon the lawyer being “materially limited” by a duty owed to other persons. While this too is a vague standard, it has the benefit of being one that is consistent among many other states, which will have a body of authority to assist in its interpretation. We believe the members of the bar may be better served by adoption of the language of the ABA Model Rule.

II. ADVANCE WAIVERS

We speak next to the issue of advance waivers addressed in Comments 14 and 33. We have a general concern regarding the adequacy of any disclosure to a client where the relevant factual circumstances have not yet developed. There will undoubtedly be circumstances where the nature and extent of adversity cannot be fully explained in advance, calling into question the adequacy of the consent and whether it is informed.

The quality of disclosure will of course vary with the nature of the matter and the degree of effort given by the lawyer, as well as the ability to foresee and predict the circumstances that might develop. Some disclosures, as you point out in Comment 33, will involve future facts and circumstances that cannot be known at the time the consent is requested. In this regard, we are troubled that Comment 33 seems to encourage advance waivers when the facts are not known at the time the consent is requested. This is dangerous territory for both attorney and client.

The suggestion in Comment 33 that screening might be appropriate has yet to be endorsed by California courts. We understand that you may get to a rule that permits screening, but we are reluctant to see the Commission legislate new ways of planning around loyalty conflicts that have not been endorsed by the California courts.

Likewise, the suggestion in Comment 33 that the relative sophistication of the client may be a factor raises some troubling issues. Rules or comments that suggest the rule may be interpreted or applied based upon a particular client’s ability to perceive risk creates the possibility of having first class and second class clients – those with lots of litigation experience and others of the unsophisticated “mom and pop” variety. This would require the lawyer (and the disciplinary investigator) to assess the client’s intellect and experience before knowing whether or not a particular disclosure will violate an ethical rule. This could open the door to rules being interpreted and applied differently, rather than providing a uniform standard.

A flexible rule that allows for consideration of client sophistication will make compliance simpler for those who represent major corporations, but far more difficult for those who represent inexperienced individuals. Will this have the potential effect of skewing discipline toward small firms or lawyers who represent the mom and pop type clients, whose waivers will be more difficult to craft? By suggesting such distinctions, you are placing the focus not on the quality of the disclosure, but on the quality of the client. If the Rules tend to distinguish between clients it adds yet another layer of complexity to their interpretation and enforcement. It is potentially an unwieldy standard.

Advance waivers are fraught with risk. The disclosures are difficult to write and even more difficult for clients to understand. While there are certainly circumstances in which an advance waiver might yield an informed consent, we do not think they should be generally encouraged, and words of caution more explicit than those you have stated in the comments should be included.

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.

MEMORANDUM

Date: June 6, 2008

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.16 - Declining or Terminating Representation**

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

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

Comment:

The OCBA believes that the proposed rule should require cause to withdraw only when there is pending litigation or when doing so will prejudice the client's rights. This position was endorsed by *Ramirez v. Sturdevant*, 21 Cal. App. 4th 904, 915 (1994) which stated that "we see no basis in law, or in logic, for a conclusion that an attorney never may withdraw from a case except for cause." Accordingly, we propose adding (b)(11) to the rule, to provide that:

- (11) The lawyer believes in good faith, in a proceeding not pending before a tribunal, that there will be no prejudice to the client's rights if the attorney withdraws, subject to the requirements of (d) and (e).

Paragraph (b)(10) says withdrawal is allowed where "the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." Although the rule's intent appears to be to impose a good cause requirement in cases pending before a tribunal, where the tribunal has no such rule of its own, the wording of the rule – requiring a lawyer to speculate as to what a court would deem good faith, as opposed simply to acting in good faith – sets a standard that will be confusing and challenging for attorneys to follow in practice. Accordingly, we propose changing paragraph (b)(10) to read as follows:

- (10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that other good cause for withdrawal exists, subject to the requirements of paragraphs (c), (d) and (e).

We also believe that there is a discrepancy between paragraph (b)(5) and the Comment regarding optional withdrawal. Paragraph (b)(5) allows withdrawal where “the client breaches an agreement or obligation to the lawyer *as to expenses or fees*, and the lawyer has given the client a reasonable warning...” (emphasis added). However, the Comment does not similarly limit breaches of agreement to fee disputes. It reads: “Paragraph (b)(5) is intended to allow a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, *such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.*” (emphasis added).

We suggest that the provision in the Rule be revised to match the Comment so that paragraph (b)(5) is inclusive as to breaches other than fee agreements. This would not only align the Rule with the Comment, but would align the Rule with the common practice of attorneys to include retainer agreement provisions authorizing the attorney to withdraw if the client fails to adhere to certain non-pecuniary obligations (e.g., to respond to communications in a timely fashion and attend required court hearings).

We suggest that the Rule be revised so that paragraph (b)(5) reads as follows:

the client breaches a material term of the agreement or obligation to the lawyer, including as to expenses or fees, and the lawyer has given the client reasonable advance notice confirmed in writing after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled.

Finally, we have a concern with regard to lawyers who threaten to withdraw and demand unreasonable increases in fees. In this regard, we suggest that you consider cross-referencing the comments in Rule 1.8.1 regarding the modification of fee agreements somewhere in the comments to this rule.

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 1.17.1

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

Agree:

Agree as Modified: **X**

Disagree :

Comments: Modify subdivision (d) to make clear “confidential information” is confidential client information and not general financial information or due diligence information pertaining to the law practice being offered for sale. Comment 10 appears to address this issue but the distinction should be made clear within the body of the Rule.

Name: Cathrine Castaldi

Title: President

Organization: Orange County Bar Association

☒ **Commenting on behalf of an organization**

Address: P.O. Box 6130

City, State, Zip: Newport Beach, CA 92658

Please **write or fax or respond using the Internet** to:

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

Internet: http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90842

DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 1.17.2

Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

Agree:

Agree as Modified: **X**

Disagree :

Comments: Subdivision (a), by not requiring the inclusion of goodwill in a sale, together with subdivisions (3), (9), (10), and (11) thereof, potentially embody within this Rule, a restraint of trade prohibited by Business and Professions Code Section 16601. If practice in an area or field is to be prospectively restrained, the proposed Rule should be modified to require the inclusion of goodwill. Subdivision (a)(8) prohibits compensation to any broker, finder or middleman for the purchase and sale of a geographic area or substantive field of law practice. There appears to be insufficient justification for not permitting the use of a compensated broker in this circumstance Accordingly, the proposed Rule should be modified to delete this prohibition.

Name: Cathrine Castaldi

Title: President

Organization: Orange County Bar Association

☒ **Commenting on behalf of an organization**

Address: P.O. Box 6130

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DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 3.5

Impartiality and Decorum of the Tribunal [5-300, 5-320]

Agree:

Agree as Modified: **X**

Disagree :

Comments: Modify subdivision "c" to clarify whether the reference to "arbitrators" means only court appointed/judicial arbitrators or whether private arbitrators are also within the purview of the Rule.

Name: Cathrine Castaldi

Title: President

Organization: Orange County Bar Association

☒ **Commenting on behalf of an organization**

Address: P.O. Box 6130

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DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 3.10

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

Agree: **X**

Agree as Modified:

Disagree :

Comments: _____

Name: Cathrine Castaldi

Title: President

Organization: Orange County Bar Association

☒ **Commenting on behalf of an organization**

Address: P.O. Box 6130

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DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 4.2

Communication with a Person Represented by Counsel [2-100]

Agree:

Agree as Modified: **X**

Disagree :

Comments: As effected by subdivisions (a) and (b), the substitution of "party" for "person" could arguably be construed as broadening the scope of the Rule without reasonable proffered justification for the change. Accordingly, the Rule should be modified to delete this change. Subdivisions (c) through (g) of the Rule are acceptable as proposed.

Name: Cathrine Castaldi

Title: President

Organization: Orange County Bar Association

☒ **Commenting on behalf of an organization**

Address: P.O. Box 6130

City, State, Zip: Newport Beach, CA 92658

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DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

RULES OF PROFESSIONAL CONDUCT OF STATE BAR OF CALIFORNIA

Please indicate which proposed rule you are commenting on:

Rule 4.3

Dealing with Unrepresented Person [n/a]

Agree: **X**

Agree as Modified:

Disagree :

Comments: _____

Name: Cathrine Castaldi

Title: President

Organization: Orange County Bar Association

☒ **Commenting on behalf of an organization**

Address: P.O. Box 6130

City, State, Zip: Newport Beach, CA 92658

Please write or fax or respond using the Internet to:

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DEADLINE FOR COMMENT: 5:00 P.M. Friday, June 6, 2008

MEMORANDUM

Date: June 6, 2008

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 5.4 – Duty to Avoid Interference with a Lawyer's Professional Independence**

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

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

Comment:

The exception set forth in paragraph (a)(1) of the proposed Rule is ambiguous. The rule needs clarification as to whether or not it is intended to prohibit the payment of a Rule 1.5.1 (2-200) referral fee to the estate (or named beneficiary) of a deceased lawyer pursuant to an otherwise valid referral fee arrangement (which necessarily is made with an outside firm, or a lawyer from an outside firm.) As drafted, because subsection (a)(1) limits the payments to those coming from the deceased lawyer's firm or another lawyer within the firm, it would preclude the deceased lawyer's estate or designated beneficiary from receiving the proceeds of an otherwise lawful referral fee from a different lawyer or firm. Why should such an earned payment of a referral fee be treated any differently than the retirement of a lawyer's partnership interest or stock in his or her law firm?

If referral fees for the bare referral are still to be permitted, then the Committee should consider whether there should be an exception in Rule 5.4 to allow payment of a referral fee to the estate or beneficiary of a deceased lawyer who, but for his or her death, would have been entitled to receive that fee pursuant to an agreement with another lawyer or law firm, appropriately approved by the client. This scenario needs to be addressed either here in Rule 5.4(a) or in Rule 1.5.1 which addresses fee sharing.

It is also uncertain as to what the nature of the "agreement" referred to in Rule 5.4(a)(1) might be, and whether such an agreement is just one that covers "a lawyer's" death, or could also be an agreement that is triggered during the lawyer's lifetime. A helpful clarification would be to change the words "pursuant to an agreement between a lawyer

and either the lawyer's law firm or another lawyer in the firm" to clarify who the lawyer is, and that it is referring to the deceased lawyer, not to an agreement permitting payment to some other strangers.

It needs clarification that the nature of the agreement is one that limits payment to a class of persons who would be the deceased lawyer's estate, trust or heirs.

MEMORANDUM

Date: June 6, 2008

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.7 – Conflicts of Interest: Current Clients**

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

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

COMMENT:

I. DIRECT AND INDIRECT ADVERSITY

We have concerns about the distinction between "direct adversity" as that term is used in the rule, and the concept of indirect adversity which appears only in the comments. We are also concerned about the use of "Client's adversary," a term that appears in the subtitle of subsection (c), but not in the body of the rule. There can be many permutations of what constitutes a client's adversary, yet the proposed rule attempts to limit that context to only one situation.

These concepts, including "direct adversity," "client's adversary," and especially "indirect adversity," are not adequately defined. We believe the average lawyer will have difficulty applying them. Further, the use of the term "Client's Adversary" in the subtitle adds confusion because that term is not used within the text of that rule.

Even an indirect adversity can be severe enough to cause a client to lose confidence in the lawyer. Assume that Client A consults lawyer for assistance in a land use planning matter in which a proposed road will take a particular path that would be injurious to the Client A. The lawyer assists Client A to attempt to persuade the government agency to relocate the road. At the same time, the lawyer's partner represents Client B in seeking entitlements for B's development project nearby. B favors the road taking that path that Client A does not like, because it will bring more traffic to Client B's commercial location. They are different matters. They are different clients. They are not suing each other, yet their goals are in conflict. Each lawyer is negotiating

with the agency for a different route for the same road. Does that make A and B Client Adversaries for purposes of the heading in subsection (c)? Does it make them “directly adverse” for purposes of either subsection (a) or (c), or is it merely indirect?

Comment 6 suggests that because they are not parties in the “same matter” (which is itself indefinite) their adversity would merely be “indirect.” If so, it is not governed by either subsection (a) or (c) which require direct adversity. Would they be considered clients with actually or potentially conflicting interests in a single matter, under subsection (b) because, while they are different projects, the matters both pertain to the same road? They are certainly not joint clients. They are both interested in the same road from different goal orientations. They have a common interest in the road with conflicting goals and they are not working together.

One could posit several conflicting fact patterns within the same scenario, each with differing degrees of adversity. Without going through all possible examples, one must ask: Is this kind of conflicting representation permitted by the rule? The above may be a fact pattern that the members of the Commission could easily discern and apply the rule, thus you may have a quick answer. Our concern is that the average lawyer won’t. The rule needs to be drafted for the average lawyer.

As written, there are uncertainties as to what constitutes a single matter or a different matter, what is directly adverse versus merely indirectly adverse, and when the clients are adversaries. It is not always as simple as one being a plaintiff and the other being a defendant, and competitors may certainly be adverse. Comments 5, 6 and 7 suggest that the poorly defined indirect adversity in many instances is not going to be a conflict at all. However, it is still possible for a client to be harmed even if the adversity is merely indirect. Even the examples you have provided in Comment 7 recognize this risk.

Perhaps the Commission is attempting to draft a rule that will accommodate some types of conflicting representations to minimize the use of disqualification motions as an offensive tool in litigation. While this may be a useful goal, it should not be to the sacrifice of basic notions of loyalty to clients, or create confusion by artificial attempts to define the difference between direct and indirect conflicts.

We believe the proposed rule lacks the certainty necessary to guide the lawyer to ethical decision making, especially with respect to the determination as to whether the adversity is direct or merely indirect. Comment 5 is unhelpful in its warning that there is no single definition for indirect adversity.

Further, because the draft rule deviates significantly from the Model Rule, lawyers seeking to resolve a conflict are denied the guidance they may find in authorities from other states in which the rules have been interpreted. Since discipline is the price paid for violating the rule, these terms should be better defined. If you are going to maintain these distinctions from the Model Rule, we also believe that interpretation of the

proposed rule would be better aided by a series of specific examples of direct and indirect adversity.

We also believe it would be helpful for the Rule to better explain or define the distinctions between the same matter and different matter contexts that are fundamental to Subsections (a), (b) and (c). As may be seen in our example above, the distinction is not always easy to discern.

It is noted that the Commission has stayed away from adopting certain concepts of adversity defined in the Model Rules, such as the standard based upon the lawyer being “materially limited” by a duty owed to other persons. While this too is a vague standard, it has the benefit of being one that is consistent among many other states, which will have a body of authority to assist in its interpretation. We believe the members of the bar may be better served by adoption of the language of the ABA Model Rule.

II. ADVANCE WAIVERS

We speak next to the issue of advance waivers addressed in Comments 14 and 33. We have a general concern regarding the adequacy of any disclosure to a client where the relevant factual circumstances have not yet developed. There will undoubtedly be circumstances where the nature and extent of adversity cannot be fully explained in advance, calling into question the adequacy of the consent and whether it is informed.

The quality of disclosure will of course vary with the nature of the matter and the degree of effort given by the lawyer, as well as the ability to foresee and predict the circumstances that might develop. Some disclosures, as you point out in Comment 33, will involve future facts and circumstances that cannot be known at the time the consent is requested. In this regard, we are troubled that Comment 33 seems to encourage advance waivers when the facts are not known at the time the consent is requested. This is dangerous territory for both attorney and client.

The suggestion in Comment 33 that screening might be appropriate has yet to be endorsed by California courts. We understand that you may get to a rule that permits screening, but we are reluctant to see the Commission legislate new ways of planning around loyalty conflicts that have not been endorsed by the California courts.

Likewise, the suggestion in Comment 33 that the relative sophistication of the client may be a factor raises some troubling issues. Rules or comments that suggest the rule may be interpreted or applied based upon a particular client’s ability to perceive risk creates the possibility of having first class and second class clients – those with lots of litigation experience and others of the unsophisticated “mom and pop” variety. This would require the lawyer (and the disciplinary investigator) to assess the client’s intellect and experience before knowing whether or not a particular disclosure will violate an ethical rule. This could open the door to rules being interpreted and applied differently, rather than providing a uniform standard.

A flexible rule that allows for consideration of client sophistication will make compliance simpler for those who represent major corporations, but far more difficult for those who represent inexperienced individuals. Will this have the potential effect of skewing discipline toward small firms or lawyers who represent the mom and pop type clients, whose waivers will be more difficult to craft? By suggesting such distinctions, you are placing the focus not on the quality of the disclosure, but on the quality of the client. If the Rules tend to distinguish between clients it adds yet another layer of complexity to their interpretation and enforcement. It is potentially an unwieldy standard.

Advance waivers are fraught with risk. The disclosures are difficult to write and even more difficult for clients to understand. While there are certainly circumstances in which an advance waiver might yield an informed consent, we do not think they should be generally encouraged, and words of caution more explicit than those you have stated in the comments should be included.



THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

June 6, 2008

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

Re: Proposed Rule 1.7

Dear Mr. Sondheim:

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

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

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

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

Harry Sondheim
June 6, 2008
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case, relate to a conflict arising from a lawyer's fiduciary duties to a **non-client**. Including this concept under the "representation of a client" section of the rule, which requires informed consent of both "clients," creates confusion, since the use of the term "client" ordinarily implies an attorney client relationship.

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

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

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

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

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

Thank you for your consideration of our comments.

Very truly yours,



Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

ATT2 - 501

June 6, 2008

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By Facsimile and U.S. Mail

The State Bar of California
Commission for the Revision
of the Rules of Professional Conduct
180 Howard Street
San Francisco, CA 94105

RE: Draft California Rule of Professional Conduct 1.7, Comment 33
(Advance Waivers of Conflicts of Interest)

Dear Rules Revision Commission:

We support draft California Rule of Professional Conduct 1.7, Comment 33, regarding advance waivers of conflicts of interest. We support the draft Comment for the following reasons:

- (1) The Comment recognizes and permits as ethical advance waivers of conflicts of interest.
- (2) The Comment provides certainty and guidance to tens of thousands of California State Bar members who use, or work in law firms that use, advance waivers of conflicts of interest with their clients.
- (3) Advance waivers of conflicts of interest are used regularly in modern law practice, especially by medium and large law firms. A 2007 survey of AmLaw 200 law firms reports that 64% of such firms include advance waivers of conflicts as part of their standard engagement letter. (See "2007 Law Firm Risk Management Survey," IntApp, Inc.)
- (4) Advance waivers of conflicts of interest permit access to counsel of choice for clients.
- (5) The draft Comment applies to advance waivers all the client protections found in Draft Rule 1.7 (Conflict of Interest: Current Clients) concerning waivers of current conflicts. The draft Comment thus provides client protection to the same extent, regarding advance waivers of future conflicts, as it does concerning waivers of current conflicts.

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Commission for the Revision of the Rules of Professional Conduct
June 6, 2008
Page Two

Thank you for this opportunity to provide comment on draft Comment 33. Additionally, we appreciate and thank the Commission for permitting us to appear at Commission meetings to offer our comments on this draft Comment as it was developed by the Commission.

Respectfully,

A handwritten signature in black ink, reading "Douglas C. Hendricks". The signature is written in a cursive, flowing style.

Douglas C. Hendricks
Associate General Counsel
Morrison & Foerster LLP



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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":

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 comply 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

Peter Keane
Dean Emeritus and Professor of Law, Golden Gate University School of Law

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Fred Zacharias (as to sections 1, 3 and 4 only)
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Richard Zitrin
Adjunct Professor of Law, UC Hastings College of the Law; Founding Director, University of San Francisco School of Law Center for Applied Legal Ethics (now Center for Law and Ethics); senior author Legal Ethics in the Practice of Law (ethics textbook) and Legal Ethics: Rules, Statutes and Comparisons (2008 ed.)



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: JUNE 6, 2008

Your Information

Professional Affiliation  Law Office of Carol M. Langford

Commenting on behalf of an organization 

☐ Yes

☒ No

* Name Carol M. Langford

* City Walnut Creek

* State California 

* Email address langford@usfca.edu
(You will receive a copy of your comment submission.)

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

Rule 1.7 Conflict of Interest: Current Clients [3-310] 

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

☐ AGREE with this proposed Rule

☒ DISAGREE with this proposed Rule

☐ AGREE ONLY IF MODIFIED

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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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C-2008-245 Carol M. Langford [1.7]

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Comment on Proposed Rule 1.7: Conflict of Interest: Current Clients

The following is a comment on proposed rule 1.7 pertaining to conflicts of interest. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also Chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

My comment explains how proposed rule 1.7 directly contradicts well-established California case law and the fundamental notions of the attorney-client privilege. My comment concludes by suggesting a solution to this direct conflict that would avoid undesirable or unintended interpretations of the proposed rule.

Proposed rule 1.7 states: “A lawyer shall not accept or continue representation of a client in a matter in which the lawyer’s representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, without informed written consent from each client.” By specifying that the lawyer’s representation of the first client be directly adverse *in that matter*, the proposed rule suggests that the attorney’s continued representation turns on the nature of the cases involved. If the first case is related to the second, then the interests would be adverse in that matter and the lawyer would need consent. But if the cases were unrelated, then the interests would not be adverse in that matter and the lawyer need not obtain consent. For example, an attorney is representing A (A v. B) in a breach of contract case. While the

suit is pending, B asks the attorney to represent him in an unrelated tort case (B v. X). Here, the interests between the two clients are directly adverse (A v. B), but not in *that matter* (B v. X). Thus the proposed rule would not require the lawyer to obtain consent before agreeing to represent B.

However, the current California Rules and well-established California case law expressly prohibit such a situation. The California Supreme Court has held that even where simultaneous representations are wholly unrelated and there is no possibility of breach of confidentiality, disqualification is required in all but a few cases. Flatt v. Superior Court, 9 Cal. 4th 275, 284-285 (1994). Essentially, this is a holding that an attorney cannot represent a client against another current client without informed consent. Id. at 284-286.

In Truck Ins. Exchange v. Fireman's Fund Ins. Co., 6 Cal. App. 4th 1050, 1055-1056 (1st Dist. 1992), an attorney was representing Fireman's Fund Insurance Company (FFIC) in a wrongful termination suit. While this suit was pending, Truck Insurance Exchange asked the same attorney to represent it against FFIC in an unrelated indemnification suit. In interpreting rule 3-310 of the California Rules of Professional Conduct, the court held that the attorney could not concurrently represent clients whose interests conflicted without obtaining informed consent. Id. at 1056. In Jeffrey v. Pounds, 67 Cal. App. 3d 6, 9-10 (3d Dist. 1977), the court held that an attorney representing a client in a personal injury case could not concurrently represent the client's wife in divorce proceedings (without informed consent).

Some argue that an ethical screen can overcome the problems inherent in representing a client who is directly adverse to another client. However, California courts

have expressly rejected that notion. Courts have held that the central concern in concurrent representation conflicts is the attorney's duty of undivided loyalty, rather than the duty of confidentiality. Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 822 (N.D.Cal. 2004). Since an ethical screen is aimed at preserving the duty of confidentiality, it can "do nothing to mitigate conflict arising from concurrent adverse client relationships." Id. The purpose of the prohibition on concurrent representation without consent is to "maintain the public confidence in the legal profession by assuring existing clients that they will have the undivided loyalty of their lawyers." Cal. Practice Guide: Professional Responsibility (The Rutter Group 2007) ¶ 4:36.

Allowing an attorney to represent an adverse client without obtaining consent may be an unintended consequence of the proposed rule. Comment four of proposed rule 1.7 states: "[T]he duty of undivided loyalty means that, without the informed written consent of each affected client, a lawyer may not act as an advocate or counselor in a matter against a person or organization the lawyer represents in another matter, even when the matters are wholly unrelated." This comment is in line with California case law, suggesting that it would be improper for an attorney to represent adverse clients without their consent. However, due to the manner in which the proposed rule is currently drafted, it could be interpreted to allow just the opposite. Therefore, the language of proposed rule 1.7(a) should be changed to become consistent with California case law and proposed comment four.

There seems to be a simple solution to this undesirable interpretation of the proposed rule. I agree with Richard Zitrin that the three clauses using the "in that matter" language should be eliminated from the proposed rule. The proposed rule would then

read: “A lawyer shall not accept or continue representation of a client [where] the lawyer’s representation of that client will be directly adverse to another client the lawyer currently represents, without informed written consent from each client.” This would require an attorney to obtain informed consent before representing someone whose interests would conflict with a current client *in any matter*, even if unrelated.

In addition, comment four of the proposed rule should include guidelines as to how thorough the informed consent would have to be. The attorney should be required to fully explain to his clients the reasonably foreseeable adverse consequences of concurrent adverse representation, in sufficient detail to make the consent truly informed.



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

To: Rules Revision Commission

From: Margaret G. Lodise, Chair, Ethics Subcommittee of the Trusts & Estates Section Executive Committee

Date: June 6, 2008

Re: Public Comment to Proposed New Rule 1.7 (Former 3-310)

Proposed new Rule 1.7 (former 3-310) proposes to require disqualification where an attorney represents a client in a matter directly adverse to another client without tying the disqualification to the possession of confidential information relevant to the new matter. The Trusts & Estates Section believes this change to the rule potentially severely impacts estate planners, who may do planning for a client, completely unrelated to other work for that client, and place their firms into a conflict position merely by the representation of the individual without access to any information which is in any way confidential or material to the new representation. Moreover, in a non-litigation situation, it may be extremely difficult to even determine whether a new representation is adverse. The prior rule, which allows a showing that no material confidential information was exchanged, allows this situation to be dealt with by allowing an attorney to continue representation so long as no confidential information would be affected. Thus, the old rule offers a bright line test more easily followed than a rule referring only to directly adverse representation in situations where there is no litigation, a situation frequently encountered by trusts and estates attorneys. As additional rules are being discussed and circulated later (Rules 1.9 and 1.18) the Trusts & Estates Section requests that consideration be given to the unique role of estate planners as non-litigating parties.

The Trust & Estates Section further notes that the prior version of the rule contained a comment relating to the situation of reciprocal will for a husband and wife or of representation in an antenuptial agreement as situations where a potential conflict might exist. The current version deletes this example. The Trusts & Estates Section believes the example was useful and should be returned to the comments.

DISCLAIMER

This position is only that of the TRUSTS & ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

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June 17, 2008

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

RE: Rule 1.7 - Conflicts of Interests: Current Clients [3-310]

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has the following comments on Proposed Rule 1.7:

After considerable debate and analysis, we support the recommendation of Professor David McGowan:¹

(a) Representation directly adverse to current client. A lawyer shall not accept or continue representation of a client without informed written consent from each client if the lawyer's representation of that client will be directly adverse to another client the lawyer currently represents.

We suggest that this articulation of "a" makes "b" unnecessary. In terms of "c," we suggest:

(c) A lawyer shall not accept the representation of a client if that client has a dispute with another of the lawyer's clients, unless the lawyer's representation of each client concerns matters other than those which are the subject of the dispute.

We believe that "d" is well drafted.

Comments [5], [6], and [7]:

We as a group are having difficulty with comments [5], [6], and [7]. We believe it would be easier to understand if the exception to direct was explained, rather than the numerous

¹ Professor at the University of San Diego School of Law from legalethicsforum.com. To locate his analysis, search that webpage with the search term: "1.7." This was originally posted on April 7, 2008.

comments which attempt to define what is "direct." We believe it would be easier if positional and business interest conflicts were specifically considered in these comments.

Therefore, we respectfully request that you return to the drafting table, and eliminate existing 5,6, and 7, and suggest that the comment should focus on what is excluded from the scope of the rule, rather than attempt to define "direct adversity."

Comment 20:

One of the original obligations the Rule Revision Commission was to attempt to reconcile the California rules with the ABA Model Rules.

Our Committee supports the adoption of the Model Rule, which has been adopted in many states which merely require a "written confirmation," not a written consent from a client.

Comment 23:

The Committee is concerned that this comment buries a potential conflict that could exist among related attorneys. We believe that another rule (1.10) could address the imputed comment issues. It is possible that this comment is only intended as a side reference.

Comments [27] and [28]:

We would appreciate if the section on prohibited representations be placed at an earlier point in the comments, closer to the top of the comment section.

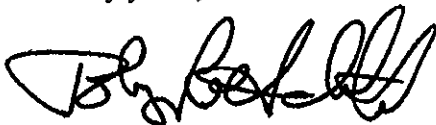
Comment 33:

We believe that the third sentence of that comment, which states that an advance consent can comply with this Rule, even where the lawyer cannot provide all the information and explanation is both contradictory and ambiguous. Therefore, we suggest striking it.

Conclusion:

We all join in thanking you for the remarkable work that you are all doing, and for the opportunity to comment.

Sincerely yours,



Toby J. Rothschild, Chair
Professional Responsibility and Ethics Committee

cc: Gretchen M Nelson, President
LACBA PREC Members



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

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.

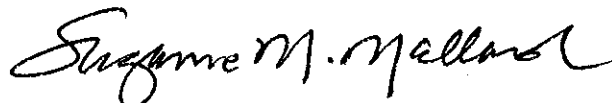
Third, in proposed Comment [7], we feel that using the term "criminal defendant" would make more sense than "criminal defense client." This is because there could be witnesses called by a lawyer that might be criminal defense clients in other cases, but the "narrative" approach is only available to the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

A handwritten signature in black ink, reading "Suzanne M. Mellard". The signature is fluid and cursive, with the first name "Suzanne" being more prominent and the last name "Mellard" following in a similar style.

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

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.

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 cite 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 *Schaeffer* 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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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.

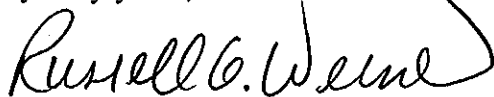
4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by 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
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 [☒] 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 [☒]

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 needed 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 deletes 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."

It 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 ☒

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 ☒ 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.

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

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.

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**.

Attachment 

file: [3.3 final.pdf \(284k\)](#)

Attachment 

Attachment 

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☐ 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.



CPDA

California Public Defenders Association
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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

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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. Cronin* (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 misled 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-

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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."

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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.

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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 than 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.

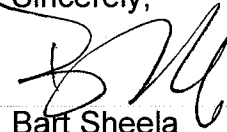
Sentence three tilts too far toward an objective-only standard and will unduly chill "[d]efense counsel's obligation ... 'to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.' " *People v. Bolton* (2008) 166 Cal.App.4th 343, 357 (quoting 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."

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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,

A handwritten signature in black ink, appearing to read 'B Sheela', written over a horizontal line.

Bart Sheela
President,
California Public Defenders Association

OFFICE USE ONLY.

* Date 10/23/2009 	Period PC 	File : D-2009-277b California Public Defenders Association [3.3].pdf
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MICHAEL P. JUDGE
PUBLIC DEFENDER

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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.

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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

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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 inculcate 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."

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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 entirety, 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 inadmissible as evidence in a trial. I believe comment (5) should be restored.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Judge", with a stylized flourish at the end.

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF 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

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 3.3 – 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
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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 3.3 – Candor Toward the Tribunal

Dear Ms. Hollins:

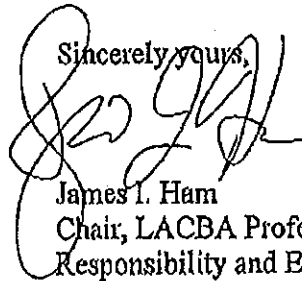
The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) supports Proposed Rule 3.3 with the various changes to the proposed rule and comments suggested by a majority of the Rules Revision Commission with the following comments and suggestions:

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.

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

Sincerely yours,

A handwritten signature in black ink, appearing to read "James L. Ham", written over the typed name and title.

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