

## ATTACHMENT 2

Full Text of the Public Comments  
Received on the Batch 6 Proposed Rules



## Rule 1.0.1 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380a SDCBA [1.0.1]

F-2010-381a Sandra McIntyre [1.0.1]

F-2010-382a SCCBA [1.0.1]

F-2010-385a OCBA [1.0.1]

F-2010-392a State Bar OCTC [1.0.1]

F-2010-397a COPRAC [1.0.1]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

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\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

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Online

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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**Conference 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 6)**

**Dear Ms. Hollins:**

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 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,

**Patrick L. Hosey, President  
San Diego County Bar Association**

**Enclosures**

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

LEC Rule Volunteer Name(s): Dave McGowan

**Old Rule No./Title: Part of 1-100**

**Proposed New Rule No./ Title: 1.0.1 "Terminology"**

(1) Well, sort of. These are the definitions. It is a good idea to have definitions. Whether you agree with particular ones is a different question.

(5) There are 14 defined terms. Most are not objectionable. A good one is the definition of confidential information, which tracks the Restatement definition and does away with the pretense that anyone understands the actual language of 6068(e). The various definitions of "reasonable" are circular and vacuous but that is not the commission's fault.

More questionable is the definition of a tribunal, which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. The difference is supposed to matter because free speech concerns are present in the latter situation but not the former. That premise is silly but its silliness may not matter much.

The bite to the definition is supposed to come in Rule 3.3, candor to the tribunal, but that rule is toothless. Sure, it says you can't lie to tribunals, but the bite to the rule came from remedial obligations to correct false testimony and statements. Under the Model Rules that obligation trumps the duty of confidentiality. Our commission reverses the trump, so if you client perjures herself before a tribunal you get to remonstrate with the client, wring your hands, and say nothing. Given that you could not straighten out a court it seems less important that you could not straighten out a mediator.

I would be inclined to favor a broader definition keyed to a more practical question: whom do we not want lawyers to lie to? But given the watering down of Rule 3.3 I do not think much turns on this and we've already had our whack at the confidentiality issue. I would just approve it and keep transaction costs down.

**CONCLUSION:** We approve the new rule in its entirety. (However, please see comments above.)

---

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

~~**Old Rule No./Title: CRPC 3-410 Disclosure of Professional Liability Insurance**~~

~~**Proposed New Rule No./ Title: CRPC 1.4.1 Disclosure of Professional Liability Insurance**~~

~~(5) First, please consider recently enacted CRPC 3-410. The issue of malpractice insurance disclosure has been the subject of State Bar consideration, as well as legislative activity within the State Bar Act, for decades. In 2005, the State Bar formed the Disclosure Task Force, which after a spirited and eventful analysis by the Board of Governors between 2006 and 2007, resulted in the text of CRPC 3-410. That rule was adopted by the California Supreme Court by order dated August 26, 2009, to be effective January 1, 2010.~~



# THE STATE BAR OF CALIFORNIA

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Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

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

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[Rule 1.11 \[n/a\]](#)

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[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

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[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.

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\* Date

02/19/2010 

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File :

F-2010-381a Sandra McIntyre [1.0.1].pdf

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# 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.)

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

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.

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\* Date

03/01/2010



Period

PC



File :

F-2010-382a SCCBA [1.0.1]

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\* Required



**ORANGE COUNTY BAR ASSOCIATION**

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OC TRIAL LAWYERS ASSOC.  
OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

- Rule 1.0.1 Terminology [1-100]
- Rule 1.4.1 Insurance Disclosure [3-410]
- Rule 1.11 Special Conflicts for Government Employees [N/A]
- Rule 1.17 Sale of a Law Practice [2-300]
- Rule 1.18 Duties to Prospective Client [N/A]
- Rule 3.9 Non-adjudicative Proceedings [N/A]
- Rule 4.1 Truthfulness in Statements to Others [N/A]
- Rule 4.4 Respect for Rights of 3rd Persons [N/A]
- Rule 6.1 Voluntary Pro Bono Service [N/A]
- Rule 6.2 Accepting Appointments [N/A]
- Rule 6.5 Limited Legal Services Programs [1-650]
- Rule 8.2 Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 1.0.1 -- Terminology**

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 and Ethics Committee.

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

The OCBA endorses the adoption of proposed Rule 1.0.1, with the following exceptions:

The Model Rule's definition of "Screened" contains the language, "...the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are **reasonably** adequate under the circumstances..." (emphasis added). The Commission proposes removing the word "reasonably," which the OCBA opposes. While the Commission expressed that "the removal of 'reasonably' is intended to avoid the suggestion that half-way measures will suffice," the OCBA believes that there is little risk members of the Bar will interpret the word "reasonably" as authorizing "half-way" measures. Rather, the OCBA believes the greater risk is that removal of "reasonably" from the definition of screening will create a strict liability rule in a context where "adequate" – which would be the only standard remaining – is not even defined. Moreover, the Commission does not appear to have considered whether there is or should be a distinction between "adequate" screening procedures in a large firm versus a small firm.

In (new) Comment [1], the Commission proposes adding that "A sole proprietorship is a law firm for purposes of these Rules." However, because a sole proprietorship already is included in the definition of a "law firm" under paragraph (c), it is unnecessary to include the proposed language in Comment [1]. Moreover, the heading to Comment [1] should read "Law Firm" instead of "Firm" in order to be consistent with the Commission's expressed preference for the former term.

The OCBA proposes revising Comment [2] to generally clarify that the relationship between the attorney and the law firm depends upon the circumstances, rather than the attorney's title. Accordingly, the OCBA recommends against singling out the title "Of Counsel" to the

exclusion of other, similar titles, like "Special Counsel," "Senior Counsel," and "Special Partner." The OCBA also recommends that the substance of this provision (whether revised to encompass additional "alternative" titles or not) be incorporated into a Rule rather than into a Comment because it bears upon the substance of the definition of "law firm."

Finally, the OCBA recommends deleting Comment [9], which contains substantive guidance regarding screening procedures. This guidance, if it is to be given, properly belongs either in one or more substantive Rules related to screening, or in the Comment(s) to those Rules, not in a Comment to a definition, where it is less likely to be seen by lawyers searching for substantive rules regarding screening.



**THE STATE BAR OF  
CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

**OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT**

Russell G. Weiner, Interim Chief Trial Counsel

TELEPHONE: (415) 538-2000

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DIRECT DIAL: (415) 538-2063

March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**Rule 1.0.1 Terminology/Definitions.**

1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.
2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] – [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.
3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.

4. It is confusing to have comments which simply define terms. For example, Comment 2 discusses the term "of counsel;" if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments 1, 3, 4, 5, 11 and 12 are so general as to provide no meaningful assistance.
5. Comments 6 - 10 attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees with these Comments but suggests that they belong in the rules involving conflicts, not here.

~~**Rule 1.11 Special conflicts of interest for Former and Current Government Officers and Employees.**~~

- ~~1. Paragraph (a) is incomplete and confusing. Business and Professions Code section 6131 prohibits a former prosecutor from representing or receiving valuable consideration from a defendant he or she formerly prosecuted. Unlike paragraph (a) of proposed rule 1.11, section 6131 does not permit the government agency to waive this conflict. In OCTC's opinion, the rule must be harmonized with section 6131 regarding the waiver issue.  
  
Paragraph (b) prohibits an attorney in a firm from "knowingly" undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened, is apportioned no part of the fee, and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the rule. OCTC agrees with the Commission minority view that use of the term "knowingly" would inappropriately immunize attorneys who do not bother to check for conflicts. The Commission minority suggests using the term "knows or reasonably should know;" this appears to be the correct standard, and OCTC supports the use of this language.~~
- ~~2. OCTC does not object to the concept contained in paragraph (c), but suggests that the Commission might want to tighten the language.~~
- ~~3. Paragraph (d)(2)(ii), prohibiting government officers and employees from negotiating for private employment, might be too broad. For example, read literally, it would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.~~
- ~~4. OCTC notes that paragraph (e) has no comparable provision in the ABA rules. While OCTC understands the intent is to screen the conflicted attorneys, this creates a rule which could negatively impact government agencies' ability to handle matters. Further, there is the issue of when disclosure must occur. This could impact the government's ability to conduct investigations without advising their targets. While the Commission appears to be trying to accommodate this concern by including language that notice to the former client is not required if prohibited by law or a court order, this language is probably inadequate to cover all situations. Overall, this provision is problematic.~~
- ~~5. Paragraph (f) unnecessarily repeats the definition used in proposed rule 1.1(e).~~
- ~~6. As a general observation, there are too many comments and most do not appear to serve any purpose. For example, comments 1-5, 7-9, 9C, and 10 explain in general terms the purpose of the rule and screening. They seem unnecessary given the language of the rule itself. Comment 9B has some value, but it provides no real guidance as to when the entire office should be disqualified.~~



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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 1.0.1

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 1.0.1 and offers the following comments.

COPRAC supports Rule 1.0.1, subject to the following comments with respect to the terms "Informed Consent," "Screened" and "Law Firm":

"INFORMED CONSENT":

Paragraph (e) [definition of "Informed Consent"]: COPRAC objects to the requirement in this paragraph that, for consent to be informed, the lawyer must communicate (among other things) the "reasonably available alternatives to the proposed course of conduct." No such communication is required under the current California rules with respect to informed consent or informed written consent, nor is such communication generally necessary for consent to be informed. For example, in connection with the engagement by a prospective new client where such engagement would result in a conflict of interest for the attorney, the proposed course of conduct is the engagement of the conflicted attorney, and the reasonably available alternative is so obvious it need not be communicated – namely, not engaging the conflicted attorney. Failure to communicate such information should not form the basis for discipline. COPRAC therefore recommends deleting this requirement from the definition of "Informed Consent." If there are instances in the rules where communication of such

reasonably available alternatives is appropriate, the requirement for such communication should be added in such relevant rules.

“SCREENED”:

Paragraph (k) [definition of “Screened”]: COPRAC disagrees with the deletion of “reasonably” from the Model Rule (as in “the timely imposition of procedures within a firm that are *reasonably* adequate under the circumstances to (i) to protect information . . .”). Firms should be entitled to rely on their reasonably imposed procedures, and not be held to a strict liability standard (judged after the fact) as to whether the procedures in fact proved to be adequate. Contrary to the suggestion contained in the Explanation of Changes to paragraph (k), “half-way measures” should never be sufficient anyway because they are not “reasonably adequate.”

Comment [8]: This comment refers to a “personally *disqualified* lawyer.” Because the rules relate to discipline, we recommend conforming this term to the more preferred “personally prohibited lawyer,” or for more clarity: “lawyer who is personally prohibited with respect to a matter.”

Comment [9]: The use of the term “screened lawyer” in this comment is imprecise and possibly confusing. We recommend revising the language of this comment to clarify whether it applies to the lawyer in possession of confidential information, all other lawyers in the law firm on the other side of such screen, or both. We further recommend that the language in the last sentence of this comment be revised to clarify which files or other materials will be subject to restricted access by reference to the appropriately screened lawyer or lawyers.

“LAW FIRM”:

Comment [1]: COPRAC disagrees with the deletion of the last sentence from the corresponding comment to the Model Rule. We believe that sentence adds textual clarity to the prior sentence and makes a very important point: namely, a group of lawyers may constitute a law firm for purposes of one rule, but not a law firm for purposes of another rule. We further believe that the commentary for the definition of the term “law firm” is the appropriate place to make this important point. To make this point more clearly, however, COPRAC recommends revising the current last sentence of this proposed comment, by adding language to the end thereof so that it would read as follows:

“Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved, and to recognize that a group of lawyers could be regarded as a law firm for purposes of one rule but such same group of lawyers might not be regarded as a law firm for purposes of another rule.”

Finally, we note (and agree with) the Commission’s stated intention to use the single term “law firm,” and to drop the reference to “firm” [see last sentence in the Explanation of Changes to paragraph (c) of the rule]. Consistent with such approach, COPRAC

recommends (1) using the term “law firm” consistently throughout the rules and commentary (e.g., the use of the term “firm” in the definition of “Screened” should be conformed), (2) changing the subheading in the commentary above Comment [1] from “Firm” to “Law Firm,” and (3) rearranging the definitions such that the definition of “Law Firm” is correctly placed alphabetically after the definition of “Knowingly.”

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

## Rule 1.4.1 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380b SDCBA [1.4.1]

F-2010-381b Sandra McIntyre [1.4.1]

F-2010-382b SCCBA [1.4.1]

F-2010-385b OCBA [1.4.1]

F-2010-397b COPRAC [1.4.1]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

---

\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

**2010 Board of Directors**

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Wells B. Lyman

**Conference 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 6)**

**Dear Ms. Hollins:**

**On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,**

**Patrick L. Hosey, President  
San Diego County Bar Association**

**Enclosures**

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~LEC Rule Volunteer Name(s): Dave McGowan~~

~~Old Rule No./Title: Part of 1-100~~

~~Proposed New Rule No./ Title: 1.0.1 "Terminology"~~

~~(1) Well, sort of. These are the definitions. It is a good idea to have definitions. Whether you agree with particular ones is a different question.~~

~~(5) There are 14 defined terms. Most are not objectionable. A good one is the definition of confidential information, which tracks the Restatement definition and does away with the pretense that anyone understands the actual language of 6068(e). The various definitions of "reasonable" are circular and vacuous but that is not the commission's fault.~~

~~More questionable is the definition of a tribunal, which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. The difference is supposed to matter because free speech concerns are present in the latter situation but not the former. That premise is silly but its silliness may not matter much.~~

~~The bite to the definition is supposed to come in Rule 3.3, candor to the tribunal, but that rule is toothless. Sure, it says you can't lie to tribunals, but the bite to the rule came from remedial obligations to correct false testimony and statements. Under the Model Rules that obligation trumps the duty of confidentiality. Our commission reverses the trump, so if you client perjures herself before a tribunal you get to remonstrate with the client, wring your hands, and say nothing. Given that you could not straighten out a court it seems less important that you could not straighten out a mediator.~~

~~I would be inclined to favor a broader definition keyed to a more practical question: whom do we not want lawyers to lie to? But given the watering down of Rule 3.3 I do not think much turns on this and we've already had our whack at the confidentiality issue. I would just approve it and keep transaction costs down.~~

~~**CONCLUSION:** We approve the new rule in its entirety. (However, please see comments above.)~~

---

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

**Old Rule No./Title: CRPC 3-410 Disclosure of Professional Liability Insurance**

**Proposed New Rule No./ Title: CRPC 1.4.1 Disclosure of Professional Liability Insurance**

(5) First, please consider recently-enacted CRPC 3-410. The issue of malpractice insurance disclosure has been the subject of State Bar consideration, as well as legislative activity within the State Bar Act, for decades. In 2005, the State Bar formed the Disclosure Task Force, which after a spirited and eventful analysis by the Board of Governors between 2006 and 2007, resulted in the text of CRPC 3-410. That rule was adopted by the California Supreme Court by order dated August 26, 2009, to be effective January 1, 2010.

In sum, present Rule 3-410 requires written disclosure where a lawyer does *not* carry professional liability insurance. It exempts government lawyers and in-house counsel, and legal services rendered in an emergency.

Proposed Rule 1.4.1 proposes adoption of existing Rule 3-410 with a single, substantive change. Added to the engagements excluded from written disclosure (i.e., of *the lack of* professional liability insurance coverage) is “a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.” This exception is intended to encourage acceptance of such appointments, and applies in a setting where customarily the client is not in a position to be “shopping” for legal services, such that the disclosure is likely to be of little moment, an appointee being atypical of legal-service consumers.

As a practical matter, the title of the proposed rule continues a sort of misnomer, in speaking to “Disclosure of Professional Liability Insurance,” when in fact disclosure by its terms is triggered not by professional liability insurance, but rather the absence of such. However, inasmuch as this issue did not trouble the California Supreme Court in its August order, the text has been exhaustively considered and the matter does not appear to be one which would provoke material confusion, I suggest our Committee defer.

The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted, hence opponents (if any) have had their opportunity to be heard on the issues, (2) adoption came after lengthy, deliberate and at times contentious consideration by the State Bar, and has since been approved by the California Supreme Court, and (3) the addition of an excepted class is modest, is of limited application, and premised on sensible, worthy considerations.

**CONCLUSION:** We approve the new rule in its entirety.

---

~~LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)~~

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

~~Proposed New Rule No./ Title: 1.11 “Special Conflicts of Interest for Former and Current Government Officers and Employees”~~

~~(5) Proposed Rule 1.11 addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule’s topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4<sup>th</sup> 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App. 4<sup>th</sup> 17.~~

~~The Commission deemed Proposed Rule 1.11 “Moderately Controversial” because the proposed Rule departs from the Model Rule by requiring, pursuant to California case law, that a government lawyer’s disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the prohibited lawyer is~~



# THE STATE BAR OF CALIFORNIA

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*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

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

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

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

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\* Date

02/19/2010 

Period

PC

File :

F-2010-381b Sandra McIntyre [1.4.1]

Commented On:

Specify:

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\* Required



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

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\* Name

\* City

\* State

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[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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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\* Date

03/01/2010 

Period

PC

File :

F-2010-382b SCCBA [1.4.1]

Commented On:

Specify:

Submitted via:

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\* Required



**ORANGE COUNTY  
BAR ASSOCIATION**

**PRESIDENT**

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OC CHAPTER

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J. REUBEN CLARK LAW SOCIETY

LUX ROMANA

OC ASIAN AMERICAN BAR

OC DISTRICT PUBLIC DEFENDERS

OC TRIAL LAWYERS ASSOC.

OC WOMEN LAWYERS ASSOC.

March 9, 2010

Audrey Hollins

Office of Professional Competence, Planning and Development

The State Bar of California

180 Howard Street

San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 1.4.1 – Disclosure of Professional Liability Insurance**

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 and Ethics Committee.

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

Proposed Rule 1.4.1 is substantively identical to current Rule 3-410, which only went into effect January 1, 2010, and also to Model Rule 1.4.1. Like Rule 3-410 and Model Rule 1.4.1, it requires lawyers to disclose to new clients if they do not have professional liability insurance and, similarly, to disclose to existing clients within 30 days if their insurance lapses. The only changes the Commission proposes to Model Rule 1.4.1 are minor, non-substantive changes to conform the Rule's language to similar language in other California rules (*e.g.*, changing "member" to "lawyer") and one substantive change to provide a limited exemption for court-appointed lawyers similar to the exemption provided to government lawyers and in-house counsel.

The OCBA generally supports the adoption of proposed Rule 1.4.1 and agrees with the recommendations of the Commission. The only change the OCBA suggests is the insertion of the word "reasonably" into the first sentence of Section (a), so that it reads: A lawyer who knows or reasonably should know that he or she does not have professional liability insurance...."



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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 1.4.1

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 1.4.1 and supports the adoption of proposed Rule 1.4.1.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

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

cc: Members, COPRAC

## Rule 1.8.4 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-381g Sandra McIntyre [1.8.4]

F-2010-382c SCCBA [1.8.4]



# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

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\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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\* Name

\* City

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[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

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[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

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[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.

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\* Date

02/19/2010 

Period

PC

File :

F-2010-381g Sandra McIntyre [1.8.4]

Commented On:

Specify:

Submitted via:

Online

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\* Required



# THE STATE BAR OF CALIFORNIA

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Professional Affiliation

Commenting on behalf of an organization

- Yes  
 No

\* Name

\* City

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- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</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.**

We support the Rules Revision Commission proposed recommendation to not adopt Rule 1.8.4.

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\* Date

03/01/2010 

Period

PC

File :

F-2010-382c SCCBA [1.8.4]

Commented On:

Specify:

Submitted via:

Online

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\* Required

## Rule 1.8.9 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-381h Sandra McIntyre [1.8.9]

F-2010-382d SCCBA [1.8.9]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

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I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

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File :

F-2010-378 Esther [multiple].pdf

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File :

F-2010-381h Sandra McIntyre [1.8.9]

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\* Required



# THE STATE BAR OF CALIFORNIA

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 AGREE ONLY IF MODIFIED

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

We support the Rules Revision Commission recommendation to not adopt this rule.

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\* Date

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File :

F-2010-382d SCCBA [1.8.9]

Commented On:

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\* Required

## Rule 1.11 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380c SDCBA [1.11]

F-2010-381i Sandra McIntyre [1.11]

F-2010-382e SCCBA [1.11]

F-2010-385c OCBA [1.11]

F-2010-392b State Bar OCTC [1.11]

F-2010-396a US Attorney's Office [1.11]

F-2010-397c COPRAC [1.11]



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Commenting on behalf of an organization

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\* Name

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[Rule 7.6](#)

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[Rule 6.1 \[n/a\]](#)

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PC

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F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

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**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

**2010 Board of Directors**

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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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~In sum, present Rule 3-410 requires written disclosure where a lawyer does not carry professional liability insurance. It exempts government lawyers and in-house counsel, and legal services rendered in an emergency.~~

~~Proposed Rule 1.4.1 proposes adoption of existing Rule 3-410 with a single, substantive change. Added to the engagements excluded from written disclosure (i.e., of the lack of professional liability insurance coverage) is “a court appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.” This exception is intended to encourage acceptance of such appointments, and applies in a setting where customarily the client is not in a position to be “shopping” for legal services, such that the disclosure is likely to be of little moment, an appointee being atypical of legal-service consumers.~~

~~As a practical matter, the title of the proposed rule continues a sort of misnomer, in speaking to “Disclosure of Professional Liability Insurance,” when in fact disclosure by its terms is triggered not by professional liability insurance, but rather the absence of such. However, inasmuch as this issue did not trouble the California Supreme Court in its August order, the text has been exhaustively considered and the matter does not appear to be one which would provoke material confusion, I suggest our Committee defer.~~

~~The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted, hence opponents (if any) have had their opportunity to be heard on the issues, (2) adoption came after lengthy, deliberate and at times contentious consideration by the State Bar, and has since been approved by the California Supreme Court, and (3) the addition of an excepted class is modest, is of limited application, and premised on sensible, worthy considerations.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

---

LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)

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

**Proposed New Rule No./ Title:** 1.11 “Special Conflicts of Interest for Former and Current Government Officers and Employees”

(5) Proposed Rule 1.11 addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule’s topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4<sup>th</sup> 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App. 4<sup>th</sup> 17.

The Commission deemed Proposed Rule 1.11 “Moderately Controversial” because the proposed Rule departs from the Model Rule by requiring, pursuant to California case law, that a government lawyer’s disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the prohibited lawyer is

timely and effectively screened. Under the Model Rule

A minority of the Commission objected to paragraph 1.11 (e) to the extent that screening is permitted to rebut the presumption of shared confidences between a former private lawyer now in the employ of the government and other lawyers in the prohibited lawyer's office or agency. They believed that this will undermine the ability of lawyers to promote client candor. For example, where a private lawyer representing a client with respect to matters that are the subject of a governmental investigation becomes employed by that governmental agency, the former client will fear that he or she has revealed information to the lawyer now working for the government that could further an investigation against the former client, and that the former client cannot object to the screen and has no way to verify that the screen is actually working.

Although (e) (2) requires that former client be "notified in writing of the warranted implementation of the screening procedures ... and of the actions taken to comply with those requirements" it is unclear how the client could monitor the screen and ensure it retains its effectiveness. On this point, while I agree that effective monitoring is troublesome to say the least. Nevertheless, it appears consistent with existing California law (*City of Santa Barbara v. Superior Court*, *supra*, 122 Cal.App.4th 17; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108) and I recommend we approve the majority's wording.

Rather surprisingly, proposed Rule 1.11 does not address the situation where the prohibited lawyer is now the head of the government office. As noted by the Supreme Court in *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4<sup>th</sup> 839:

"Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one. Thus, a former client may legitimately question whether a government law office, now headed by the client's former counsel, has the unfair advantage of knowing the former client's confidential information when it litigates against the client in a matter substantially related to the attorney's prior representation of that client.

"There is another reason to require the disqualification of the conflicted head of a government law office. That reason arises from a compelling societal interest in preserving the integrity of the office of a city attorney. . . ."

In *Cobra Solutions*, the court disqualified the new City Attorney and the entire Office of the City Attorney of San Francisco. This is an area that the Commission may wish to address. Otherwise, the adoption of Rule 1.11 would seemingly *de facto* overrule the holding in *Cobra Solutions*.

A second minority of the Commission objected to the recommended adoption of the Model Rule's "**knowingly**" standard as applied to imputation in paragraphs (b) and (c). Section

1.11 (b) states in part:

“When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may **knowingly** undertake or continue representation in such a matter unless: [the prohibited lawyer is screened...].”

The minority argue that the use of the word “knowingly” will require **actual** knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. They believe that this will “immunize from discipline a lawyer who does not bother to check for conflicts of interest” and thereby evades actual knowledge of the conflict. They assert “the lawyer who **knows or reasonably should know** that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.” (Emphasis added.)

I agree with the minority on this point and believe that paragraphs (b) and (c) of Rule 1.11 should be modified to prohibit lawyers in a firm who “know or reasonably should know” that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing to representation in such a matter unless the screening is conducted and notice given as set forth in 1.11 (b)(1) and (2).

**CONCLUSION:** We approve the new rule with modifications.\*

---

LEC Rule Volunteer Name(s): Radmila Fulton

~~Old Rule No./Title: RPC 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased)~~

~~Proposed New Rule No./ Title: 1.17 “Purchase and Sale of a Law Practice”~~

~~(5) The Proposed Rule includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This Rule moots many of the criticisms of earlier proposals and also addresses one of the recommendations of the Executive Director to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memo, the Executive Director suggested that the Commission consider whether the rule permitting the sale of entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The Proposed Rule addresses that subject.~~

~~However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection as follows:~~

- ~~1. The sale of the practice, or a substantive field of practice, or of a geographic area of practice must include the entire practice or entire field or area of practice — lawyers~~



# THE STATE BAR OF CALIFORNIA

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Period

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File :

F-2010-381i Sandra McIntyre [1.11]

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File :

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**ORANGE COUNTY  
BAR ASSOCIATION**

**PRESIDENT**

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March 9, 2010

Audrey Hollins

Office of Professional Competence, Planning and Development

The State Bar of California

180 Howard Street

San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees**

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 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 generally supports the adoption of the proposed rule affirming the policies and obligations set forth in California case law, which address conflicts of interest involving former and current government lawyers. We offer the following suggestions for clarification of and revisions to the proposed Rule and Comments.

The OCBA supports the provisions of the proposed Rule that permit screening, in view of the public policy considerations articulated in the Comments, as well as existing California case law. We disagree with the minority view that permitting screening will undermine client candor, particularly in view of the fact that: (1) California law generally permits screening in the circumstances governed by this proposed Rule; and (2) most other states have a similar rule, and there is no evidence suggesting this has created an adverse effect on client candor.

The OCBA also supports the use of the "knowingly" standard in paragraphs (b) and (e) of the proposed Rule. We do not believe that lawyers would be incentivized by these provisions not to conduct conflict checks because, although discipline under the Rule might be avoided by such an approach, a lawyer's firm or government office could still be subject to disqualification under applicable case law. Applying discipline to a lawyer who accepts a client without knowledge that another lawyer in a firm is prohibited from the representation also could result in harsh consequences for clients.

We agree with the Commission's proposed changes from the Model Rule in paragraphs (b), (b)(1), and (c), and the concept used in paragraph (e), where the Commission has substituted the word "prohibited" in place of the word "disqualified," to clarify that a violation of the Rule results in discipline, but that disqualification is subject to a determination by a tribunal.

As for the Comments, we have several additional concerns. First, the head of the office exception to screening addressed in the *Cobra* case seems too important a concept to be relegated to a Comment. We suggest that the principle should be incorporated into the Rule itself, rather than Comment [9B].

Second, Comment [9C] indicates the Rule does not address whether a "law firm" will be disqualified. While we see that the proposed definition of the term "law firm" will include a government agency, we respectfully suggest that because this Rule necessarily differentiates between a "firm" (as opposed to a "law firm") and a "government agency," the reference to a "law firm" in Comment [9C] easily could be misread or misinterpreted to exclude government agencies, that is, to suggest that the Rule *does* address the disqualification of a government agency. Given that the definition of "law firm" in proposed Rule 1.0.1 includes an office of a government entity, to avoid confusion, it would be appropriate to make this more clear, perhaps by referencing proposed Rule 1.0.1 in Comment [9C]. Alternatively, the Commission could use the undefined terminology from proposed Rule 1.11 itself, that is, "firm" and "government agency," to clarify that the Rule does not address disqualification of a firm or government agency.

Finally, we note that the Commission has chosen not to include the term "firm" in the terminology rule, proposed Rule 1.0.1, and instead opted to define only the term "law firm." The OCBA is concerned that this approach will create confusion and/or arguments concerning the definition of the term "firm" as used in this proposed Rule.



THE STATE BAR OF  
CALIFORNIA

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March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions:~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

- ~~4. It is confusing to have comments which simply define terms. For example, Comment 2 discusses the term "of counsel;" if this term needs defining, it should be done in the rule, not a comment. Additionally, Comments 1, 3, 4, 5, 11 and 12 are so general as to provide no meaningful assistance.~~
- ~~5. Comments 6 - 10 attempt to provide a very broad description of the factors involved in informed consent and informed written consent; factors involved in determining whether consent has been given; and the issues involved in screening. OCTC agrees with these Comments but suggests that they belong in the rules involving conflicts, not here.~~

### **Rule 1.11 Special conflicts of interest for Former and Current Government Officers and Employees.**

1. Paragraph (a) is incomplete and confusing. Business and Professions Code section 6131 prohibits a former prosecutor from representing or receiving valuable consideration from a defendant he or she formerly prosecuted. Unlike paragraph (a) of proposed rule 1.11, section 6131 does not permit the government agency to waive this conflict. In OCTC's opinion, the rule must be harmonized with section 6131 regarding the waiver issue.  
  
Paragraph (b) prohibits an attorney in a firm from "*knowingly*" undertaking or continuing representation in such a matter unless the conflicted attorney is timely and effectively screened, is apportioned no part of the fee, and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the rule. OCTC agrees with the Commission minority view that use of the term "*knowingly*" would inappropriately immunize attorneys who do not bother to check for conflicts. The Commission minority suggests using the term "knows or reasonably should know;" this appears to be the correct standard, and OCTC supports the use of this language.
2. OCTC does not object to the concept contained in paragraph (c), but suggests that the Commission might want to tighten the language.
3. Paragraph (d)(2)(ii), prohibiting government officers and employees from negotiating for private employment, might be too broad. For example, read literally, it would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.
4. OCTC notes that paragraph (e) has no comparable provision in the ABA rules. While OCTC understands the intent is to screen the conflicted attorneys, this creates a rule which could negatively impact government agencies' ability to handle matters. Further, there is the issue of when disclosure must occur. This could impact the government's ability to conduct investigations without advising their targets. While the Commission appears to be trying to accommodate this concern by including language that notice to the former client is not required if prohibited by law or a court order, this language is probably inadequate to cover all situations. Overall, this provision is problematic.
5. Paragraph (f) unnecessarily repeats the definition used in proposed rule 1.1(e).
6. As a general observation, there are too many comments and most do not appear to serve any purpose. For example, comments 1- 5, 7- 9, 9C, and 10 explain in general terms the purpose of the rule and screening. They seem unnecessary given the language of the rule itself. Comment 9B has some value, but it provides no real guidance as to when the entire office should be disqualified.



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

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

FROM: George S. Cardona.  
Chief Assistant United States Attorney  
Central District of California

RE: Proposed California Rules of Professional Conduct 4.1 and 1.11(e)

DATE: March 12, 2010

As an initial matter, I want to again 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. I write on behalf of my office to provide additional comments on Proposed Rule 4.1, Truthfulness in Statements to Others, which we believe could invite confusion by appearing to authorize private attorneys to authorize or engage in deception in situations beyond those narrow circumstances in which courts have found it permissible, and a subsection of Proposed Rule 1.11, Special Conflicts of Interest for Former and Current Officers and Government Employees, that we believe is contrary to current California law and could negatively affect our ability to maintain the confidentiality necessary to certain investigations.

A. Proposed Rule 1.11(e)

Unlike the ABA Model Rule, which has no equivalent provision, subsection (e) of Proposed Rule 1.11 imputes conflicts of individual government lawyers to their entire “office, agency or department” unless there is: (a) timely and effective screening; and (b) written notice to the former client, unless such notice is “prohibited by law or a court order.” We believe that adoption of this subsection and its accompanying comments, and the resulting variance from the ABA Model Rule, would run contrary to current California and Federal law, improperly limit the ability of our office to maintain the confidentiality necessary to certain investigations, and be difficult to administer in practice. Accordingly, we urge the Commission to adopt the approach taken by ABA Model Rule 1.11 and reject the addition of subsection (e).

As a starting point, we note that, as the result of “special problems raised by imputation within a government agency,” ABA Model Rule 1.11 “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.” ABA Model Rule 1.11, comment 2. As a result, ABA Model Rule 1.11 contains no counterpart to proposed subsection (e), and instead merely notes in its comments that “ordinarily it will be prudent to screen such lawyers.” ABA Model Rule 1.11, comment 2.

California and Federal cases recognize that imputation of conflicts within government offices pose the same “special problems” noted by the ABA. See, e.g., In re Charlissee C., 45 Cal. 4<sup>th</sup> 145, 162-65 (2008) (discussing cases that have “cited several considerations in declining to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices”); United States v. Bolden, 353 F.3d 870, 878 (10<sup>th</sup> Cir. 2003) (“disqualification of

Government counsel is a drastic measure and a court should hesitate to impose it except where necessary”); United States v. Caggiano, 660 F.2d 184, 190-91 (6<sup>th</sup> Cir. 1981) (“disqualification of an entire government department, because of a conflict of interest of a government attorney arising from his former employment, would not be appropriate”) (discussing ABA Formal Op. 342 (1975)). Nevertheless, as proposed by the Commission, subsection (e) diverges from the ABA Model rule by imputing conflicts within a “government office, agency or department.” As drafted, proposed subsection (e) applies to all government offices, and does not differentiate between government offices engaged in criminal prosecution and other government offices. Moreover, proposed subsection (e) has no limitation on the scope of the imputation within a government “office, agency or department,” thus potentially imputing conflicts on the part of a single attorney in a single United States Attorney’s Office to the entire Department of Justice, and prohibits the government office from relying on screening to avoid the conflict where the government office is unable to notify the former client “in writing of the circumstances that warranted implementation of the screening procedures” and “the actions taken to comply with those requirements” unless such notice is “prohibited by law or a court order.” See Proposed Subsection (e)(1), (2). In addition, the comments to proposed subsection (e) suggest that screening may not be available, and the government office “may be disqualified from the representation” if the “personally prohibited lawyer” is either the “head of the office, agency or department” or a “lawyer with direct supervisory authority over any of the lawyers participating in the matter,” citing to California cases as support. See Proposed Comment 9(b).

For the following reasons, we do not believe that proposed subsection (e) and its accompanying comments should be adopted:

1. As applied to prosecuting offices, proposed subsection (e) appears contrary to California law. In City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4<sup>th</sup> 839 (2006), which involved a city attorney’s office engaged in civil litigation, the court relied in part on the decision in Younger v. Superior Court, 77 Cal. App. 3d 892 (1978), in which the Court of Appeal upheld an order disqualifying the entire Los Angeles County District Attorney’s Office from prosecuting a defendant because that defendant had previously been represented by the recently appointed Assistant District Attorney (Johnie Cochran), “notwithstanding the ethical screen erected between Cochran and the prosecution of defendants formerly represented by his law firm.” Cobra Solutions, 38 Cal. 4<sup>th</sup> at 850. As Cobra Solutions recognized, however, its continued reliance on Younger was appropriate only because the disqualification issue before it did not involve a prosecuting agency:

The disqualification standard that the Court of Appeal applied in Younger no longer controls *criminal* prosecutions because the Legislature in 1980 enacted Penal Code Section 1424 (Stats. 1980, ch. 780, S 1, p. 2373), which provides for the recusal of local prosecuting agencies only when “the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” (Pen. Code, S 1424, subs. (a)(1) & (b)(1)).

38 Cal. 4<sup>th</sup> at 850; see also In re Charlyse C., 45 Cal. 4<sup>th</sup> at 164 n.9 (2008) (noting Cobra Solutions’ observation that “the Legislature, by statute, had ‘superseded’ Younger’s holding”); People v. Conner, 34 Cal. 3d 141, 147 (1983) (after § 1424 conflict permitting disqualification

must be one “of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered”); People v. Jenan, 140 Cal. App. 4<sup>th</sup> 782, 791 (2006) (Section 1424 “supersedes the case law rule that previously allowed a defendant to recuse the district attorney by showing ‘a conflict of interest which might prejudice him [or her] against the accused and thereby affect, *or appear to affect*, his [or her] ability to impartially perform the discretionary functions of his [or her] office.’”) (emphasis in original) (citation omitted); United States v. Nosal, 2009 WL 482236 (N.D. Cal. Feb. 25, 2009) (holding that even though recently appointed United States Attorney had personal conflict based on prior representation of defendant in current criminal case, in light of Penal Code Section 1424, “even if California law were applied there would be no basis to force the recusal of the prosecutor’s office in this case,” and directing United States Attorney to file declaration under seal detailing screening procedures implemented to ensure his lack of influence over matter); Grand Jury Investigation of Targets, 918 F.Supp. 1374, 1379 (1996) (noting that § 1424 and People v. Conner “overruled” earlier, broader recusal rules). We recognize that discipline and disqualification/recusal are different matters. By essentially returning to the Younger standard for disciplinary purposes, however, proposed subsection (e) would, as applied to prosecuting offices, effectively require those offices and their attorneys, as a means of avoiding discipline, to apply the Younger standard as the basis for recusal, a result that would run directly contrary to the supercession of Younger by the legislature’s enactment of Penal Code Section 1424. It would also run contrary to the policy underlying Penal Code Section 1424, which was “a legislative response to a substantial increase in the number of unnecessary prosecutorial recusals” under the earlier standard. See Jenan, 140 Cal. App. 4<sup>th</sup> at 791. As a result, if the Commission adopts proposed subsection (e) as drafted, it will, as applied to prosecuting offices, run contrary to California law.

2. Even for government and public offices engaged in activities other than criminal prosecution, California law generally permits screening, and requires judicial consideration of the effectiveness of the screening and a multitude of other factors in assessing whether vicarious disqualification of a government or public office is required based on an individual attorney’s personal conflict, even if that individual attorney is a senior supervisor. In Cobra Solutions itself, the court recognized that it was not deciding “whether ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney’s supervision” and continued to note that:

In ruling on such a motion, the trial court should undertake a factual inquiry into the actual duties of the supervisor with respect to those attorneys who will be ethically screened and to the supervisor’s responsibility for setting policies that might bear on the subordinate attorneys’ handling of the litigation. In addition, the trial court should consider whether public awareness of the case, or the conflicted attorney’s role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.

38 Cal. 4<sup>th</sup> at 850 n.2. In In re Charlissee C., the court cited this portion of Cobra Solutions in concluding that in deciding whether to disqualify a public office, CLC, based on prior representation of a client adverse to its current client, the court “should have determined whether CLC has adequately protected, and will continue to adequately protect, [the former client’s]

confidences through timely, appropriate, and effective screening measures and/or structural safeguards.” 45 Cal. 4<sup>th</sup> at 165. More generally, the court stated:

[W]e begin by noting that there are court-created limitations to the vicarious disqualification rule, which itself was “judicially created.” As here relevant, California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. Instead, in this context, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards.

45 Cal. 4<sup>th</sup> at 161-162.

Thus, for government and public offices, California law requires courts addressing disqualification motions to consider the adequacy of screening measures, coupled with consideration of other factors, before disqualifying a government or public office based on an individual attorney’s conflict. Federal law is similar. See Bolden, 353 F.3d at 876 (“disqualifying an entire United States Attorney’s office is almost always reversible error regardless of the underlying merits of the case”); United States v. Whitaker, 268 F.3d 186, 194-96 (3d Cir. 2001) (disqualification of entire United States Attorney’s office improper); United States v. Vlahos, 33 F.3d 758, 762-63 (7<sup>th</sup> Cir. 1994) (error to disqualify entire United States Attorney’s Office; even if individual AUSA had conflict of interest, weight of authority indicates court should have ordered another AUSA To handle case rather than disqualify entire office); United States v. Lorenzo, 995 F.2d 1448, 1453 (9<sup>th</sup> Cir. 1993) (no basis for disqualification because “even were we to hold that the vicarious disqualification rules apply to a U.S. Attorney’s Office, the appellants have not demonstrated prejudice”).

Nowhere do the California cases adopt (and to the contrary, they appear to reject) a bright line, inflexible rule of the type included in proposed subsection (e) that would require notice to the former client to render screening effective. Indeed, the California cases’ placement of the burden of establishing the effectiveness of screening on the government or public office defending against a disqualification motion appears to be in part based on recognition that the party seeking disqualification will not have had notice or an opportunity to obtain advance access to the relevant information relating to screening. See In re Charlissee C., 35 Cal. 4<sup>th</sup> at 166. We appreciate the Commission’s apparent recognition, as evidenced by its addition to proposed subsection (e)(2) of a sentence recognizing that such notice need not be given where “prohibited by law or a court order,” that there are instances where other laws (for example, Federal Rule of Criminal Procedure 6(e)’s secrecy limitations prohibiting disclosure of grand jury information, or Proposed Rule 1.6’s prohibitions on the disclosure of confidential client information) may preclude such notice. But this does not address all the situations in which notice may be impossible. For example, the very nature of an ongoing investigation (for example, an investigation using individuals posing as prospective tenants to investigate housing discrimination) may require that the existence of the investigation remain confidential. In such circumstances, notice to the target of the investigation of screening, which would be notice of the investigation’s existence, would render the investigation impossible to complete. There is no law that would prohibit the notice, and it may be impossible to obtain from any court

(particularly if there is no pending proceeding) what would essentially be an advisory opinion that such notice is not required. Under these circumstances, however, proposed subsection (e) would require notice, even though we think it clear the California cases would not, and would instead consider all the circumstances to determine whether the screening implemented by the government office remained, even in the absence of notice, effective. We believe the flexible approach taken by the California cases to be far the better one, and accordingly urge that proposed subsection (e), which requires notice as a prerequisite for effective screening, should not be adopted.

3. The decisions in which California courts have relied on policy considerations to impute and require vicarious disqualification based on personal conflicts of the head of a government or public office have arisen in situations involving relatively localized government or public offices. The policy concerns underlying these decisions simply do not apply to large, complex government offices of the size and scope of the Department of Justice, which has approximately 11,000 lawyers operating through a number of distinct divisions and offices. Yet, proposed subsection (e) has no limitation on the scope of the “office, agency or department” to which it would apply its requirements, posing the possibility of absurd results. For example, it would make no sense to require that the entire United States Department of Justice, including the local United States Attorney’s Office handling the matter, be recused from an ongoing undercover investigation of a relatively small defense procurement fraud in California simply because current Attorney General Eric Holder happened to be involved in that matter before he was appointed to his position. All that should be required is that the Attorney General, who typically is not involved in local investigations in any event, be screened from participating in or supervising the investigation in any way.

What this demonstrates is that issues of this type are far better dealt with, as they have been by both California and Federal courts, on a case by case basis that can take into account the multitude of factors that must be assessed based on particular facts to determine whether screening is timely and effective, factors that include the relative position of the individual with the personal conflict, the mechanics of the screening implemented, and the likelihood that the individual’s position would influence the handling of the case regardless of these screening efforts. Attempting to suggest or define bright lines governing certain of these factors (such as the position of the individually conflicted lawyer, as in proposed comment 9(B)) or requiring written notice (as in proposed subsection (e)) in a disciplinary rule will invariably result in lines that are, for particular cases, either over or under broad, and will deter the development of case law that can more effectively fashion and define standards to be used in assessing when screening will be effective or ineffective in preventing the imputation of personal conflicts to require vicarious disqualification.

4. The policy factors cited by California and Federal courts in their discussion of vicarious disqualification of government and public offices also weigh in favor of leaving imputation of conflicts to the disqualification arena, and not addressing them in a disciplinary rule. In particular, California courts have repeatedly recognized the “heavy” “burdens” imposed by vicarious disqualification of government legal offices. Cobra Solutions, 35 Cal. 4<sup>th</sup> at 852. Moreover, courts have recognized that the incentives to breach client confidences are less in a public office because “public sector lawyers do not have a financial interest in the matters on

which they work.” In re Charlisse C., 45 Cal. 4<sup>th</sup> at 163 (quoting City of Santa Barbara v. Superior Court, 122 Cal. App. 4<sup>th</sup> 17, 24-25 (2004)). It is in light of these dual considerations that screening (without more) has generally been permitted to avoid conflicts within government and public offices:

As the Christian court put it, “in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or ‘ethical walls’ to avoid conflicts within government offices . . . have been permitted. [Citations.]”

45 Cal. 4<sup>th</sup> at 163 (quoting People v. Christian, 41 Cal. App. 4<sup>th</sup> 986, 998 (1996)). In the federal system an additional Constitutional concern weighing against vicarious disqualification of an office as a whole is the separation of powers issue posed by a judicial order that effectively will prevent an executive office from carrying out its statutorily authorized duties. See United States v. Bolden, 353 F.3d 870, 879 (2003) (noting that “disqualifying government attorneys implicates separation of powers issues” and that “every circuit court that has considered the disqualification of an entire United States Attorney’s office has reversed the disqualification”); Cf. United States v. Silva-Rosa, 275 F.3d 18, 22 (1<sup>st</sup> Cir. 2001) (rejecting disqualification even of individual AUSAs because “appellants are asking this Court to dictate to the executive branch whom it can appoint as its prosecutors. Such a position would expand the power of judicial officials to such a degree as to trigger weighty separation of powers concerns.”).

In addition to the effectiveness of screening, California courts consider other policy-based factors in assessing whether conflicts should be imputed to justify vicarious disqualification, including in particular, the likelihood of whether the overall circumstances concerning the individually conflicted attorney are “likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.” In re Charlisse C., 45 Cal. 4<sup>th</sup> at 165 (quoting Cobra Solutions, 38 Cal 4<sup>th</sup> at 850 n.2). Neither the actual effectiveness of screening nor these other policy-based factors are readily amenable to ex ante evaluation. By forcing government and public office attorneys to run the risk of discipline based on their ex ante evaluation of these factors, however, proposed subsection (e) will likely lead these attorneys to err on the side of disqualification, a result that will cause more disqualifications of government and public offices, and a result thus at odds with the very policy considerations that have led California courts to recognize the general validity of screening as a means of avoiding disqualification of government and public offices. To avoid this unjustified result, and leave in place the policy-based balance already reached by California courts, the Commission should follow the ABA Model Rules and delete subsection (e).

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# OFFICE USE ONLY.

\* Date

03/12/2010



Period

PC



File :

F-2010-396a US Attorney's Office [1.11]

Commented On:

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Submitted via:

Online

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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

March 12, 2010

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 1.11

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 1.11 and offers the following comments.

COPRAC generally supports the adoption of the rule (subject to our comments below). COPRAC respectfully disagrees with the two minority positions set forth in the proposal: First, COPRAC supports the use of screening in the limited context set forth in the rule. Second, COPRAC does not agree that adoption of the Model Rule's "knowingly" standard will immunize lawyers who fail to conduct adequate conflicts checks.

Paragraph (b) and Comment [8]: COPRAC respectfully disagrees with the Minority position objecting to the inclusion of the Model Rule's "knowingly" standard in paragraph (b) of this rule. It is our belief that a lawyer should not be subject to discipline for taking on a representation where he or she is not aware of the conflict. Our belief is no less applicable with respect to former government lawyers, especially since it may be likely that the conflict database system for government lawyers is often not as thorough or effective as that used by law firms, perhaps making it difficult for the former government lawyer to properly input all potential conflicts into a firm's conflict system. Similarly, COPRAC respectfully disagrees with the Minority position to Comment [8], in which the Minority objects to the inclusion of the Model Rule's "actual knowledge" standard applying to paragraph (c) of the rule. We believe that the former government lawyer should not be subject to discipline for representing a client who could benefit from such information unless the lawyer in fact has actual knowledge of such information.

Paragraph (e) and Comment [9B]: COPRAC believes that the head of the office exception to screening addressed in the *Cobra* case is too important to be relegated to a comment [see second sentence of Comment [9B]], and that the exception should be included in the rule itself. That said, however, we believe the wording of the second sentence of Comment [9B] (which summarizes the exception) misstates the law, and in that sense is not supported by the cases referenced at the end of the comment. Specifically, we agree that, where the personally prohibited lawyer is the head of the office, agency or department (or a lawyer with comparable managerial authority), it may be appropriate to prohibit other lawyers in such office, agency or department from working on such matter. However, where the personally prohibited lawyer only has supervisory authority over other lawyers, only those lawyers – and **not** the entire office, agency or department – should be prohibited. Also, we note that for consistency the term “disqualified” as used in this sentence should be changed to “prohibited from participating;” and in the second instance in clause (ii), the incomplete reference to “office” should be replaced with the full reference to “office, agency or department.” Accordingly, we recommend that the second sentence of Comment [9B] be deleted and the following sentence be added to paragraph (e) of the rule:

“However, (i) if the lawyer personally prohibited from participation in a matter is a lawyer with direct supervisory authority over other lawyers, then such prohibited lawyer and such other supervised lawyers (but not necessarily the entire office, agency or department) may be prohibited from participating in the matter, and (ii) if the lawyer personally prohibited from participation in a matter is the head of the office, agency or department, or a lawyer with comparable managerial authority, then both such prohibited lawyer and the office, agency or department may be prohibited from participating in the matter.”

Comment [9C]: For consistency and in order to maintain the parallel references in the two sentences of this comment, we recommend inserting “lawyer or” in front of “law firm” in the first sentence of this comment.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

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

cc: Members, COPRAC

## Rule 1.17 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380d SDCBA [1.17]

F-2010-381c Sandra McIntyre [1.17]

F-2010-382f SCCBA [1.17]

F-2010-385d OCBA [1.17]

F-2010-392c State Bar OCTC [1.17]

F-2010-397d COPRAC [1.17]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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**Conference 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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~1.11 (b) states in part:~~

~~“When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: [the prohibited lawyer is screened...].”~~

~~The minority argue that the use of the word “knowingly” will require actual knowledge before a lawyer who has a conflict of interest under this Rule may be disciplined. They believe that this will “immunize from discipline a lawyer who does not bother to check for conflicts of interest” and thereby evades actual knowledge of the conflict. They assert “the lawyer who knows or reasonably should know that he or she is prohibited from representation under this Rule ought to be subject to discipline, and not merely the lawyer that OCTC can prove had actual knowledge.” (Emphasis added.)~~

~~I agree with the minority on this point and believe that paragraphs (b) and (c) of Rule 1.11 should be modified to prohibit lawyers in a firm who “know or reasonably should know” that a lawyer in his or her firm is prohibited from representation, from undertaking or continuing to representation in such a matter unless the screening is conducted and notice given as set forth in 1.11 (b)(1) and (2).~~

~~CONCLUSION: We approve the new rule with modifications.\*~~

---

LEC Rule Volunteer Name(s): Radmila Fulton

Old Rule No./Title: **RPC 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased)**

Proposed New Rule No./ Title: **1.17 “Purchase and Sale of a Law Practice”**

(5) The Proposed Rule includes provisions recently added by the ABA to Model Rule 1.17 that permit the sale not only of an entire law practice, but also of a substantive field of the practice or a geographic area of the practice. This Rule moots many of the criticisms of earlier proposals and also addresses one of the recommendations of the Executive Director to the Board of Governors concerning Appointment of a Career Transition Planning Taskforce. In her memo, the Executive Director suggested that the Commission consider whether the rule permitting the sale of entire law practice should be changed to permit the sale of a part of a law practice. She pointed out that greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement. The Proposed Rule addresses that subject.

However, the Model Rule provisions concerning the required notice to be given to clients whose matters are included in the sale have been substantially replaced by the counterpart provisions in current rule 2-300 to provide better protection for the interests of the clients whose matters are being transferred. Additions to the rule and changes in the comments have been made for better client protection as follows:

1. The sale of the practice, or a substantive field of practice, or of a geographic area of practice must include the entire practice or entire field or area of practice – lawyers

will not be permitted to “cherry pick” lucrative matters and leave clients with less lucrative matters to fend for themselves;

2. The selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold;
3. Although brokers to facilitate the sale are allowed, the lawyer may only sell the practice to a lawyer, not to a broker or other intermediary – this is to ensure continuity of representation and protection of the seller’s clients;
4. Fees may not be increased solely by reason of the sale - clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and
5. Appropriate protections for confidentiality of the clients have been made part of the rule.

The Commission deemed Proposed Rule 1.17 “Moderately Controversial” because a minority of the Commission believed that the proposed Rule that permits lawyers to sell a geographic area of the practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law.

**CONCLUSION:** We approve the new rule in its entirety.

---

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

~~Old Rule No./Title: Not Applicable~~

~~Proposed New Rule No./ Title: Rule 1.18 Duties to Prospective Client~~

~~(5) Rule 1.18 clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California rule counterpart, but the duty to protect confidential information of a proposed client, even if no attorney-client relationship results, is found in Evidence Code section 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.~~

~~**Disagreement over the inclusion of a provision permitting the non-consensual screening of the consulted lawyer when confidential information is learned during the pre-retention period.**~~

~~The Commission voted 5-5 to strike from the proposed Rule 1.18 the concept of non-consensual screening and so the concept which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2). Given the split of opinion on whether this paragraph should remain in the proposed rule, the LEC should take a position on whether to strike paragraph (d)(2) or not. A summary of this issue, which is fully set forth in the materials for those interested in the detail, is as follows:~~



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

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\* Date

02/19/2010 

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File :

F-2010-381c Sandra McIntyre [1.17]

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.**

We support this rule with the exception of the 90-day rule. The SCCBA believes that the 90-day term used in the Proposed Rule is too long a period for a purchaser to wait to start acting on behalf of his new clients. Once the transaction has been finalized the parties to the transaction want to move forward. A shorter period not only accommodates the intent of the seller and purchaser, but also provides more protection to the client whose rights might be prejudiced while his or her matter is in a holding pattern. Although there is an exception allowing the purchaser to act on behalf of the client where a client's rights might be prejudiced, without all of the information at the purchasers' disposal (such as the client's confidential information and the previous attorney's work product), the purchaser might not be able to determine whether the client's rights are in fact in jeopardy.

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\* Date

03/01/2010



Period

PC



File :

F-2010-382f SCCBA [1.17]

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**ORANGE COUNTY  
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OC ASIAN AMERICAN BAR  
OC DEPUTY PUBLIC DEFENDERS  
OC TRIAL LAWYERS ASSOC.  
OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 1.17 – Purchase and Sale of a Law Practice**

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 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 1.17, which is based in part on the Model Rule, and supports the retention of current Rule 2-300.

The proposed Rule would permit the sale of a "geographic area" or "substantive area of practice," but it fails to define those terms, allowing for varying interpretations of those terms and a great likelihood for abuse. As noted by the Commission, clients are not commodities that can be purchased or sold at will, and the parsing of a practice into "areas," as left to the discretion of a seller in this Rule, disserves the public.

While we recognize that the intent of the proposed Rule is to avoid "cherry picking" of cases in the sale of less than all of a practice, we are concerned that the vagueness creates more problems than it solves.

There is also a likely potential for abuse in the ability of an attorney to build a practice area just for the purpose of selling it, which is not addressed by the proposed Rule. If the client hires attorney A, he or she expects to receive services from that attorney, and the attorney should not be able to sell off some subset of his or her cases. The attorney should have to substitute out of those cases he or she no longer is able or wishes to handle, following the applicable substitution rules.

The proposed Rule also allows the wholesale auctioning of cases through a broker, further leading to the degradation of the public perception of the profession.

Further, the proposed Rule would presume consent on the part of the client once notified of the sale, by operation of the passage of time and client silence.

Current Rule 2-300 permits only a single sale of all or substantially all of a practice. This better serves the legal profession and protects clients from being treated as commercial property.



THE STATE BAR OF  
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT

Russell G. Weiner, Interim Chief Trial Counsel

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FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions:~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

### **Rule 1.17 Purchase and Sale of Law Practice.**

1. Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC's believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some comments regarding this, but OCTC believes that it should be stated in the rule itself.)
2. Comment 2 says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16. Comment 1A defines "selling lawyer;" this definition should be in the rule, not a comment. Comment 4 is completely repetitive of the rule itself and thus unnecessary. Comments 5- 6 and 13 also serve no purpose. Comment 12, which provides information regarding the withdrawal requirement, should be in the rule, not a comment. Comments 15A (that lawyers must comply with rules 1.5.1 and 1.5.4) and 15B (requiring compliance with Bus & Prof. Code section 6180) also belong in the rule, not a comment.

### **~~Rule 1.18 Duties to Prospective Clients.~~**

- ~~1. The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.~~
- ~~2. OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule which clearly deals with all related issues.~~
- ~~3. Like the rule itself, comments 6- 8 are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in comment 9 to the competence rules and the client's property rules.~~

### **~~Rule 3.9 Non-adjudicative Proceedings.~~**

- ~~1. OCTC is concerned with the Commission's departure from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's rule.~~
- ~~2. Comments 1-2 are too general. OCTC also requests a comment that other rules may apply depending on the facts and circumstances.~~



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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 1.17

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 1.17 and offers the following comments.

COPRAC generally supports the adoption of proposed Rule 1.17. While we are sympathetic to the concern expressed in the Minority position with respect to the vagueness of the term "geographic area," we believe that concern can be mitigated to some extent by adding specificity to the terms of the sale of the law practice (as discussed below in our suggestions regarding Comment [4]). We therefore support adoption of the rule, and suggest the following modifications:

Paragraph (c) and Comment [6]: In accordance with proposed paragraph (c), the sale must include "all or substantially all" of the practice (or of the substantive field or geographic area). While seller and purchaser should endeavor to transfer the entirety of the law practice, as the proposed rule acknowledges there are instances where portions of the practice simply cannot be transferred. For example: (i) as noted in the Explanation to paragraph (b), a purchaser may have conflicts of interest and might not be able to take on certain clients and/or matters; (ii) as acknowledged in paragraphs (d)(1)(A) and (d)(2)(A), the client has the right to retain other counsel; and (iii) as contemplated by Comment [3], when a seller moves to a position as in-house counsel to a business that was a client, the seller may in effect retain that client (with the result that matters for that client are not necessarily available to be transferred to the purchaser). These possible exclusions, when taken in the aggregate, may result in an inability to satisfy the requirement to include in the sale "substantially all" of the practice. We do not think that is an

appropriate result, nor perhaps what the Commission intended here. Comment [6], which partially addresses this concern, misstates the language of paragraph (c) of the rule (i.e., by not referencing “substantially all”), and doesn’t go far enough to expressly acknowledge the foregoing exclusions. In order to address these concerns and clarify the intent of paragraph (c), we recommend modifying Comment [6]: (1) to conform the comment to the rule (by using the rule’s terminology of “all or substantially all” in place of “entire” or “all”); and (2) by adding the following sentence to the end of the comment:

“The determination as to whether the purchase and sale includes all or substantially all of the practice, or of the substantive field or geographic area of the practice, is to be measured by taking into account only that portion of the practice that, in accordance with the rules, should be transferred to the purchasers. For example, a sale of only a portion of a practice may satisfy the rule if it includes all or substantially all of the practice excluding client matters subject to a conflict of interest, matters where the clients choose to retain other counsel, and, if the seller becomes employed as in-house counsel to a business that was a client, matters for such business.”

Paragraphs (d)(1)(A), (d)(1)(B), (d)(2)(A) and (d)(2)(B): The notice requirement contained in these provisions reference the imprecise term “the client.” For clarity (since the law practice will often not entail only one specific client, and since no notice should be required for clients who are not part of the sale), COPRAC recommends that the term “the client” be replaced with “each of the seller’s clients whose matters are included in the sale.”

Paragraph (d)(2)(B): The first and third references to “the purchaser” in this paragraph appear to be incorrect. Since it is the seller providing the notice prior to transfer, it is likely that the seller (and not the purchaser) will receive a response from the client. As a result, consent to the transfer should not be presumed if the purchaser does not receive a timely response, when in fact the seller may have received the response. COPRAC recommends modifying the language in the first instance to state that “consent shall be presumed if neither the seller nor the purchaser receives a response,” and in the third instance to state “unless the seller or the purchaser is otherwise notified.”

Paragraph (e) & Comment [10]: This paragraph and related comment obligate the purchaser to assume the seller’s obligations under existing client agreements regarding scope of work. However, there may be instances where the transferred scope of work may need to be narrowed: e.g., where the purchaser may have a conflict of interest with respect to certain matters, or where the purchaser is not qualified or admitted to practice in certain jurisdictions or courts. To address this concern, COPRAC recommends using the language of the Model Rule in paragraph (e) and deleting the second sentence of the proposed Comment [10].

Comment [1]: COPRAC recommends deleting “the reasonable value of” in the second sentence of this comment. The language implies that a law practice may only be sold for its “reasonable value” – a concept not found in the rule itself. We believe that the seller and purchaser should not be so constrained in their negotiation over the price for the sale of the law practice.

Comment [2]: We believe that this comment blurs the distinction between paragraph (b) of the rule (which addresses what the seller makes available for sale) and paragraph (c) of the rule (which addresses what is actually sold), and, in so doing, misstates both rules. Because of the subheadings within the comment portion of the proposed rule, it appears that Comment [2] is intended to provide commentary on paragraph (b), and Comment [5] is intended to provide commentary on paragraph (c). We recommend that Comment [2] be corrected by deleting the first sentence (which, in addition to being incorrect, is unnecessary).

Comment [2A]: Paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. The language of the paragraph does not preclude the possibility that the seller could return to the practice, or the substantive field or geographic area, at some time in the future following the sale. In fact, Comment [2A] acknowledges that “a return to private practice” after an unanticipated change in circumstance doesn’t violate the rule. However, the use of the word “return” in Comment [2A] is more limiting than the language of paragraph (a) because it fails to recognize that the seller may continue to practice law in a different substantive or geographic area (and therefore would not be returning to the practice of law). To fix this inconsistency, COPRAC recommends revising the first sentence of Comment [2A] to read:

“Return to private practice, or return to the practice in the substantive field or geographic area of the practice that was sold, as a result of an unanticipated change in circumstances does not necessarily result in a violation.”

Comment [3]: As noted above, paragraph (a) of the rule requires that the seller cease to engage in the practice of law, or in the substantive field or geographic area for the practice being sold. Comment [2] states that if a number of the seller’s clients refuse to discharge the seller, there is no violation, and the seller can continue representing such clients until the seller can withdraw. There is, however, no express provision for a transition period following the sale of the law practice, where the seller attorney continues to represent such clients and works with such clients and the purchaser attorney to transition the law practice. The rule and comments do not seem to allow that to occur: the lawyer must quit the relevant practice, and can stay on only if clients refuse to allow withdrawal. Clients, the seller, and the purchaser might be better served by explicitly recognizing that an agreement to allow a reasonable transition period does not violate the rule. COPRAC therefore recommends adding the following sentence to the end of Comment [3]:

“In addition, an agreement for sale of a law practice that otherwise complies with this Rule does not violate this Rule if it contains a provision for a reasonable transitional period during which the seller may continue to practice and represent clients for the purpose of facilitating the transition of consenting clients to the purchaser.”

Comment [4]: COPRAC shares the Minority’s concern regarding the ambiguity of the term “geographic area,” especially in a state as disparate as California. The example set forth in the second paragraph of the Explanation of Changes to the introductory paragraph of the rule provides some guidance: “if a lawyer had a practice in both northern and southern California, he or she might choose to sell one aspect of the geographic area of practice in order not to have to

commute to different parts of the state.” However, the example suggests an impractical and broad definition of the term “geographic area,” and might be read to imply that, for example, San Francisco and Sacramento (because they are both in northern California) are in the same geographic area (likewise with San Diego, Los Angeles and Santa Barbara in southern California). We agree with the Minority that it is probably not possible to provide an appropriate limiting definition of the term, but we are not of the view that this constitutes a fatal flaw in the proposal. Rather, we believe sufficient clarity can and should be provided by agreement between the seller and purchaser of the law practice. We recommend that the commentary provide that any sale of a geographic area of a law practice specifically define the geographic area in question. We therefore recommend that the following sentence be added to Comment [4]:

“The agreement for the sale of a geographic area or areas of a law practice should state as precisely as possible the specific geographic area or areas being sold.”

Comment [5]: Similar to our concern raised with respect to Comment [2A] above, the example in Comment [5] goes further than the requirement of paragraph (a) of the rule by stating that the “practitioner may not thereafter accept [any such] matters.” This language is unduly restrictive and misstates the language of paragraph (a). COPRAC recommends that the last clause of the third sentence of this comment be conformed to the language of the rule, by changing “however, that practitioner may not thereafter accept any estate planning matters” to “however, that practitioner must cease practicing on estate planning matters.”

Comment [15]: We note that proposed rule 7.2(b) [prohibiting the payment of value to a person for recommending the lawyer’s services] includes a cross reference to this rule to clarify that the payment for a law practice in accordance with rule 1.17 does not constitute an impermissible referral fee in violation of 7.2(b) [see 7.2(b)(3)]. For clarity, COPRAC suggests that a similar cross reference be contained in this rule, and recommends the following be added either to Comment [15] or as a new comment:

“The purchase of a law practice in accordance with this Rule does not constitute the conveyance of value to a person for recommending the lawyer’s services in violation of Rule 7.2(b).”

Thank you for your consideration of our comments.

Very truly yours,



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

cc: Members, COPRAC

## Rule 1.18 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380e SDCBA [1.18]

F-2010-382g SCCBA [1.18]

F-2010-383a LACBA [1.18]

F-2010-385e OCBA [1.18]

F-2010-391 BASF [1.18]

F-2010-392d State Bar OCTC [1.18]

F-2010-397e COPRAC [1.18]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~will not be permitted to “cherry pick” lucrative matters and leave clients with less lucrative matters to fend for themselves;~~

- ~~2. The selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold;~~
- ~~3. Although brokers to facilitate the sale are allowed, the lawyer may only sell the practice to a lawyer, not to a broker or other intermediary this is to ensure continuity of representation and protection of the seller’s clients;~~
- ~~4. Fees may not be increased solely by reason of the sale clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and~~
- ~~5. Appropriate protections for confidentiality of the clients have been made part of the rule.~~

~~The Commission deemed Proposed Rule 1.17 “Moderately Controversial” because a minority of the Commission believed that the proposed Rule that permits lawyers to sell a geographic area of the practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

---

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

**Old Rule No./Title:** Not Applicable

**Proposed New Rule No./ Title:** Rule 1.18 Duties to Prospective Client

(5) Rule 1.18 clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California rule counterpart, but the duty to protect confidential information of a proposed client, even if no attorney-client relationship results, is found in Evidence Code section 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.

**Disagreement over the inclusion of a provision permitting the non-consensual screening of the consulted lawyer when confidential information is learned during the pre-retention period.**

The Commission voted 5-5 to strike from the proposed Rule 1.18 the concept of non-consensual screening and so the concept which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2). Given the split of opinion on whether this paragraph should remain in the proposed rule, the LEC should take a position on whether to strike paragraph (d)(2) or not. A summary of this issue, which is fully set forth in the materials for those interested in the detail, is as follows:

Paragraph (d) of Rule 1.18 provides as follows:

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if:

- (1) both the affected client and the prospective client have given informed written consent; or
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and
  - i. the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no fee therefrom; and
  - ii. written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Those who oppose (d)(2) believe that the unilateral nature of this power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought.

Those who favored (d)(2) noted that it was only available in limited situations and that it appropriately balances the interests of the prospective client and the interests of the law firm's affected clients in retaining the lawyer of its choice. It follows that the lawyer who might have acquired the prospective client's information despite the lawyers "reasonable measures" is screened to protect the information.

After reviewing this proposed rule, I am in favor of modifying it to delete paragraph (d)(2). I agree with the opposition's concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought without their consent. This would be a change from existing California law and seems to be contrary to the policy of open communication between lawyer and (potential) client.<sup>1</sup> Furthermore, after the prospective client is provided with written notice to enable the prospective client to ascertain compliance with the provisions of the proposed rule, a situation could develop where a firm is representing an adverse party while the potential client is investigating and objecting to whether there was compliance with the rule, and thus, whether representation of the adverse party is allowed. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach.

I am in approval of the new rule after paragraph (d)(2) is deleted.

---

<sup>1</sup> A potential client might withhold information out of concern that the law firm might ultimately represent an adverse party.

**CONCLUSION:** We approve the new rule with modifications.\* - delete paragraph (d)(2)

---

~~LEC Rule Volunteer Name(s): Jack Leer~~

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

**Proposed New Rule No./ Title:** ~~3.9 "Non-adjudicative Proceedings"~~

~~(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee's determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. However, given the proposed Rule's minimal requirements and the policy of seeking to bring California's rules in line with the ABA Model Rules, I believe the Rule should be adopted as proposed.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

---

~~LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)~~

~~**Old Rule No./Title:** N/A (Existing CA statute: Bus & Prof. Code section 60608(e))~~

~~**Proposed New Rule No./ Title:** 4.1 "Truthfulness In Statements to Others"~~

~~(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers' conduct and beliefs.~~

~~Proposed Rule 4.1 (a) states a lawyer's duty of honesty that is owed to third persons in the course of representing a client as follows:~~

~~"(a) In the course of representing a client a lawyer shall not knowingly:~~

~~(1) make a false statement of material fact or law to a third person; or~~

~~(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is~~



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.**

The Santa Clara County Bar Association recommends that subsection (d) (2) (ii) be deleted. This subsection requires that the attorney given written notice to the prospective client, which in many instances creates too onerous an obligation for an attorney or law firm, in particular, for government attorneys.

# OFFICE USE ONLY.

\* Date

03/01/2010



Period

PC



File :

F-2010-382g SCCBA [1.18]

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**LACBA**

**LOS ANGELES COUNTY  
BAR ASSOCIATION**

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March 1, 2010

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

RE: Comments Regarding Proposed Rule of Professional Conduct 1.18 –  
Duties to Prospective Clients

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee ("PREC") has the following comments regarding Proposed Rule 1.18.

**Subparagraph (d)**

PREC proposes a middle ground to resolve the competing positions enunciated by members of the Commission with respect to non-consensual screening of a consulted lawyer when confidential information is learned during the pre-retention period.

The duty of loyalty is at the heart of the lawyer's role in our society. This duty is rightly owed even to prospective clients, who otherwise might be unable to knowledgeably obtain competent and appropriate counsel. Prospective clients ought not to be placed in a position where the confidential information that they have conveyed to prospective counsel is used against them. But this shield ought not become a sword for the disqualification of associated counsel where there is no retention. Subparagraph (d) rightly addresses these competing interests.

Those who oppose non-consensual screening note that "[t]his unilateral power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences . . . ." We believe that this is a legitimate concern, and that the credibility of the legal system requires that prospective clients be made aware, before they convey confidential information, of the possible consequences of doing so. Accordingly, PREC recommends that an additional provision be added, as a subsection to subparagraph (d)(2), requiring notice to the prospective client, prior to the receipt of confidential information, of the possibility of non-consensual screening.<sup>1</sup> PREC recommends that the Commission also provide a

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<sup>1</sup> PREC agrees, as provided in Comment [2], that no screening whatever is necessary where the communication is unilateral and without any reasonable

Comment to the new, proposed subsection that, where practicable, the required notice to the prospective client of the possibility of non-consensual screening be confirmed in writing.

**Comment [1]**

Comment [1] states, among other matters, that “prospective clients are entitled to some but not all of the protection afforded clients.” This sentence appears to add nothing to the understanding of Rule 1.18. Moreover, in the absence of further extensive explication to what protections are not afforded prospective clients, the sentence inadequately summarizes existing California law. For example, California State Bar Formal Opinion No. 2003-161, provides that:

“In California State Bar Formal Opn. No. 1984-84, we concluded that a person who consults with an attorney to retain the attorney is a ‘client,’ not only for purposes of determining the applicability of the evidentiary attorney-client privilege under Evidence Code section 950 et seq., but also for purposes of determining the existence and scope of the attorney’s ethical duty of confidentiality under Business and Professions Code section 6068, subdivision (e), and under former rule 4-101 of the Rules of Professional Conduct of the State Bar of California, the precursor to rule 3-310(E) . . . . [¶] . . . [W]e reaffirm our conclusion in California State Bar Formal Opn. No. 1984-84 that, with regard to information imparted in confidence, attorneys can owe the broader duties of confidentiality under Business and Professions Code, section 6068, subdivision (e) and rule 3-310(E) to persons who never become their clients.”

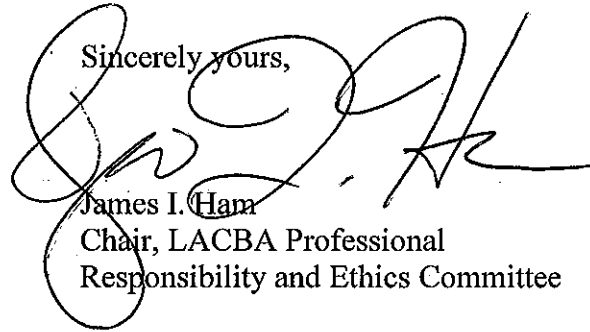
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expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.

Because the comment concerning “some but not all of the protection afforded clients” is both gratuitous and inadequate as a summary of existing law, PREC suggests that this single sentence be deleted.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. I. Ham', is written over the typed name and title. The signature is fluid and cursive, with a large initial 'J' and 'I'.

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



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March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 1.18 – Duties to Prospective Client**

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 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 generally supports the adoption of proposed Rule 1.18, but believes that several modifications should be made for purposes of clarity and consistency.

As an initial matter, it is unclear from the use of the word "client" in the first sentence of paragraph (c) whether this provision (along with paragraph (d)) is intended to deal solely with current clients, as opposed to future clients, that have interests materially adverse to those of a prospective client. The language of Comment [6] seems to suggest that it applies to both current and future clients (*i.e.*, "continuing or accepting the representation of a client"). The OCBA recommends that this be clarified in paragraphs (c) and (d).

The paragraph that follows, specifically, paragraph (d)(2), permits representation of an affected client despite receipt of information that would prohibit the representation under paragraph (c) if, *inter alia*, "the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client ...." However, neither the proposed Rule nor the Comments provide guidance as to what would constitute "reasonable measures to avoid exposure." The OCBA recommends that examples of reasonable measures be added after the first sentence in Comment [4].

In addition, subpart (i) of paragraph (d)(2) refers to the lawyer being "timely and effectively screened." The Commission added the words "and effectively" to the ABA Model Rule language here and in Comment [7]. However, this language is not consistent with the definition of "screened" in proposed Rule 1.0.1, which refers to "adequate" procedures. The OCBA recommends that the wording used to describe the screening procedures in paragraph (d)(2) and Comment [7] of proposed Rule 1.18 be consistent with the definition ultimately used in proposed Rule 1.0.1, as well as in proposed Rule 1.10 if a screening provision is added to that Rule, which the OCBA supports.

With respect to the Comments, the OCBA recommends several changes.

- First, the OCBA agrees with the inclusion of the limitations contained in Comment [2] regarding who may constitute a “prospective client,” but does not believe that the Comment addresses the situation in which a person contacts a lawyer for the purpose of conflicting him or her out of the representation of an adversary (without a good faith intention to retain the lawyer in the matter at hand). In this regard, the OCBA suggests that the Commission incorporate language in the Comment similar to that adopted by Nevada, such as: “A person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the consultation is not a ‘prospective client’ within the meaning of the Rule.”
- Second, the OCBA suggests that the reference to “disqualifying information” in Comment [4] be changed to “information that prohibits representation as defined in paragraph (c),” which is consistent with the Commission’s modification to the language in paragraph (d).
- Third, Comment [5] states that “[a] lawyer may condition conversations with a prospective client on the person’s *informed consent* that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter.” (Emphasis added.) The OCBA recommends that this be changed to “informed written consent” to be consistent with the language and requirement of paragraph (d)(2) and to ensure that any such agreement be documented for avoidance of doubt.
- Fourth, the OCBA recommends that the word “materially” be added between “interests” and “adverse” in the first sentence of Comment [6] to accurately reflect the language of paragraph (c).

**COOPER, WHITE & COOPER LLP**

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March 12, 2010

**Via Facsimile**  
**(415) 538-2171**

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

Re: **Public Comment on Proposed Rule of Professional Conduct 1.18**  
**(Duties to Prospective Client)**

Dear Ms. Hollins:

On behalf of the Bar Association of San Francisco's Legal Ethics Committee, and as Vice Chair of that Committee, I respectfully submit the following comments on Proposed Rule of Professional Conduct 1.18 (Duties to a Prospective Client). Our Committee opposes the provision of this rule permitting "non-consensual" screening.

As a preliminary matter, we note that the materials provided by the Commission indicate that the provision permitting non-consensual screening of a consulted lawyer when confidential information is learned during the pre-retention period remains in paragraph (d)(2) after a 5-5 vote by the Commission to strike the provision.

**The Proposed Rule Would Significantly Depart From Existing Law and Policy Concerns.**

Except in the limited context of government lawyers, California courts have not generally approved the concept of non-consensual screening, despite numerous opportunities to do so. See *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 410, 438, fn. 11. In considering the matter, California courts have emphasized, among other things, the detrimental effect that such screening could have on public confidence in the legal system. See, e.g., *Adams v. Aerojet-General Corp.* (2001) 86 Cal.App.4<sup>th</sup> 1324

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March 12, 2010  
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("No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage .... No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."). Allowing non-consensual screening outside the government lawyer context is therefore a significant departure from existing law and concerns about public confidence in the integrity of the legal process.

The policy considerations that led to an exception for screening in the government lawyer context do not have the same application in the private sector context. See, e.g., *Chambers v. Superior Court* (1981) 121 Cal.App.3d 893, 899 (discussing the interest in not unduly inhibiting the government's ability to attract legal talent). Instead, non-consensual screening in the private sector appears to be driven largely by the interests of lawyers and law firms. Unlike the public interest in encouraging lawyers to work for governmental bodies that act for the benefit of the public as a whole there is no overriding "public interest" in a particular firm being able to represent a particular client in a particular private-sector matter.<sup>1</sup>

**No Principled Reason has Been Articulated For Affording Less Protection to Prospective Clients That Provide Confidential Information to Lawyers Than Former Clients.**

While some sophisticated clients may be accustomed to negotiating conflict issues and the use of screening mechanisms with their lawyers, many clients are not familiar with such concepts. More significantly, ethical screens in the private sector are generally the product of negotiation in the context of the engagement through, for instance, an advance conflict waiver in the engagement agreement, or through efforts by the lawyer to seek the informed consent of his or her client to proceed with an adverse representation despite having previously obtained material confidential information.

Here, the Commission proposes non-consensual screening where the prospective client may never have any further contact with the lawyer beyond his or her initial discussion(s) regarding possible retention of the lawyer, and may never have occasion to

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<sup>1</sup> There is, of course, an important interest in clients being able to retain counsel of their choice. However, case law recognizes that "[t]he important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citation.]" *People ex. rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4<sup>th</sup> 1135, 1145.

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discuss or negotiate such issues. Nor is the lawyer required to initiate such negotiations by seeking informed consent from the prospective client. Instead, the lawyer and his or her firm have the unilateral power to resolve the conflict issue without input from the prospective client. Why is a prospective client who consults with a lawyer for the purpose of retaining the lawyer, and provides material confidential information, but does not end up retaining the lawyer, entitled to less protection of his or her confidential information than the prospective client who ends up retaining the lawyer?

California case law acknowledges that, in addition to a client's or prospective client's interest in confidential information, other important policies are implicated when considering conflicts and appropriate methods for resolving them. Those policies include the need to maintain the public's trust and confidence in the legal system, to preserve a client's or prospective client's trust in the lawyer he or she consults with, and to preserve trust in their ability to communicate freely with the lawyer in confidence. See *SpeedDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1145; *Aerojet, supra*, 86 Cal.App.4<sup>th</sup> 1334-1335. We see no reason why these concerns are less important in the context of a "prospective client" who has provided confidential information to the lawyer, as opposed to a former client who has done so.

**The Requirement That the Lawyer Take "Reasonable Measures to Avoid Exposure to More Information That Prohibits Representation Than was Reasonably Necessary to Determine Whether to Represent the Prospective Client" Does Not Justify Non-Consensual Screening.**

While those in favor of a non-consensual screening provision note that it is available in only limited situations where the consulted lawyer "took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client," it is not clear that this provides meaningful protection to a prospective client who has given material confidential information to the lawyer.

The information a lawyer may "reasonably" require in a given matter in order to decide whether to represent a prospective client is not static, and can vary from case-to-case. The proposed standard appears to focus more on the quantity of information obtained by the lawyer, or his or her intention to abstain from obtaining more information than reasonably necessary, rather than the protection of the information that was in fact obtained. As the rule is written, unilateral screening comes into play when the lawyer has *in fact* obtained material confidential information. At that juncture, what relevance does the amount of information obtained or the lawyer's prior intention have as to the level of protection that should be afforded to the confidential information? See *SpeedDee Oil*,

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*supra*, 20 Cal.4<sup>th</sup> at 1148 ("The primary concern is whether and to what extent the attorney acquired confidential information. [Citation.]"). Why do these factors warrant imposition of a non-consensual screen when a law firm could not do so with respect to a former client in the same position?

California courts have rejected the notion that disqualification based on a lawyer's potential or actual receipt of confidential information must necessarily be denied because the lawyer's relationship or interaction with the moving party was brief. See *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4<sup>th</sup> 109, 113-114 ("Even the briefest conversation between a lawyer and a client can result in the disclosure of confidences."). Similarly, our courts have refused to formulate protections for such information based on the good or bad intentions of the lawyer. Instead, the courts have noted that the legal protections afforded to confidential information are intended to be prophylactic and to prevent disclosure of confidential information by even a well-intentioned lawyer. See, e.g., *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1147 (the conflict of interest rules are "...'designed not alone to prevent the dishonest practitioner from fraudulent conduct,' but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients' rights. (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another.").

The notion that the provision appropriately balances the interests of the prospective clients and the interests of the firm's affected clients in retaining the lawyer of their choice is also problematic. Allowing a non-consensual screen in the prospective client context suggests that the confidentiality interests of prospective clients are given less deference than the confidentiality interests of those who follow through with the retention of the lawyer. This principle is at odds with existing authority. As the Commission notes in its materials, California has long recognized a duty to protect confidential information of a prospective client even where no attorney-client relationship exists. That concept is codified in Cal. Ev. C. § 951; see also *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1147-1148, quoting *Westinghouse Elec. Corp. v. Kerr-McGee Corp.* (7<sup>th</sup> Cir. 1978) 580 F.2d 1311, 1319, fn. omitted ("The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.").

**Allowing Non-Consensual Screening Could Impair the Flow of Information  
Between Attorney and Client.**

Under the rule as currently drafted, a law firm contacted by a prospective client that receives the prospective client's material confidential information is not required to

Audrey Hollins  
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provide any notice to the prospective client of the potential consequences of the consultation. The law firm may later appear against the prospective client in the same matter in which the prospective client sought the law firm's advice by unilaterally imposing a screen. Such a proposition risks chilling the free-flow of information between the lawyer and potential client. The process of determining whether to undertake representation of a client can often entail more than one discussion, and can proceed well beyond an initial conflicts check. Lawyers dealing with prospective clients should not be encouraged to limit the information they need to make an intelligent and informed decision about the potential representation. Such a proposition also risks a chilling effect on the prospective client's willingness to disclose important information to the lawyer. California, and other jurisdictions, have long recognized that full disclosure of facts, and open communication, between a lawyer and client are part of the bedrock of the attorney-client relationship and are fundamental to a lawyer's ability to effectively represent a client and to carry out his or her ethical obligations. See *SpeeDee Oil, supra*, 20 Cal.4<sup>th</sup> at 1146; *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235.

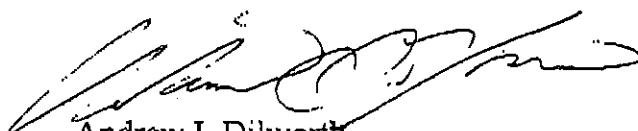
**The Written Notice Requirement Does Not Enable the Prospective Client to Verify That Its Confidences Are Being Appropriately Protected**

We appreciate the fact that the Commission has tried to enhance the protections afforded to a prospective client by adopting language not contained in ABA Model Rule 1.18, to the effect that written notice must be promptly given to the prospective client "to enable the prospective client to ascertain compliance with the provisions of the Rule." While at first blush this language might suggest a greater level of accountability by the law firm, it may be largely illusory. Screens can be in place over long periods of time (legal matters can go on for months or years). If a prospective client has an interest in ensuring that a firm has an effective screen in place at the beginning of the firm's adverse representation of another client, it presumably has no less of an interest four months or four years into that representation. Even where a law firm advises a client of screening procedures it has put in place, a client typically has no meaningful way to monitor continuing compliance with, or the effectiveness of, the screen. This is especially true for a "prospective client" who does not have a continuing relationship with the law firm.

Audrey Hollins  
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We appreciate the opportunity to have presented our views to the Commission, and hope that the Commission will give further consideration to these matters.

Very truly yours,



Andrew I. Dilworth  
Bar Association of San Francisco,  
Legal Ethics Committee, Vice Chair

AID:rc

cc: William Balin, Chair  
San Francisco Bar Association, Legal Ethics Committee



THE STATE BAR OF  
CALIFORNIA

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March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions:~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

**Rule 1.17 Purchase and Sale of Law Practice.**

- ~~1. Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC's believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some comments regarding this, but OCTC believes that it should be stated in the rule itself.)~~
- ~~2. Comment 2 says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16. Comment 1A defines "selling lawyer;" this definition should be in the rule, not a comment. Comment 4 is completely repetitive of the rule itself and thus unnecessary. Comments 5-6 and 13 also serve no purpose. Comment 12, which provides information regarding the withdrawal requirement, should be in the rule, not a comment. Comments 15A (that lawyers must comply with rules 1.5.1 and 1.5.4) and 15B (requiring compliance with Bus & Prof. Code section 6180) also belong in the rule, not a comment.~~

**Rule 1.18 Duties to Prospective Clients.**

1. The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.
2. OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule which clearly deals with all related issues.
3. Like the rule itself, comments 6 - 8 are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in comment 9 to the competence rules and the client's property rules.

**Rule 3.9 Non-adjudicative Proceedings.**

- ~~1. OCTC is concerned with the Commission's departure from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's rule.~~
- ~~2. Comments 1-2 are too general. OCTC also requests a comment that other rules may apply depending on the facts and circumstances.~~



**THE STATE BAR  
OF CALIFORNIA**

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**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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 1.18

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 1.18, Duties to Prospective Client.

We generally support adoption of this proposed rule. In particular, we support the inclusion of non-consensual screening in paragraph (d)(2)(i), a concept that apparently split your committee 5-5.

Notwithstanding our general support for proposed Rule 1.18, we recommend the following changes.

First, we find the language of subparagraph (d) confusing in that it does not specify who can represent the affected client. We recommend changing (d) to read:

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client by another lawyer at such lawyer's firm is permissible if: (added language underscored)

Second, we find awkward the use of the phrase "prohibited lawyer" in subparagraph (d)(2)(i). We recommend the phrase be changed to "the lawyer who received the information."

Third, in Comment [1], we recommend the deletion of the sentence "Hence, prospective clients are entitled to some but not all of the protection afforded clients." We believe that this sentence may suggest inappropriately that a lawyer owes a duty of confidentiality to

prospective clients that is different than the duty of confidentiality owed to current or past clients. We see no difference under existing California law.

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 style with a large, prominent initial "C".

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

cc: Members, COPRAC

## Rule 3.9 – Public Comment – File List

F-2010-378 Esther [multiple]  
F-2010-380f SDCBA [3.9]  
F-2010-382h SCCBA [3.9]  
F-2010-384 Jill Smith BHFS [3.9]  
F-2010-385f OCBA [3.9]  
F-2010-386 CBIA [3.9]  
F-2010-389 Latham Watkins [3.9]  
F-2010-390 Brett Jolley [3.9]  
F-2010-392e State Bar OCTC [3.9]  
F-2010-394a David Ivester [3.9]  
F-2010-395 Louise Renne [3.9]  
F-2010-397f COPRAC [3.9]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

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---

\* Required



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BAR ASSOCIATION**

February 12, 2010

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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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~CONCLUSION: We approve the new rule with modifications.\* delete paragraph (d)(2)~~

---

LEC Rule Volunteer Name(s): Jack Leer

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

**Proposed New Rule No./ Title:** 3.9 – “Non-adjudicative Proceedings”

(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee’s determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. However, given the proposed Rule’s minimal requirements and the policy of seeking to bring California’s rules in line with the ABA Model Rules, I believe the Rule should be adopted as proposed.

**CONCLUSION:** We approve the new rule in its entirety.

---

~~LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)~~

~~**Old Rule No./Title:** N/A (Existing CA statute: Bus & Prof. Code section 60608(e))~~

~~**Proposed New Rule No./ Title:** 4.1 “Truthfulness In Statements to Others”~~

~~(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers’ conduct and beliefs.~~

~~Proposed Rule 4.1 (a) states a lawyer’s duty of honesty that is owed to third persons in the course of representing a client as follows:~~

~~“(a) In the course of representing a client a lawyer shall not knowingly:~~

~~(1) make a false statement of material fact or law to a third person; or~~

~~(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is~~



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.

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\* Date

03/01/2010 

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File :

F-2010-382h SCCBA [3.9]

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.

March 3, 2010

Jill H. Smith  
805.882.1438 tel  
805.965.4333 fax  
jsmith@bhfs.com

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

RE: Comments on Proposed Rule 3.9 Advocate in Nonadjudicative Proceedings

Dear Ms. Hollins:

Brownstein Hyatt Farber Schreck, LLP has reviewed the proposed Rule 3.9 Advocate in Nonadjudicative Proceedings. The purpose of this letter is to offer comments on the proposed rule to the Commission for its consideration.

Comment 3 to the proposed Rule 3.9 states that the rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. However, Comment 3 fails to specify whether the rule would apply when a lawyer represents a client in a "quasi-legislative" or "quasi-judicial proceeding."<sup>1</sup> As written, the rule is unclear as to whether this rule would apply to a lawyer representing a client in connection with obtaining a land use permit, proposed ordinance or local policy matter being considered by a planning commission. These hearings are in the nature of legislative or adjudicative hearings, conducted by a local agency as to local matters. The rule expressly states that it applies to a nonadjudicatory proceeding.

Brownstein Hyatt Farber Schreck, LLP respectfully requests that the Commission revise proposed Rule 3.9 Comment 3 so that it clearly states whether or not it applies to lawyers representing clients in "quasi-judicial proceedings." Members of our firm maintain the highest ethical standards in our presentations before any decision makers, but we concur with commentators who have noted that holding lawyers to the strict standard proposed can place attorneys at a distinct disadvantage because,

<sup>1</sup> Section 11440.60 of the Government Code defines "quasi-judicial proceeding" as any of the following:

- (A) A proceeding to determine the rights or duties of a person under existing laws, regulations, or policies.
- (B) A proceeding involving the issuance, amendment, or revocation of a permit or license.
- (C) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.
- (D) A proceeding at which action is taken involving the purchase or sale of property, goods, or services by an agency.
- (E) A proceeding at which an action is taken awarding a grant or a contract.

Variations and conditional use permits are quasi-judicial, requiring an administrative decision maker to ascertain facts in a specific case, to exercise discretion in applying the law to those facts, and to draw conclusions and adopt findings to support those conclusions. (CEB Cal. Land Use Practices §7.4 C. Procedures Required for Consideration of Variance.)

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

March 3, 2010  
Page 2

in these kinds of proceedings, different witnesses have differing versions of what is and is not a falsehood.

Thank you for considering these comments.

Sincerely,

A handwritten signature in cursive script that reads "Jill H. Smith". The signature is written in black ink and is positioned above the printed name.

Jill H. Smith

SB 536119 v1:000009.0001

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\* Date

03/08/2010 

Period

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File :

F-2010-384 Jill Smith BHFS [3.9]

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OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

- Rule 1.0.1 Terminology [1-100]
- Rule 1.4.1 Insurance Disclosure [3-410]
- Rule 1.11 Special Conflicts for Government Employees [N/A]
- Rule 1.17 Sale of a Law Practice [2-300]
- Rule 1.18 Duties to Prospective Client [N/A]
- Rule 3.9 Non-adjudicative Proceedings [N/A]
- Rule 4.1 Truthfulness in Statements to Others [N/A]
- Rule 4.4 Respect for Rights of 3rd Persons [N/A]
- Rule 6.1 Voluntary Pro Bono Service [N/A]
- Rule 6.2 Accepting Appointments [N/A]
- Rule 6.5 Limited Legal Services Programs [1-650]
- Rule 8.2 Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofsky  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 3.9 – Non-Adjudicative Proceedings**

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 and Ethics Committee.

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

Proposed Rule 3.9 would regulate a lawyer's conduct when representing a client before a legislative body or administrative agency in a non-adjudicative matter. The proposed Rule would require the lawyer to disclose that his or her appearance is in a representative capacity and, further, would require compliance with proposed Rule 4.1 (which imposes a duty to avoid making any representation of a material fact which the lawyer knows to be false).

The OCBA opposes the adoption of the proposed Rule and agrees with the position of the Commission's minority. The proposed Rule should not be adopted in any form because it exposes lawyers to unique risks and disciplinary measures that are not faced by others who appear before the same legislative or administrative bodies and could have the effect of chilling communications with the government.

First, the OCBA believes that the first part of the proposed Rule, requiring a lawyer to disclose that his or her appearance is in a representative capacity, may occasionally conflict with the interests of his or her client and, in certain circumstances, may directly conflict with actual instructions of the client that the representation not be disclosed.

Second, the OCBA opposes any specific reference to Rule 4.1 or any other reference to a lawyer's other duties. Of course, a lawyer should observe all Rules of Professional Conduct and the State Bar Act that are applicable to any particular circumstance. Moreover, like all other persons who appear before legislative bodies or administrative agencies, a lawyer should also abide by and comply with other applicable laws and rules, including rules promulgated by the specific governmental body that regulate conduct of persons appearing before it. However, the OCBA believes that a lawyer should not be considered subject to additional constraints and discipline in this context simply because of the fact that he or she is a lawyer – whether acting for a client or on his or her own behalf.



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fax 916/443-1960  
www.cbia.org

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Home Builders  
Association of  
Northern California  
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Home Builders  
Association of  
Tulare & Kings Counties  
Visalia

North State Building  
Industry Association  
Roseville

March 9, 2010

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

Re: Proposed Rule 3.9 Advocate in Nonadjudicative  
Proceedings

Dear Ms. Hollins:

The California Building Industry Association (CBIA) is a non-profit trade association representing approximately 3,700 member companies who are responsible for all aspects of the planning, design, financing, construction, sales and maintenance of approximately 70% of all homes built in California annually. CBIA includes more than 200 lawyers who specialize in representing this industry in nonadjudicative proceedings throughout the state. Regrettably, we write to inform you of our opposition to Proposed Rule 3.9.

Proposed Rule 3.9 would prohibit attorney-advocates from making false statements in proceedings conducted by legislative and executive branches of government.

We are opposed to Proposed Rule 3.9 because we believe that the net effect of the rule will be to chill the role of lawyers who represent clients in nonadjudicative proceedings without any resulting improvement to the integrity, honesty or candor in such proceedings.

Before the Legislature enacted California's SLAPP statutes, California had a history of litigation arising out of advocacy for or against a pending project. That litigation frequently was without merit, but was used to chill speech. As matters now stand, everyone who participates in the public process before a legislative or executive branch of government can communicate without having to be concerned about being prosecuted for what they say.

Rule 3.9 would single out lawyers for potential prosecution for their statements before a legislative or executive branch of government. Our experience suggests that it will open the door to largely groundless claims and complaints that will be motivated by the desire to silence lawyers representing clients before the agency.

By exposing lawyers to unique risks that do not apply to any other participant in the process, will limit lawyers' ability to be effective advocates for their clients in such proceedings. We expect that proponents and opponents of homebuilding projects across the state will use other consultants who are not subject to the risk this Rule would create. Unlike proceedings in the judicial branch, parties addressing a legislative or executive branch are not required to be represented by lawyers. They are free to hire other representatives not subject to the prohibitions of Proposed Rule 3.9. Non-lawyers are not restrained by an obligation to tell the truth. In fact they are protected by Civil Code section 47 from civil liability in exercising their First Amendment rights.

If the purpose of the Proposed Rule is to enhance integrity in nonadjudicatory proceedings, it will fail to achieve its goal. At the same time, it will create an unlevel playing field, where lawyers are the only category of professional before an agency who would be exposed to claims based on what they say before the agency. Lawyers often are in the best position to protect a client's position before the agency. If a lawyer is being a particularly effective advocate for a client in a contentious proceeding, we expect that opponents will attempt to take the lawyer out of the process either by reporting the lawyer to the State Bar for discipline or by bringing suit against the lawyer using the Proposed Rule 3.9 as the basis for the claim. Our experience prior to the SLAPP statutes is that victory consists in either quieting or restraining the target by the claim. It is not likely to matter whether the suit or State Bar complaint is successful. Indeed, the case or complaint probably will not be resolved until long after the proceedings before the agency are over.

The end result will not benefit clients. The entitlement process before executive and legislative bodies is a highly technical process. Many cases involve complicated legal issues. The risk adverse lawyer can be expected to limit his or her participation in the client's matter in the face of a claim, leaving the client to

use less effective advocates, who do not have the skill or training to address the legal issues.

Further complicating Proposed Rule 3.9 is its reference to Rule 4.1. Rule 4.1, comment [1] appears to prohibit a lawyer from incorporating or affirming another person's statement that the lawyer knows is false. Would this mean that merely repeating what another says, not adopting it as her or his own statement, would place a lawyer in jeopardy of violating the Proposed Rule?

Rule 4.1 comment [1] also prohibits making a partially true but misleading material statement. Unfortunately the comment does not specify that the statement must be made knowingly. Many statements may be misleading without any knowledge on the part of the speaker. This seems inappropriate in this context.

Because Proposed Rule 3.9 lacks clarity, lawyers will not know what statements are permitted and what are prohibited. Therefore, we believe that it will have a chilling effect on lawyers' ability to represent clients in nonadjudicatory proceedings. Additionally, the Proposed Rule puts lawyers who practice in nonadjudicative proceedings at a distinct disadvantage. For these reasons, we oppose Proposed Rule 3.9.

Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Nick Cammarota". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

Nick Cammarota

General Counsel

# LATHAM & WATKINS LLP

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Milan	

March 12, 2010

### VIA EMAIL AND FACSIMILE

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

Re: Proposed Rule 3.9 – Nonadjudicative Proceedings

Dear Chairman Sondheim and Commissioners:

On behalf of Latham & Watkins LLP, I am writing with respect to Proposed Rule 3.9 (Nonadjudicative Proceedings), which the Commission for the Revision of the Rules of Professional Conduct has circulated for public comment.

Our firm only recently has become aware of Proposed Rule 3.9 and is concerned that other members of the State Bar may likewise not be aware of the proposed rule. Our firm holds itself to the highest standards of truthfulness in all of our practice areas, including in nonadjudicative proceedings. However, we are concerned that Proposed Rule 3.9, and the minority dissent to the proposed rule, raise significant and complicated issues, the implications of which may not be fully understood by members of the State Bar who practice before legislative and administrative bodies.

We therefore respectfully request that the Commission provide additional time for public comment prior to taking action on Proposed Rule 3.9.

We appreciate your consideration of this request.

Sincerely,

  
John J. Clair  
Los Angeles Office Managing Partner  
of LATHAM & WATKINS LLP

cc: Randall Difuntorum

March 12, 2010

**VIA FACSIMILE AND U.S. Mail**

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

Re: Opposition to Proposed Rule 3.9 of the Rules of Professional Conduct

Dear Ms. Hollins:

I write in opposition to Proposed Rule 3.9 of the Rules of Professional Conduct which imposes requirements upon attorneys during administrative hearings and exposes those attorneys to potential liability to which no other class of participant or representative would be subject. While the intent of the rule is no doubt honorable, adopting this rule would chill public participation, and could deprive citizens of access to justice during non-adjudicative proceedings.

Although I currently serve as the President of the State Bar's California Young Lawyers Association, I do not submit these comments in that capacity or on behalf of CYLA (which has not considered the proposed rule), but rather on behalf of the Land Use practice group of Herum Crabtree and as member in good standing of the State Bar since 2000. As land use attorney, I and other attorneys in my office regularly appear before city councils, county boards of supervisors, planning commissions, LAFCOs, and other administrative bodies on behalf of project proponents, opponents, and public agencies. Though based in Stockton, our geographic territory for administrative hearings is expansive – from as far north as Chico to as far south as Riverside County.

Proposed Rule 3.9 is unsettling as it will eliminate certain protections that facilitate open communication between the public and governmental agencies. To this end, we agree with the minority dissent and urge the Commission to not adopt the Rule.

The proposed rule would create an unnecessary, unfair, and unreasonable double standard for participants in administrative hearings. Stated slightly differently, attorneys would be subject to potential discipline – *and threat of discipline* – not apt to any other

participant in administrative proceedings. Rule 3.9 could open the door for individuals who do not agree with an attorney's statements made during a public hearing to retaliate by filing a complaint against that attorney with the State Bar – burdening both the financially-strapped regulators and the regulated attorneys with unnecessary hardship.

While we do not dispute that an attorney should conform duties of honesty and professional responsibility in both judicial and non-adjudicative proceedings, this Rule goes far beyond the issue of truthfulness and clearly eliminates the level playing field currently enjoyed by all who participate in administrative proceedings. As a practical matter, unlike court proceedings, parties to land use proceedings are often represented during the proceedings by lawyers, as well as political and environmental consultants, architects, engineers, and even themselves. Formal rules of evidence and procedure do not apply to these proceedings. To the extent attorneys are subject to disciplinary standards to which other speakers and classes of professionals are not, attorney participation will be discouraged. Stated slightly differently, while such rule may properly apply in court where only attorneys represent clients – the same cannot be said of administrative hearings.

To this end, and also unlike judicial proceedings, the decision makers in land use proceedings – whether quasi-legislative or quasi-judicial – are not judicial officers and instead are often laypeople in the eyes of the law. The decision makers also frequently engage in ex parte communications with interested parties. It is not uncommon for a decision maker who is adverse to a particular party or side of an issue to use his or her position on the dais as a vehicle to conduct an ad hoc deposition of a speaker who is not under oath. I have personally observed decision makers in this situation read prepared, pointed, and sometimes hostile questions at a speaker – and often times the questions reflect the direct influence of an interested party who has shared this information with the decision maker. To the extent an attorney is held to a higher standard in responding to these questions than his client or his client's architect, engineer, or planning consultant this places an unfair burden on the attorney and may actually *discourage* clients from using attorneys in heated situations for fear that the attorney will have to disclose information about the client or face a threat of violating Rule 3.9.

And rather than facilitate open communication with local government, the Rule will deter the public from exercising its First Amendment right to free speech. California's Anti-SLAPP Law was enacted to eliminate threats discouraging individuals from exercising their rights of petition and free speech in connection with public issues. As the Legislative History on CCP §425.16 reveals, "The purpose of this bill is to protect a person's exercise of First Amendment free speech and petition rights from being chilled by meritless lawsuits." See, Senate Committee on Judiciary analysis of SB 10 (1991, Lockyer), enclosed herewith. That report continues:

Ms. Audrey Hollins  
Comment on Proposed Rule 3.9  
March 12, 2010  
Page 3

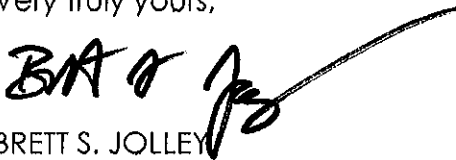
[SLAPP] suits are being brought in large numbers in order to chill the exercise of first amendment rights. Most SLAPP suits...are filed for the sole purpose of intimidation...Proponents assert that although the great percentage of SLAPP suits are legally unsuccessful, they nonetheless exact a high toll from targeted defendants who are forced to invest significant financial resources, time, and emotions in defending the suits.

Rule 3.9 has the potential to counteract this purpose; subjecting attorneys to standards and discipline during public hearings to which no other participants are held, will discourage lawyers from engaging in open discussion with government officials regarding public policy matters on behalf of their clients. By way of example, assume a community group engages an attorney to represent its interests in opposing a land use permit for a landfill in proceedings before a city planning commission. The planning commission denies the landfill permit and the project proponent appeals to the City Council. Between the planning commission and city council hearings the landfill proponent files a complaint with the State Bar that a statement made by the attorney is untruthful and violates Rule 3.9. Even if entirely meritless, what impact does this filing have on the attorney and his client as they prepare for the city council appeal? What psychological impact does this action have on the city council members who will hear and decide the appeal? What if the landfill proponent uses this complaint as "leverage" to prevent counsel from representing his client at the appeal hearing?

We share the minority's concern that Rule 3.9 will result in a new breed of retaliatory measures designed to chill an adverse party's advocacy before a government agency. The mere threat of Rule 3.9 sanctions may be inappropriately used to chill attorney participation in administrative proceedings, just as SLAPP suits chilled public participation. And depriving citizens of representation by counsel contradicts principles of promoting access to justice.

We appreciate the opportunity to comment on Proposed Rule 3.9 and urge the Board of Governors to reject Rule 3.9.

Very truly yours,



BRETT S. JOLLEY  
Attorney at Law

Enclosure: Senate Committee on Judicial analysis, SB 10 (1991)

cc: Steven A. Herum, Herum Crabtree  
Natalie M. Weber, Herum Crabtree  
Kerri K. Foote, Herum Crabtree

SENATE COMMITTEE ON JUDICIARY  
Bill Lockyer, Chairman  
1991-92 Regular Session

SB 10 (Lockyer)  
As introduced  
Hearing date: March 12, 1991  
Code of Civil Procedure  
GWW/ps

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CIVIL LAWSUITS  
PLEADING HURDLE FOR "SLAPP" SUITS

HISTORY

Source: Author

Prior Legislation: SB 2313 (1991) - Vetoed

Support: Planning and Conservation League; First Amendment  
Coalition; ACLU; Numerous individuals

Opposition: California Building Industry Association

KEY ISSUE

SHOULD A PLAINTIFF BE REQUIRED TO SHOW A COURT THAT THE ACTION HAS A SUBSTANTIAL PROBABILITY OF SUCCESS BEFORE HE MAY PROCEED WITH A LAWSUIT AGAINST A PERSON FOR ACTS OF THE PERSON IN FURTHERANCE OF THAT PERSON'S FIRST AMENDMENT RIGHT OF PETITION OR FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE?

SHOULD A PREVAILING DEFENDANT IN SUCH AN ACTION BE ENTITLED TO RECOVER HIS OR HER ATTORNEY'S FEES?

PURPOSE

Existing law prohibits certain causes of actions from being included in a complaint or other pleading unless the court enters an order allowing the pleading upon establishment by the plaintiff that there is a substantial probability of success or sufficient evidence to support the claim, depending on the particular case. "Pleading hurdles" are in place for tort actions against volunteer

(More)

directors and officers of non-profit corporations, and for punitive damage claims against health care professionals and religious organizations.

This bill would enact a "pleading hurdle" for "causes of action against a person arising from any act of that person in furtherance of his or her first amendment right of petition or free speech in connection with a public issue." For a law suit to proceed, the plaintiff must establish a substantial probability of success.

The bill would also allow a prevailing defendant in any action described above to recover his or attorney's fees and costs.

The purpose of this bill is to protect a person's exercise of First Amendment free speech and petition rights from being chilled by meritless lawsuits.

#### COMMENT

##### 1. Need to deter SLAPP suits

According to the author's office and research by two professors at the University of Denver, "Strategic Lawsuits Against Public Participation (SLAPP)" suits are being brought in large numbers in order to chill the exercise of first amendment rights. Most SLAPP suits are filed under a variety of causes of actions, such as defamation, interference with economic opportunity, or conspiracy, and are filed for the sole purpose of intimidation.

According to the University of Denver study by Professors George Pring and Penelope Canan, 83 of 100 studied cases were ultimately dismissed or found to be without merit. Updated statistics, not yet finalized, on 250 cases indicate that more than 90% of the SLAPP suits are legally unsuccessful. According to Professor Pring, there are perhaps thousands of such lawsuits being filed annually.

Proponents assert that although the great percentage of SLAPP suits are legally unsuccessful, they nonetheless exact a high toll from targeted defendants who are forced to invest significant financial resources, time, and emotions in defending the suits.

The author also states: "These are lawsuits designed to silence ordinary citizens from trying to influence their government. In a democratic society with the right to petition government being one of the fundamental liberties, we want to encourage participation."

In Sierra Club v. Butz 349 F. Supp 974 (1972), the district court held:

(More)

"[A]ll persons, regardless of motive, are guaranteed by the First Amendment to the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful."

2. Examples of SLAPP suits

Proponents offer several examples of SLAPP suits which SB 10 is intended to screen:

- Alan La Pointe was sued for \$42 million after he publicly complained to stop construction of a local sanitary district's garbage burning plant. The case was ultimately dismissed and the expenses to defend the action would have exceeded \$20,000 had not the attorney provided the services pro bono.
- Two Hudson Falls, N.Y. citizen groups who went to court in 1989 to stop construction of a \$74 million trash incinerator were countersued by local agencies for \$1.5 million. Officials contended that the opposition drove off prospective buyers of bonds to finance the project. The government attorney added a further intimidating touch by announcing that defendants risked losing their homes. The countersuit was dismissed by a state appellate court in January, 1990.
- Dr. John Bolton and the American Academy of Pediatrics were sued by Alta Dena Dairy for \$220 million after he gave testimony before Congress about the dangers of raw "certified" milk. The case was eventually dismissed, but the defendants incurred \$75,000 in defense costs.
- Members of the Land Utilization Alliance (in San Joaquin County) have been recently sued for protesting a sewer plant expansion and a local development.
- Rick Sylvester and others were sued in 1987 for \$75 million by a land development corporation which claimed that he and others broke an agreement to not publicly oppose a development project. Mr. Sylvester has already incurred \$350,000 in defending the suit.

Proponents assert that the pleading hurdle proposed in SB 10 is intended to screen out meritless cases at an early stage in order to save defendants the tremendous burden of unnecessary litigation. Proponents also note that legitimate suits would not be affected because the plaintiff in that case would be able to make the requisite showing to the trial judge.

(More)

3. Examples of pleading hurdle in existing law

Other uses of the pleading hurdle in existing law include:

- punitive damages claims for medical malpractice (Sec. 425.13) or against religious organizations (CCP Sec. 425.14);
- liability suits against volunteer directors and officers of specified non-profit organizations (CCP S. 425.15); and
- liability suits against attorneys for civil conspiracy with client to deny plaintiff's rights. (Civil Code Sec. 714.10)

4. Attorney's fees to prevailing defendant

Statutes which provide for attorney's fees usually provide it to a prevailing party. SB 10, in contrast, provides attorney's fees only to a prevailing defendant.

The exception to the general rule is both necessary and justifiable, assert proponents. It is necessary to "make whole" the defendant of a SLAPP suit, and it is justifiable in order to deter actions to chill the exercise of first amendment rights.

5. Building industry opposition

The CBIA opposes SB 10, asserting that SB 10 involves "the misconception that a new breed of litigation has surfaced in which builders or land developers file meritless lawsuits against individuals who exercise their right to speak out against a project."

6. Prior veto

In his veto of SB 2313, former Governor Deukmejian stated: "[T]here are currently protections against frivolous causes of action, and judges should be encouraged to impose liberal sanctions against parties who file such lawsuits. I do not believe this bill is necessary to protect citizen involvement in public issues."

Proponents respond that mandatory sanctions are necessary to deter the filing of frivolous actions which chill the exercise of important constitutional rights; the mere filing of a SLAPP suit on a given issue has been known to operate to chill other speech on that issue. Further, proponents point out that SLAPP suits are expensive to defend and it is still very difficult and expensive to obtain an early dismissal of a meritless action. They assert that it is better to provide a pro-active and front-end protection for the exercise of First Amendment rights.

(More)

7. Possible overbreath

The California District Attorneys' Association, while not opposing the bill, expresses concern that the bill may have the unintended consequence of hindering enforcement of certain consumer protection laws by state and local agencies, e.g., enforcement of law prohibiting false, misleading or deceptive advertising.

The author's staff suggests that possible language could be drafted later to address concerns of possible overbreadth.

\*\*\*\*\*



THE STATE BAR OF  
CALIFORNIA

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OFFICE OF THE CHIEF TRIAL COUNSEL  
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March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions:~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

### **Rule 1.17 Purchase and Sale of Law Practice.**

- ~~1. Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC's believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some comments regarding this, but OCTC believes that it should be stated in the rule itself.)~~
- ~~2. Comment 2 says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16. Comment 1A defines "selling lawyer;" this definition should be in the rule, not a comment. Comment 4 is completely repetitive of the rule itself and thus unnecessary. Comments 5-6 and 13 also serve no purpose. Comment 12, which provides information regarding the withdrawal requirement, should be in the rule, not a comment. Comments 15A (that lawyers must comply with rules 1.5.1 and 1.5.4) and 15B (requiring compliance with Bus & Prof. Code section 6180) also belong in the rule, not a comment.~~

### **Rule 1.18 Duties to Prospective Clients.**

- ~~1. The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.~~
- ~~2. OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule which clearly deals with all related issues.~~
- ~~3. Like the rule itself, comments 6-8 are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in comment 9 to the competence rules and the client's property rules.~~

### **Rule 3.9 Non-adjudicative Proceedings.**

- OCTC is concerned with the Commission's departure from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's rule.
- Comments 1-2 are too general. OCTC also requests a comment that other rules may apply depending on the facts and circumstances.



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.**

Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that my interfere with their representation of clients. Current law takes pains to assure that people can freely communicate with their government without fear of consequence. It would be unwise essentially to carve exceptions in such law to uniquely expose lawyers to risks for what they say on behalf of people communicating with their government, as Rule 3.9 would. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves.

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

Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of clients. Current law takes pains to assure that people can freely communicate with their government without fear of consequence. It would be unwise essentially to carve exceptions in such law to uniquely expose lawyers to risks for what they say on behalf of people communicating with their government, as Rule 3.9 would. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves.

I note that several states that have adopted rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. For the reasons noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.

# OFFICE USE ONLY.

\* Date

03/12/2010 

Period

PC

File :

F-2010-394 David Ivester [3.9]

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\* Required



RENNE SLOAN HOLTZMAN SAKAI LLP

1000 Market Street, Suite 300  
San Francisco, California 94102  
Tel: 415.774.1000  
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March 12, 2010

VIA FACSIMILE: 415-538-2171

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

**Re: Proposed Rule of Professional Conduct 3.9**

Dear Ms. Hollins:

I write to urge that the Special Commission for the Revision of State Bar Rules of Professional Conduct not adopt proposed Rule 3.9. As the former San Francisco City Attorney, former General Counsel to the San Francisco Unified School District, and as outside counsel to numerous California cities, counties, school districts, and other public entities, I believe that proposed Rule 3.9 represents a step in the wrong direction.

Proposed Rule 3.9 would eliminate existing statutory privileges and protections enjoyed by all speakers before Boards, Councils, and other legislative bodies, but only as to lawyers appearing before those bodies to advocate on behalf of clients. I believe that the proposed Rule carries the unintended consequences of reducing representation of citizens at public meetings, and of chilling speech.

The concerns raised by the dissent are valid. The level of discourse in the public arena has been increasingly hostile for some time. Unfortunately, most public meetings today seem to be marked by an overall lack of civility. In this context, it is not difficult to imagine how one might use Rule 3.9 to punish an opponent, or restrain or chill an advocate's participation in the public process.

The Legislature has long recognized the importance of open and unfettered discussion in public meetings. Since 1872, Civil Code section 47 has privileged statements made in legislative or other official proceedings from prosecution. (See Cal. Civ. Code § 47(a).) And nearly two decades ago, the Legislature established a special motion to strike to prevent lawsuits aimed at chilling public participation. (See Code Civ. Proc. § 425.15.) These statutes reflect a recognition that all public participation should be encouraged, even if that occasionally results in untruthful statements being made to legislative bodies; board- and councilmembers are sufficiently experienced to winnow the false from the true. Proposed Rule 3.9 is antithetical to the goals advanced by the Legislature in these statutes, unfairly restricts only attorney-advocates, and should be rejected.

Very truly yours,

Louise H. Renne



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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 3.9

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 3.9 and offers the following comments.

COPRAC generally supports the adoption of the rule. COPRAC recommends a slight change to the wording of the last sentence of Comment [1]. The use of the word "all" (as in, "Although a lawyer does not have *all* of the obligations owed by a court under Rules 3.3(a) through (c) . . .") implies or allows for the possibility that some of such obligations might apply in a non-adjudicative proceeding. However, since none of such obligations are applicable, we recommend changing "all" to "any" (so as to clarify that the lawyer does not have "any" such obligations).

COPRAC also recommends the deletion of Comment [3]. This comment, which tracks Comment [3] of the Model Rule, is no longer applicable as a result of the modification to the rule itself. In particular, the rule as proposed deletes the references contained in the Model Rule to the rules applicable to adjudicative proceedings (namely, Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5), and replaces those references with a reference to Rule 4.1. The comment attempts to clarify when those rules are applicable and when they are not in non-adjudicative proceedings; however, since such rules are no longer referenced, and Rule 3.9 should be applicable in all instances, the comment is inapplicable and could be confusing.

Thank you for your consideration of our comments.

Very truly yours,

Handwritten signature of Carole J. Buckner in cursive.

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

cc: Members, COPRAC

## Rule 4.1 – Public Comment – File List

F-2010-378 Esther [multiple]  
F-2010-379 Colin Wied [4.1]  
F-2010-380g SDCBA [4.1]  
F-2010-382i SCCBA [4.1]  
F-2010-385g OCBA [4.1]  
F-2010-392f State Bar OCTC [4.1]  
F-2010-394b David Ivester [4.1]  
F-2010-396b US Attorney's Office [4.1]  
F-2010-397g COPRAC [4.1]



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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 agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

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\* Required



Colin W. Wied\*

Attorneys at Law  
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\*National Commercial Arbitration & Mediation  
Panels, American Arbitration Association

October 7, 2009

\*Mediator Credential  
National Conflict Resolution Center

Judy Johnson, Esq. Executive Director  
State Bar Of CA/ED  
180 Howard St Fl 6  
San Francisco, CA 94105-1639

Re: Revisions to CA Rules of Professional conduct.

Dear Judy:

I just tried to send the enclosed email to Audrey Hollins. Unfortunately, it could not go through. I received a message that "Hollins" was an unauthorized recipient. I used her email address shown on p. 14 of the recent California Bar Journal.

Will you please forward my email to the appropriate party or group.

Thanks. I enjoyed our brief chat during the Annual Meeting in San Diego.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Colin W. Wied', written over a horizontal dashed line.

Colin W. Wied

## Colin Wied

---

**From:** Colin Wied [cww@cwwied.com]  
**Sent:** Wednesday, October 07, 2009 3:07 PM  
**To:** 'hollins@calbar.ca.gov'  
**Subject:** Rules of Professional Conduct

Ms.Hollins – I began teaching negotiation as an adjunct professor at University of San Diego Law School Spring Semester, 2008. A part of the course included ethics and rules of professional conduct. In preparing for this section of the course, I was aware of ABA Rule 4.1, which prohibits lying. I searched the CA Rules carefully, and I found no rule that would preclude lying generally, only lying to judges.

I am curious. Has this issue ever been addressed COPRA? If not, in my opinion, it should be.

There is more to this issue than the RPC. California case law not only condones lying and concealing, it seems to protect the perpetrator. Consider the case of *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal.App.4th 17; 116 Cal.Rptr.2d 583 (2002), in which the court determined that finality trumps fraud. An insurer brought an action against another insurer alleging fraud and seeking declaratory relief and subrogation or indemnity. Defendant's policy, with a \$500,000 limit, covered a permissive automobile driver who had negligently injured plaintiff's insured. However, during the underlying litigation, defendant was alleged to have misrepresented statutory limitations on coverage for permissive users as having restricted its policy limits to \$15,000. Relying on these representations, plaintiff's insured had settled the underlying case for \$15,000 and executed a release. Thereafter, in *Home v Zurich*, the plaintiff sought to overturn the settlement and release on grounds of fraud. Both the trial court and appellate court found in favor of the defendant, holding in essence that in California finality trumps fraud. No other state has adopted this draconian rule, and instead other states apply usual contract rules that permit agreements to be set aside for fraud or material mistake.

I urge the Board of Governors to consider adding a rule similar to ABA Rule 4.1 to the CA Rules of Professional Conduct.

Colin W. Wied, Past President, 1989  
State Bar of California

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**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~CONCLUSION: We approve the new rule with modifications.\* delete paragraph (d)(2)~~

---

~~LEC Rule Volunteer Name(s): Jack Leer~~

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

~~Proposed New Rule No./ Title: 3.9 "Non-adjudicative Proceedings"~~

~~(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee's determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. However, given the proposed Rule's minimal requirements and the policy of seeking to bring California's rules in line with the ABA Model Rules, I believe the Rule should be adopted as proposed.~~

~~CONCLUSION: We approve the new rule in its entirety.~~

---

LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)

Old Rule No./Title: N/A (Existing CA statute: Bus & Prof. Code section 60608(e))

Proposed New Rule No./ Title: 4.1 "Truthfulness In Statements to Others"

(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers' conduct and beliefs.

Proposed Rule 4.1 (a) states a lawyer's duty of honesty that is owed to third persons in the course of representing a client as follows:

**"(a) In the course of representing a client a lawyer shall not knowingly:**

**(1) make a false statement of material fact or law to a third person; or**

**(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is**

**prohibited by Rule 1.6 or Business and Professions Code section 6068(e)(1).”**

[Paragraph (b) based upon Oregon Rule 8.4, provides an exception for lawful convert activity in investigating violations of civil or criminal law, or constitutional rights.]

Thus, Rule 4.1 (a) applies only to statements of material fact or law that the lawyer knows to be false, and thus does not cover false statement that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.

The proposed Comment to Rule 4.1 largely tracks the Model Rule comment, with some additions intended to clarify California law. Proposed **Comment [2]** to proposed Rule 4.1 states:

“This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. **Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of Price or value placed on the subject of the transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category,** and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”

The above quoted proposed Rule 4.1 Comment [2] deletes the last sentence of the ABA Model Rule 4.1 Comment [2] which provides “Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation,” because, the Commission found it does not add materially to an understanding of the Rule and “is essentially a practice pointer.”

As an adjunct professor of Negotiations, I know that Model Rule 4.1 and particularly Comment [2] thereto have been the subject of numerous law review articles and considerable controversy over the past 30 years among academics primarily as it concerns the extent to which lawyers may lie and deceive during negotiations. The vast majority of legal academics writing on the subject have advocated (unsuccessfully) strengthening the duty of candor under the rules of professional conduct. Most scholars wishing to raise the ethical bar for lawyer-negotiators have advocated a variety of proposals including, but not limited to, forbidding lying and other forms of deception in a negotiation; requiring disclosure of all facts known to be important to the other party; requiring total candor and total cooperation to the extent required to insure that the result is fair; prohibiting false statements about interests and priorities; and mandating lawyers negotiate “honestly and in good faith.” Proposals to significantly modify Rule 4.1 and its comments during the “Ethics 2000” review were rejected.

The Commission deemed Proposed Rule 4.1 “Moderately Controversial” because a minority of the Commission believed that the proposed Rule addresses “nuanced concepts that are better left to the civil and criminal law, and should not be the focus of a disciplinary rule” and also concerns that the proposed Rule will expand a lawyer’s civil liability.” The minority also found “The phrase ‘generally accepted conventions in negotiation’ (from Comment [2]) is so abstruse that it does not belong in a disciplinary rule.

**CONCLUSIONS:** We approve the new rule in its entirety.



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</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.

# OFFICE USE ONLY.

\* Date

03/01/2010 

Period

PC

File :

F-2010-382i SCCBA [4.1]

Commented On:

Specify:

Submitted via:

Online

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\* Required



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BAR ASSOCIATION**

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March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 4.1 – Truthfulness in Statements to Others**

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 and Ethics Committee.

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

The OCBA supports the minority view that proposed Rule 4.1 should not be adopted. Multiple rules and statutes already address an attorney's duty of candor and duty not to participate in fraud, deceit or criminal activity. *See, e.g., CAL. BUS. & PROF. CODE, §§ 6068(d) (An attorney has a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."); 6128(a) (An attorney is guilty of a misdemeanor if he or she engages in "any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."); 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.");* proposed Rule 1.16 (addressing withdrawal from representation). In addition to these rules and statutes, case law defines fraud and deceit, and lawyers may face criminal and civil liability for such conduct. In other words, there is a well-defined body of law governing the duty of an attorney not to engage in fraudulent or criminal activity.

The proposed Rule contains a number of exceptions and vague language that do more to create ambiguity than provide clarity and guidance for attorneys. For example, proposed Rule 4.1(b) creates an exception for covert activity that is triggered when a "lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place, or will take place in the foreseeable future." Under such circumstances, the proposed Rule indicates that a lawyer may use "misrepresentation or other subterfuge" to obtain information about unlawful activity and then states "provided the lawyer's conduct is otherwise in compliance with these Rules." Clearly, the lawyer's conduct also would have to be in compliance with all other laws, and this exception does not contemplate all of the other manners in which a lawyer or someone acting at his or her direction may violate the law by use of "subterfuge" to obtain information.

Comment [1] also creates ambiguities that do not assist in providing attorneys with clear guidance on what conduct will and will not subject them to potential disciplinary action. The Comment suggests that an attorney can violate the proposed Rule by incorporating or affirming a false statement if the attorney does so knowingly. While the language suggests that an attorney must "know" that a statement of another person or declarant is false to rise to the level of a misrepresentation by the lawyer, the Comment does not provide guidance on what is required to establish knowledge. Further, there is some suggestion that attorneys vouch for the truth of deposition testimony and statements of declarants in court filings. When juxtaposed against the following sentence (stating that, "in drafting an agreement on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client"), the language implies that a lawyer does affirm or vouch for the truthfulness of the client's statements in other situations, including court filings. Because Comment [1] states that a lawyer does not "necessarily" affirm or vouch for the truthfulness of the client's representations in drafting an agreement, it leaves unclear when the lawyer does affirm or vouch for the truthfulness and when he or she does not.

Comment [2] raises similar problems, stating that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances." The circumstances are not defined in the Comment. Again, there is an entire body of case law that addresses the question: "What is a statement of fact?" Likewise, the language "[u]nder generally accepted conventions in negotiation" is too vague and provides no clear standard for attorneys to follow.

Finally, Comment [3] merely refers to and incorporates other Rules specifically designed to address criminal and fraudulent activity, underscoring why this proposed Rule should not be adopted. Again, there is ambiguity in the language of the Comment, and the language of the exceptions is difficult to follow. For example, the Comment states that "substantive law" may require an attorney to disclose information to avoid being deemed to have assisted in the client's fraud or crime, but does not clarify the substantive law that may create such a duty. It then goes on to state that, if the lawyer can only avoid assisting in the fraud or the crime by disclosing the information, the lawyer is required to do so unless the lawyer is prohibited from doing so under Rule 1.6 or Business and Professions Code section 6068(e). This language is confusing and should not be adopted.



THE STATE BAR OF  
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions:~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

#### **Rule 4.1 Truthfulness in Statements to Others.**

1. OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].
2. The Comments to this rule are too general and should be eliminated.

#### **~~Rule 4.4 Respect for the Rights of Third Persons.~~**

1. ~~OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct. The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(e); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9<sup>th</sup> Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.~~
2. ~~OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.~~
3. ~~Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.~~

#### **~~Rule 6.1 Voluntary Pro bono Publico Service.~~**

~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

#### **~~Rule 6.2 Accepting Appointments.~~**

~~OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.~~

#### **~~Rule 8.2 Judicial and Legal Officials. (Current rule 1 700.)~~**

1. ~~OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.**

Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of clients. Current law takes pains to assure that people can freely communicate with their government without fear of consequence. It would be unwise essentially to carve exceptions in such law to uniquely expose lawyers to risks for what they say on behalf of people communicating with their government, as Rule 3.9 would. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves.

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I note that several states that have adopted rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. For the reasons noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.

# OFFICE USE ONLY.

\* Date

03/12/2010 

Period

PC

File :

F-2010-394b David Ivester [4.1]

Commented On:

Specify:

Submitted via:

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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

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

FROM: George S. Cardona.  
Chief Assistant United States Attorney  
Central District of California

RE: Proposed California Rules of Professional Conduct 4.1 and 1.11(e)

DATE: March 12, 2010

As an initial matter, I want to again 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. I write on behalf of my office to provide additional comments on Proposed Rule 4.1, Truthfulness in Statements to Others, which we believe could invite confusion by appearing to authorize private attorneys to authorize or engage in deception in situations beyond those narrow circumstances in which courts have found it permissible, and a subsection of Proposed Rule 1.11, Special Conflicts of Interest for Former and Current Officers and Government Employees, that we believe is contrary to current California law and could negatively affect our ability to maintain the confidentiality necessary to certain investigations.

A. Proposed Rule 1.11(e)

Unlike the ABA Model Rule, which has no equivalent provision, subsection (e) of Proposed Rule 1.11 imputes conflicts of individual government lawyers to their entire “office, agency or department” unless there is: (a) timely and effective screening; and (b) written notice to the former client, unless such notice is “prohibited by law or a court order.” We believe that adoption of this subsection and its accompanying comments, and the resulting variance from the ABA Model Rule, would run contrary to current California and Federal law, improperly limit the ability of our office to maintain the confidentiality necessary to certain investigations, and be difficult to administer in practice. Accordingly, we urge the Commission to adopt the approach taken by ABA Model Rule 1.11 and reject the addition of subsection (e).

As a starting point, we note that, as the result of “special problems raised by imputation within a government agency,” ABA Model Rule 1.11 “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.” ABA Model Rule 1.11, comment 2. As a result, ABA Model Rule 1.11 contains no counterpart to proposed subsection (e), and instead merely notes in its comments that “ordinarily it will be prudent to screen such lawyers.” ABA Model Rule 1.11, comment 2.

California and Federal cases recognize that imputation of conflicts within government offices pose the same “special problems” noted by the ABA. See, e.g., In re Charlissee C., 45 Cal. 4<sup>th</sup> 145, 162-65 (2008) (discussing cases that have “cited several considerations in declining to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices”); United States v. Bolden, 353 F.3d 870, 878 (10<sup>th</sup> Cir. 2003) (“disqualification of

Government counsel is a drastic measure and a court should hesitate to impose it except where necessary”); United States v. Caggiano, 660 F.2d 184, 190-91 (6<sup>th</sup> Cir. 1981) (“disqualification of an entire government department, because of a conflict of interest of a government attorney arising from his former employment, would not be appropriate”) (discussing ABA Formal Op. 342 (1975)). Nevertheless, as proposed by the Commission, subsection (e) diverges from the ABA Model rule by imputing conflicts within a “government office, agency or department.” As drafted, proposed subsection (e) applies to all government offices, and does not differentiate between government offices engaged in criminal prosecution and other government offices. Moreover, proposed subsection (e) has no limitation on the scope of the imputation within a government “office, agency or department,” thus potentially imputing conflicts on the part of a single attorney in a single United States Attorney’s Office to the entire Department of Justice, and prohibits the government office from relying on screening to avoid the conflict where the government office is unable to notify the former client “in writing of the circumstances that warranted implementation of the screening procedures” and “the actions taken to comply with those requirements” unless such notice is “prohibited by law or a court order.” See Proposed Subsection (e)(1), (2). In addition, the comments to proposed subsection (e) suggest that screening may not be available, and the government office “may be disqualified from the representation” if the “personally prohibited lawyer” is either the “head of the office, agency or department” or a “lawyer with direct supervisory authority over any of the lawyers participating in the matter,” citing to California cases as support. See Proposed Comment 9(b).

For the following reasons, we do not believe that proposed subsection (e) and its accompanying comments should be adopted:

1. As applied to prosecuting offices, proposed subsection (e) appears contrary to California law. In City & County of San Francisco v. Cobra Solutions, Inc., 38 Cal. 4<sup>th</sup> 839 (2006), which involved a city attorney’s office engaged in civil litigation, the court relied in part on the decision in Younger v. Superior Court, 77 Cal. App. 3d 892 (1978), in which the Court of Appeal upheld an order disqualifying the entire Los Angeles County District Attorney’s Office from prosecuting a defendant because that defendant had previously been represented by the recently appointed Assistant District Attorney (Johnie Cochran), “notwithstanding the ethical screen erected between Cochran and the prosecution of defendants formerly represented by his law firm.” Cobra Solutions, 38 Cal. 4<sup>th</sup> at 850. As Cobra Solutions recognized, however, its continued reliance on Younger was appropriate only because the disqualification issue before it did not involve a prosecuting agency:

The disqualification standard that the Court of Appeal applied in Younger no longer controls *criminal* prosecutions because the Legislature in 1980 enacted Penal Code Section 1424 (Stats. 1980, ch. 780, S 1, p. 2373), which provides for the recusal of local prosecuting agencies only when “the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.” (Pen. Code, S 1424, subs. (a)(1) & (b)(1)).

38 Cal. 4<sup>th</sup> at 850; see also In re Charlyse C., 45 Cal. 4<sup>th</sup> at 164 n.9 (2008) (noting Cobra Solutions’ observation that “the Legislature, by statute, had ‘superseded’ Younger’s holding”); People v. Conner, 34 Cal. 3d 141, 147 (1983) (after § 1424 conflict permitting disqualification

must be one “of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered”); People v. Jenan, 140 Cal. App. 4<sup>th</sup> 782, 791 (2006) (Section 1424 “supersedes the case law rule that previously allowed a defendant to recuse the district attorney by showing ‘a conflict of interest which might prejudice him [or her] against the accused and thereby affect, *or appear to affect*, his [or her] ability to impartially perform the discretionary functions of his [or her] office.’”) (emphasis in original) (citation omitted); United States v. Nosal, 2009 WL 482236 (N.D. Cal. Feb. 25, 2009) (holding that even though recently appointed United States Attorney had personal conflict based on prior representation of defendant in current criminal case, in light of Penal Code Section 1424, “even if California law were applied there would be no basis to force the recusal of the prosecutor’s office in this case,” and directing United States Attorney to file declaration under seal detailing screening procedures implemented to ensure his lack of influence over matter); Grand Jury Investigation of Targets, 918 F.Supp. 1374, 1379 (1996) (noting that § 1424 and People v. Conner “overruled” earlier, broader recusal rules). We recognize that discipline and disqualification/recusal are different matters. By essentially returning to the Younger standard for disciplinary purposes, however, proposed subsection (e) would, as applied to prosecuting offices, effectively require those offices and their attorneys, as a means of avoiding discipline, to apply the Younger standard as the basis for recusal, a result that would run directly contrary to the supercession of Younger by the legislature’s enactment of Penal Code Section 1424. It would also run contrary to the policy underlying Penal Code Section 1424, which was “a legislative response to a substantial increase in the number of unnecessary prosecutorial recusals” under the earlier standard. See Jenan, 140 Cal. App. 4<sup>th</sup> at 791. As a result, if the Commission adopts proposed subsection (e) as drafted, it will, as applied to prosecuting offices, run contrary to California law.

2. Even for government and public offices engaged in activities other than criminal prosecution, California law generally permits screening, and requires judicial consideration of the effectiveness of the screening and a multitude of other factors in assessing whether vicarious disqualification of a government or public office is required based on an individual attorney’s personal conflict, even if that individual attorney is a senior supervisor. In Cobra Solutions itself, the court recognized that it was not deciding “whether ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney’s supervision” and continued to note that:

In ruling on such a motion, the trial court should undertake a factual inquiry into the actual duties of the supervisor with respect to those attorneys who will be ethically screened and to the supervisor’s responsibility for setting policies that might bear on the subordinate attorneys’ handling of the litigation. In addition, the trial court should consider whether public awareness of the case, or the conflicted attorney’s role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.

38 Cal. 4<sup>th</sup> at 850 n.2. In In re Charlissee C., the court cited this portion of Cobra Solutions in concluding that in deciding whether to disqualify a public office, CLC, based on prior representation of a client adverse to its current client, the court “should have determined whether CLC has adequately protected, and will continue to adequately protect, [the former client’s]

confidences through timely, appropriate, and effective screening measures and/or structural safeguards.” 45 Cal. 4<sup>th</sup> at 165. More generally, the court stated:

[W]e begin by noting that there are court-created limitations to the vicarious disqualification rule, which itself was “judicially created.” As here relevant, California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. Instead, in this context, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards.

45 Cal. 4<sup>th</sup> at 161-162.

Thus, for government and public offices, California law requires courts addressing disqualification motions to consider the adequacy of screening measures, coupled with consideration of other factors, before disqualifying a government or public office based on an individual attorney’s conflict. Federal law is similar. See Bolden, 353 F.3d at 876 (“disqualifying an entire United States Attorney’s office is almost always reversible error regardless of the underlying merits of the case”); United States v. Whitaker, 268 F.3d 186, 194-96 (3d Cir. 2001) (disqualification of entire United States Attorney’s office improper); United States v. Vlahos, 33 F.3d 758, 762-63 (7<sup>th</sup> Cir. 1994) (error to disqualify entire United States Attorney’s Office; even if individual AUSA had conflict of interest, weight of authority indicates court should have ordered another AUSA To handle case rather than disqualify entire office); United States v. Lorenzo, 995 F.2d 1448, 1453 (9<sup>th</sup> Cir. 1993) (no basis for disqualification because “even were we to hold that the vicarious disqualification rules apply to a U.S. Attorney’s Office, the appellants have not demonstrated prejudice”).

Nowhere do the California cases adopt (and to the contrary, they appear to reject) a bright line, inflexible rule of the type included in proposed subsection (e) that would require notice to the former client to render screening effective. Indeed, the California cases’ placement of the burden of establishing the effectiveness of screening on the government or public office defending against a disqualification motion appears to be in part based on recognition that the party seeking disqualification will not have had notice or an opportunity to obtain advance access to the relevant information relating to screening. See In re Charlissee C., 35 Cal. 4<sup>th</sup> at 166. We appreciate the Commission’s apparent recognition, as evidenced by its addition to proposed subsection (e)(2) of a sentence recognizing that such notice need not be given where “prohibited by law or a court order,” that there are instances where other laws (for example, Federal Rule of Criminal Procedure 6(e)’s secrecy limitations prohibiting disclosure of grand jury information, or Proposed Rule 1.6’s prohibitions on the disclosure of confidential client information) may preclude such notice. But this does not address all the situations in which notice may be impossible. For example, the very nature of an ongoing investigation (for example, an investigation using individuals posing as prospective tenants to investigate housing discrimination) may require that the existence of the investigation remain confidential. In such circumstances, notice to the target of the investigation of screening, which would be notice of the investigation’s existence, would render the investigation impossible to complete. There is no law that would prohibit the notice, and it may be impossible to obtain from any court

(particularly if there is no pending proceeding) what would essentially be an advisory opinion that such notice is not required. Under these circumstances, however, proposed subsection (e) would require notice, even though we think it clear the California cases would not, and would instead consider all the circumstances to determine whether the screening implemented by the government office remained, even in the absence of notice, effective. We believe the flexible approach taken by the California cases to be far the better one, and accordingly urge that proposed subsection (e), which requires notice as a prerequisite for effective screening, should not be adopted.

3. The decisions in which California courts have relied on policy considerations to impute and require vicarious disqualification based on personal conflicts of the head of a government or public office have arisen in situations involving relatively localized government or public offices. The policy concerns underlying these decisions simply do not apply to large, complex government offices of the size and scope of the Department of Justice, which has approximately 11,000 lawyers operating through a number of distinct divisions and offices. Yet, proposed subsection (e) has no limitation on the scope of the “office, agency or department” to which it would apply its requirements, posing the possibility of absurd results. For example, it would make no sense to require that the entire United States Department of Justice, including the local United States Attorney’s Office handling the matter, be recused from an ongoing undercover investigation of a relatively small defense procurement fraud in California simply because current Attorney General Eric Holder happened to be involved in that matter before he was appointed to his position. All that should be required is that the Attorney General, who typically is not involved in local investigations in any event, be screened from participating in or supervising the investigation in any way.

What this demonstrates is that issues of this type are far better dealt with, as they have been by both California and Federal courts, on a case by case basis that can take into account the multitude of factors that must be assessed based on particular facts to determine whether screening is timely and effective, factors that include the relative position of the individual with the personal conflict, the mechanics of the screening implemented, and the likelihood that the individual’s position would influence the handling of the case regardless of these screening efforts. Attempting to suggest or define bright lines governing certain of these factors (such as the position of the individually conflicted lawyer, as in proposed comment 9(B)) or requiring written notice (as in proposed subsection (e)) in a disciplinary rule will invariably result in lines that are, for particular cases, either over or under broad, and will deter the development of case law that can more effectively fashion and define standards to be used in assessing when screening will be effective or ineffective in preventing the imputation of personal conflicts to require vicarious disqualification.

4. The policy factors cited by California and Federal courts in their discussion of vicarious disqualification of government and public offices also weigh in favor of leaving imputation of conflicts to the disqualification arena, and not addressing them in a disciplinary rule. In particular, California courts have repeatedly recognized the “heavy” “burdens” imposed by vicarious disqualification of government legal offices. Cobra Solutions, 35 Cal. 4<sup>th</sup> at 852. Moreover, courts have recognized that the incentives to breach client confidences are less in a public office because “public sector lawyers do not have a financial interest in the matters on

which they work.” In re Charlisse C., 45 Cal. 4<sup>th</sup> at 163 (quoting City of Santa Barbara v. Superior Court, 122 Cal. App. 4<sup>th</sup> 17, 24-25 (2004)). It is in light of these dual considerations that screening (without more) has generally been permitted to avoid conflicts within government and public offices:

As the Christian court put it, “in the public sector, in light of the somewhat lessened potential for conflicts of interest and the high public price paid for disqualifying whole offices of government-funded attorneys, use of internal screening procedures or ‘ethical walls’ to avoid conflicts within government offices . . . have been permitted. [Citations.]”

45 Cal. 4<sup>th</sup> at 163 (quoting People v. Christian, 41 Cal. App. 4<sup>th</sup> 986, 998 (1996)). In the federal system an additional Constitutional concern weighing against vicarious disqualification of an office as a whole is the separation of powers issue posed by a judicial order that effectively will prevent an executive office from carrying out its statutorily authorized duties. See United States v. Bolden, 353 F.3d 870, 879 (2003) (noting that “disqualifying government attorneys implicates separation of powers issues” and that “every circuit court that has considered the disqualification of an entire United States Attorney’s office has reversed the disqualification”); Cf. United States v. Silva-Rosa, 275 F.3d 18, 22 (1<sup>st</sup> Cir. 2001) (rejecting disqualification even of individual AUSAs because “appellants are asking this Court to dictate to the executive branch whom it can appoint as its prosecutors. Such a position would expand the power of judicial officials to such a degree as to trigger weighty separation of powers concerns.”).

In addition to the effectiveness of screening, California courts consider other policy-based factors in assessing whether conflicts should be imputed to justify vicarious disqualification, including in particular, the likelihood of whether the overall circumstances concerning the individually conflicted attorney are “likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.” In re Charlisse C., 45 Cal. 4<sup>th</sup> at 165 (quoting Cobra Solutions, 38 Cal 4<sup>th</sup> at 850 n.2). Neither the actual effectiveness of screening nor these other policy-based factors are readily amenable to ex ante evaluation. By forcing government and public office attorneys to run the risk of discipline based on their ex ante evaluation of these factors, however, proposed subsection (e) will likely lead these attorneys to err on the side of disqualification, a result that will cause more disqualifications of government and public offices, and a result thus at odds with the very policy considerations that have led California courts to recognize the general validity of screening as a means of avoiding disqualification of government and public offices. To avoid this unjustified result, and leave in place the policy-based balance already reached by California courts, the Commission should follow the ABA Model Rules and delete subsection (e).

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B. Proposed Rule 4.1(b)

Our concern is that, as presently worded, Rule 4.1(b) may create confusion and mislead private attorneys into believing they are permitted to authorize or engage in misrepresentation and deception as “covert activities” in instances beyond the narrow range of circumstances in which courts have found it legally permissible, such as compliance testing. See Apple Corps Ltd., v. International Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998) (plaintiffs’ attorneys did not violate rules of professional responsibility in supervising investigators who misrepresented their identities and purpose of their contacts with defendant’s sales personnel to determine whether defendants had failed to comply with consent decree). Government lawyers who supervise investigations of criminal and fraudulent enterprises and activities are subject to restraints on their conduct imposed by the 4th, 5th, 6th and 14th Amendments to the Constitution, as well as statutes, regulations and agency practices and supervision that have developed over an extensive period of time. It is in part because of these restraints, which can in many instances be cited as a basis for relief by individuals who are the subjects of a government supervised investigation, and in part because of the public interest in detecting and deterring criminal wrongdoing, that courts have liberally authorized the use in government supervised investigations, by both law enforcement agents and informants, of misrepresentations and deceptions. Courts have more severely limited the areas in which private attorneys may authorize or engage in similar misrepresentations and deceptions in part because these Constitutional, statutory, and regulatory limitations do not apply to private attorneys. Instead, the primary sources of restraint on such parties are the rules of professional conduct. To avoid any suggestion that Rule 4.1(b) is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions, we recommend adding a comment to make more clear that Rule 4.1(b) applies only to certain types of compliance investigations in which private attorneys are legally permitted to supervise investigators who may engage in very limited forms of deception or misrepresentation (as circumscribed by substantive law) and is not intended to broaden the areas in which this is permitted.

# OFFICE USE ONLY.

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03/12/2010 

Period

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File :

F-2010-396b US Attorney's Office [4.1]

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**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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

RE: Proposed Rule 4.1

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 4.1 and offers the following comments.

COPRAC generally supports the adoption of the rule. While we are sympathetic to certain of the concerns raised by the Minority (and attempt to address one of those concerns below), we nevertheless support the proposed rule. We further support the narrow exception related to covert activity as contained in paragraph (b) of the rule.

COPRAC also supports the modifications made to Comment [1] of the Model Rule as reflected in Comment [1] to the proposed rule. In particular, we support the inclusion of the qualifier "material," which makes clear that immaterial misrepresentations and immaterial omissions will not be the basis for attorney discipline.

We agree with the Minority that the phrase "generally accepted conventions in negotiation" (as in "Under *generally accepted conventions in negotiation*, certain types of statements ordinarily are not taken as statements of material fact.") is too abstruse. The phrase implies some form of official standard, such as Generally Accepted Accounting Principles, yet to our knowledge there is no such recognized standard. We recommend that this reference be eliminated and the sentence rewritten to simply read: "In negotiations, certain types of statements ordinarily are not taken as statements of material fact."

Thank you for your consideration of our comments.

Very truly yours,

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

cc: Members, COPRAC

## Rule 4.4 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380h SDCBA [4.4]

F-2010-382j SCCBA [4.4]

F-2010-385h OCBA [4.4]

F-2010-392g State Bar OCTC [4.4]

F-2010-397h COPRAC [4.4]



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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 agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

**2010 Board of Directors**

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**President-Elect**

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Wells B. Lyman

**Conference 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 6)**

**Dear Ms. Hollins:**

**On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,**

**Patrick L. Hosey, President  
San Diego County Bar Association**

**Enclosures**

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

LEC Rule Volunteer Name(s): David Cameron Carr

Old Rule No./Title: n/a

Proposed New Rule No./ Title: 4.4 Respect for Rights of Third Persons

(5) The Commissions arguments against adopting the current ABA Model Rule 4.4(a) are not persuasive. A prohibition against “means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person” would not chill legitimate litigation tactics. ABA Model Rule 4.4(a) should be adopted verbatim. Draft rule 4.4(b) restricts itself to in, documents that “obviously appears to be privileged or confidential” consistent with Rico v. Mitsubishi. It should be adopted as drafted by the Commission.

**CONCLUSION:** Although modified approval was recommended, the LEC vote was 7-6 in support of modified approval. Since the Rules Revision vote was 5-5, the LEC is recommending NO position be taken given the close split in hopes that further revisions will develop consensus.

---

~~LEC Rule Volunteer Name(s): Robert S. Gerber~~

~~Old Rule No./Title: No prior Cal. R. Prof. Conduct; but see Cal. Bus. & Prof. Code Section 6073.~~

~~Proposed New Rule No./ Title: Proposed Rule 6.1, Voluntary Pro Bono Publico Service~~

~~(5) The primary issue concerning this rule is whether pro bono publico services ought to be placed in the disciplinary rules or not. In the past, the “aspirational” goals of such service have been set out in Bus. & Prof. Code Section 6073 and have not been part of the Cal. R. Prof. Conduct. This differs from the ABA Model Code provisions adopted by the vast majority of the states. This rule change would bring California in line with the majority of the states. *However, to make it clear, this rule change would NOT impose any disciplinary authority on the State Bar for a lawyer’s failure to provide pro bono publico services.* The goal remains aspirational, as clarified specifically in Comment 12 to the Rule, which states that “The responsibility set forth in this Rule is not enforceable through disciplinary process.”~~

~~Other than this “controversial” aspect of the rule, nothing about the rule change is significant from a policy perspective. I fully support the rule as proposed.~~

~~CONCLUSION: We approve the new rule in its entirety.~~

---

~~LEC Rule Volunteer Name(s): Erin Gibson~~

~~Old Rule No./Title: n/a~~



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

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\* Date

03/01/2010 

Period

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File :

F-2010-382j SCCBA [4.4]

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BAR ASSOCIATION**

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DIMETRIA A. JACKSON

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LUX ROMANA  
OC ASIAN AMERICAN BAR  
OC DEPUTY PUBLIC DEFENDERS  
OC TRIAL LAWYERS ASSOC.  
OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 4.4 – Respect for Rights of Third Persons**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

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

The OCBA agrees with the Commission's proposal to delete the language in Model Rule 4.4(a). The OCBA believes that including such language invites litigants to bring discovery disputes from the courtroom to the State Bar, where they will be decided by jurists with less knowledge of the underlying dispute and issues than the judge presiding over the underlying case has.

The OCBA agrees with the adoption of the Commission's proposed version of Model Rule 4.4(b). The OCBA concurs that a Rule should be adopted to reflect the recent Supreme Court decision in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807. The OCBA further agrees with the use of the word "writing" instead of "document" for consistency with other Rules, and that paragraph (b) of the Model Rule as written is overly broad in that it applies to all types of documents, not just those that are privileged or confidential. However, the OCBA respectfully raises for consideration whether this provision belongs as part of Rule 4.4 or may be better positioned somewhere else, given that it applies equally to parties and to third persons and does not address merely the rights of third persons.



THE STATE BAR OF  
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT

Russell G. Weiner, Interim Chief Trial Counsel

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions:~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

~~**Rule 4.1 Truthfulness in Statements to Others.**~~

- ~~1. OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].~~
- ~~2. The Comments to this rule are too general and should be eliminated.~~

**Rule 4.4 Respect for the Rights of Third Persons.**

- OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct.

The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(c); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9<sup>th</sup> Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.

- OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.
- Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.

~~**Rule 6.1 Voluntary Pro bono Publico Service.**~~

~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

~~**Rule 6.2 Accepting Appointments.**~~

~~OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.~~

~~**Rule 8.2 Judicial and Legal Officials. (Current rule 1 700.)**~~

- ~~OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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

RE: Proposed Rule 4.4

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 4.4 and offers the following comments.

COPRAC generally supports the adoption of the rule. However, while COPRAC shares the Commission's concern about certain aspects of the paragraph 4.4(a) of the Model Rule, COPRAC recommends that the proposed rule include a revised paragraph (a). COPRAC agrees that the first phrase of MR paragraph (a) is vague, particularly the term "burden." COPRAC recommends that the proposed rule instead incorporate the language of Business and Professions Code section 6068(f) into the rule, to avoid uncertainty and improve consistency.

COPRAC also recommends that the second phrase of paragraph (a) of the Model Rule should be included in the proposed rule. Proposed paragraph (a) would read as follows:

(a) In representing a client, an attorney shall not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged, and shall not use methods of obtaining evidence that violate the legal rights of a party or witness.

COPRAC also supports the inclusion of paragraph (b) in the rule, which will provide lawyers with guidance, although some members are reluctant to raise this issue to a disciplinary level.

We do have a concern with the proposed draft. The California Supreme Court in *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, determined that "the *State Fund* standard applies to documents that are plainly privileged and confidential, regardless whether they are privileged

under the attorney client privilege, the work product doctrine, or any other similar doctrine that would preclude discovery based on the confidential nature of the document.” *Id.* at n. 9.

Paragraph (b) as proposed omits reference to the work product doctrine, which correctly should be referred to as such rather than as a “privilege.” To truly track the holding of *Rico*, the work product doctrine should be referred to in the rule. Although work product is referenced in Comment [2], for consistency, the text of paragraph (b) itself should also reference the work product doctrine.

We note a further inconsistency between the text of the language of paragraph (b) and the text of the comment, in that, while the rule governs documents that are “obviously privileged or confidential” and “inadvertently sent,” the first sentence of Comment [2] is arguably narrower, in that only such documents “sent or produced by opposing parties or their lawyers” are covered. To rectify this inconsistency, we suggest that the first sentence of Comment [2] be revised so that the last phrase reads “and were inadvertently sent to the lawyer.”

Finally, we are unclear what the Commission means by its use of the term “confidential” in paragraph (b) of this rule and Comment [2]. Paragraph (b) uses the term confidential without defining it. Comment [2] defines “privileged or confidential” to refer to “a writing that is subject to a statutory or common law privilege or the work product rule.” Does the Commission intend to refer to confidential information, as referenced in Business and Professions Code section 6068(e) and Rule 1.6? If so, that should be made clear. The language of the Comment is misleading, since the confidentiality rule is neither a statute nor a common law “privilege.” If this is not clarified, we are concerned that the use of the term “confidential” will be misunderstood.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

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

cc: Members, COPRAC

## Rule 6.1 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380i SDCBA [6.1]

F-2010-382k SCCBA [6.1]

F-2010-385i OCBA [6.1]

F-2010-387 CA Commission on Access Justice [6.1]

F-2010-388 Public Interest Clearinghouse [6.1]

F-2010-392h State Bar OCTC [6.1]

F-2010-393 CYLA [6.1]

F-2010-397i COPRAC [6.1]

F-2010-398 Office of Legal Services [6.1]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

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[Rule 1.17 \[2-300\]](#)

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[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

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[Rule 6.2 \[n/a\]](#)

[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.**

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

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\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

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**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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Nory R. Pascua

Gita M. Varughese

Jon R. Williams

**Young/New Lawyer  
Representative**

Kristin E. Rizzo

**Immediate Past President**

Jerrilyn T. Malana

**Executive Director**

Ellen Miller-Sharp

**ABA House of Delegates  
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William E. Grauer

Monty A. McIntyre

**State Bar Board of Governors  
District Nine Representative**

Wells B. Lyman

**Conference 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 6)**

**Dear Ms. Hollins:**

**On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,**

**Patrick L. Hosey, President  
San Diego County Bar Association**

**Enclosures**

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~LEC Rule Volunteer Name(s): David Cameron Carr~~

~~Old Rule No./Title: n/a~~

~~Proposed New Rule No./ Title: 4.4 Respect for Rights of Third Persons~~

~~(5) The Commissions arguments against adopting the current ABA Model Rule 4.4(a) are not persuasive. A prohibition against “means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person” “would not chill legitimate litigation tactics. ABA Model Rule 4.4(a) should be adopted verbatim. Draft rule 4.4(b) restricts itself to in, documents that “obviously appears to be privileged or confidential” consistent with Rico v. Mitsubishi. It should be adopted as drafted by the Commission.~~

~~**CONCLUSION:** Although modified approval was recommended, the LEC vote was 7-6 in support of modified approval. Since the Rules Revision vote was 5-5, the LEC is recommending NO position be taken given the close split in hopes that further revisions will develop consensus.~~

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LEC Rule Volunteer Name(s): Robert S. Gerber

Old Rule No./Title: No prior Cal. R. Prof. Conduct; but see Cal. Bus. & Prof. Code Section 6073.

Proposed New Rule No./ Title: Proposed Rule 6.1, Voluntary Pro Bono Publico Service

(5) The primary issue concerning this rule is whether pro bono publico services ought to be placed in the disciplinary rules or not. In the past, the “aspirational” goals of such service have been set out in Bus. & Prof. Code Section 6073 and have not been part of the Cal. R. Prof. Conduct. This differs from the ABA Model Code provisions adopted by the vast majority of the states. This rule change would bring California in line with the majority of the states. *However, to make it clear, this rule change would NOT impose any disciplinary authority on the State Bar for a lawyer’s failure to provide pro bono publico services.* The goal remains aspirational, as clarified specifically in Comment 12 to the Rule, which states that “The responsibility set forth in this Rule is not enforceable through disciplinary process.”

Other than this “controversial” aspect of the rule, nothing about the rule change is significant from a policy perspective. I fully support the rule as proposed.

**CONCLUSION:** We approve the new rule in its entirety.

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~~LEC Rule Volunteer Name(s): Erin Gibson~~

~~Old Rule No./Title: n/a~~



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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.**

The Santa Clara County Bar Association recommends against including this as a disciplinary rule. Our Association fully supports encouraging lawyers to provide pro bono services to persons of limited means. However, this rule is hortatory in nature and is not a rule of conduct that can or should be subject to discipline.

# OFFICE USE ONLY.

\* Date

03/01/2010 

Period

PC

File :

F-2010-382k SCCBA [6.1]

Commented On:

Specify:

Submitted via:

Online

---

\* Required



**ORANGE COUNTY  
BAR ASSOCIATION**

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OC DEPUTY PUBLIC DEFENDERS  
OC TRIAL LAWYERS ASSOC.  
OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

## MEMORANDUM

Date: February 24, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 6.1 – Voluntary Pro Bono Service**

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 and Ethics Committee.

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

The OCBA has considered the majority and minority views for this proposed Rule and supports adoption of the minority's view. The minority's view, succinctly stated, is to leave this aspirational statement that lawyers should strive to provide pro bono legal services out of the disciplinary-based rules being considered. In other words, since this proposed Rule has no legal effect, but is, instead, a restatement of a "tradition" of service, or an "aspiration" that individual lawyers in California should strive to obtain, it should not be adopted.

Should the Commission not follow the minority view, as outlined above, and instead adopt this proposed Rule in some form, then we urge the Commission to re-evaluate the historical comments and the actions taken by other states which have considered and/or adopted some version of this Model Rule.

In particular, the OCBA urges the Commission to utilize the 1983 ABA Model Rule language for proposed Rule 6.1. This older version of the Model Rule promoting pro bono service not only encapsulates the overall intent of the ABA's current Model Rule (and the California Board of Governors' 2002 Pro Bono Resolution), but it also artfully avoids the imposition of the type of hourly and financial commitments that the minority view of the proposed Rule found to be either economically unacceptable, or simply not attainable, for some practitioners.

This 1983 version is still imposed on the attorneys of the States of Connecticut, Georgia, Indiana, Kansas, Michigan, Missouri, Pennsylvania and South Carolina, and states:

*A lawyer should render public interest service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or*

*the legal profession, and by financial support for organizations that provide legal services to persons of limited means.*

This is a well-stated and concise set of goals that each lawyer, based on his or her individual practices and financial constraints, should strive to achieve. In addition, it takes into account the varying economic circumstances that are faced by today's lawyers, and lawyers in the future, as recognized by the minority.

By being broad in scope, this language also takes into account the varying types of practices engaged in by lawyers that may make it impracticable for them to spend 50 hours in pro bono service, over the course of a year, as specified in the current Model Rule.

This is not a mandatory or disciplinary rule, as stated in Comment [12] of both the Model Rule and proposed Rule 6.1, and, therefore, a lawyer does not face sanctions for his or her failure to reach or exceed the 50 hours per year of pro bono service specified in the Rule; nevertheless, certain practitioners in, for example, the corporate securities arena or an "in house" counsel position, may not be able to meet this goal. They may provide their time to local bar associations and/or educational activities, but they are highly unlikely to be in the position to offer a readily needed specialty to persons of limited means as compared to, for example, those who are family law practitioners or wills and trust practitioners.

Moreover, the Rule (whether one is considering the Model Rule or the proposed Rule), makes no provision or even a comment about those who are not on a full-time schedule, such as deployed military members of the Bar who may not be engaged in the practice of law over the course of a year, or a part-time lawyer, who may be able to provide only a pro-rata share of his or her time to pro bono service, but cannot meet the number of hours specified in the Rule. In addition, the Model Rule seems to rank, or provide a hierarchy of the type of services that are considered to be more important than others. For example, local bar activities, which do contribute to the quality of legal services provided to the public at large, appear to be ranked below performance of single matter services for a client who cannot pay a lawyer's fees, or can only pay at a reduced rate.

In all, if a rule to promote pro bono service is to be adopted by the Commission, then using the 1983 language will permit California to avoid some of the pitfalls of the current Model Rule and, yet, still state the laudable goals that California lawyers should aspire to meet.

# CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

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

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March 11, 2010

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 6.1 – Voluntary Pro Bono Publico Service;  
Proposed amendment**

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I write in strong support of proposed rule 6.1, and to suggest a modification of that proposed rule.

We are very pleased that the pro bono goal identified in this rule is being proposed for inclusion in our Rules of Professional Conduct. We believe that its inclusion will go a long way toward achieving the goal of establishing a fair and equitable justice system. By emphasizing the professional obligation of all lawyers, and providing a framework for pro bono service, the new rule should result in substantially increased legal assistance being made available to vulnerable individuals throughout our state.

There is one change that we think would strengthen this rule and avoid unnecessary confusion. As you are aware, there is more than one definition of pro bono. The one in Model Rule 6.1 is different from the one promoted by the national Pro Bono Institute, which is followed by most large firms across the country. Both of those definitions are different from the pro bono resolution adopted in California by the Board of Governors, and used in many of our State Bar activities over the past 30 years.

We believe that the confusion that might exist because of these different definitions can be avoided if we eliminate part of subsection (b)(1), and recommend that everything after “civil liberties or public rights” be eliminated. In other words, section (b)(1) would now read:

provide any additional services through:

- (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights;

The deleted section offers an alternative suggestion for how the “additional” pro bono service can be provided, and the main disagreement among the various pro bono definitions has to do with how the “additional” pro bono obligation can be fulfilled.

By limiting (b)(1) to legal services at no fee, or a reduced fee, and by expanding it beyond straight legal aid work to include civil rights, civil liberties and public rights, this section would offer an additional type of service that lawyers can offer while fulfilling their pro bono obligation that stays quite true to the true need for pro bono. Only lawyers can offer legal help for low-income, vulnerable Californians, and we believe that any broader definition of pro bono would undermine the important need of addressing the legal needs of the most vulnerable among us.

This definition is within the definition used by the Pro Bono Institute, and we do want to avoid adopting any rule that causes confusion (and possibly the result that less pro bono will be done by large firms.)

Thank you for taking these comments into consideration, and we hope you will contact us if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald B. Robie". The signature is written in a cursive, flowing style.

Hon. Ronald B. Robie, Associate Justice, 3<sup>rd</sup> District,  
California Court of Appeal  
Chair, California Commission on Access to Justice

# PUBLIC INTEREST CLEARINGHOUSE

*California's Catalyst for Justice*

433 California Street, Suite 815 ♦ San Francisco, CA 94104

Phone 415-834-0100 ♦ Fax 415-834-0202 ♦ [www.pic.org](http://www.pic.org)

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March 12, 2010

Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
*Submitted via facsimile to 415-538-2171*

RE: Comments on Proposed Rule 6.1: Voluntary Pro Bono Publico Service

Dear Ms. Hollins,

The Public Interest Clearinghouse strongly supports the inclusion of an aspirational rule on pro bono in the Rules of Professional Conduct of the State Bar of California. PIC believes that even an aspirational rule not intended to be the basis for discipline would be valuable because it would provide formal recognition in California that all lawyers have a professional responsibility to perform pro bono work.

The Public Interest Clearinghouse (PIC) works to expand access to legal help for underserved Californians by building infrastructure and partnerships in the legal community. PIC's statewide Pro Bono Initiative supports pro bono efforts at the statewide, regional and local levels. PIC works closely with all sectors of the California legal community – including law firms, law schools and students, and the legal services nonprofits – to increase access to justice by increasing the pro bono resources available to assist low-income and other disadvantaged Californians.

## **Comments Regarding the Proposed Rule**

Pro bono participation and financial support by lawyers are needed now more than ever in California. The need for legal services to the poor continues to increase especially in the current economic recession. However, funding for legal services at the state level remains tenuous at best as California faces a multi-billion dollar deficit in 2009-2010 and 2010-2011, and interest on lawyers trust accounts continues to drop, from \$22 million in 2008 -2009 to \$7 million in 2009 - 2010. All but a handful of states including California have adopted some form of ABA Model Rule 6.1 and the time is ripe for California to adopt an aspirational pro bono rule that encourages pro bono. PIC supports an aspirational pro bono rule. However, PIC has significant concerns about the definition of pro bono used in this proposed rule.

There are already two other definitions of "pro bono" in use in California. The first is the national Pro Bono Institute's ("PBI") definition, which is employed in the Pro Bono Law Firm Challenge that many large California law firms have signed, committing these firms to provide pro bono legal services to low-income and disadvantaged individuals and families and non-profit groups in an amount equal to 5 or 3 percent of the firm's total billable hours. Many localities have adopted a local version of the pledge using the same definition. Many large firms use the Pro Bono Institute definition not only in California, but nationally, and have adopted firm-wide pro bono policies, pro bono approval procedures, and reporting mechanisms based on this definition. Firms have indicated that they would not be able to monitor or report on pro bono activity based on a different definition because of the degree to which the Pro Bono Institute definition has been institutionalized within their firms. In addition, because the law firms use this definition, the legal services and nonprofit providers that partner with these firms and provide pro bono cases and matters to them also use the PBI definition.

The second definition of pro bono already in use in California is the definition set forth in the State Bar Pro Bono Resolution that this organization adopted in 1989 and reaffirmed in 2002. This definition is used by local bar associations, IOLTA funded legal services and pro bono programs, and State Bar certified lawyer referral services throughout the state. (Please see the attachment at the end of this letter for a comparison of the three definitions).

PIC strongly advocates that proposed Rule 6.1 not create yet another definition of pro bono in California by adopting the modified version of the ABA Model Rule. Instead, proposed Rule 6.1 should employ either the definition of pro bono set forth in the Resolution or the PBI definition of pro bono. Given the widespread use of the PBI definition by California's large law firms, and therefore also by the nonprofit legal services and pro bono partners that provide them with pro bono cases and matters, PIC recommends that the proposed Rule 6.1 should adopt the PBI definition.

The Resolution definition and the PBI definition were both intentionally drafted to be narrower than the definition in the Model Rule, excluding certain categories of volunteer legal work that are not focused on providing legal services to those with limited means or addressing issues of significant public importance. Both the Resolution and the PBI definitions are consistent with criteria for the President's Pro Bono Service Awards established by the Board of Governors in 1983 as well as the Wiley W. Manuel Certificate for Pro Bono Legal Services. (This certificate program was created shortly after the 1989 Resolution was adopted to recognize California attorneys who contribute at least 50 hours of pro bono service annually.)

It is critical for the State Bar of California to maintain a consistent and unified voice with respect to pro bono, and introducing a third definition of pro bono that is broader than both the PBI definition and the Resolution definition is likely to cause confusion and divert attention from the key goal here, which is to encourage more pro bono activity for people of limited means and related to issues of significant public importance.

### **Recommendations on the Proposed Rule**

1. (a): Delete "a substantial majority of the" and replace with "at least". PIC believes 50 hours of pro bono legal services should be the minimum as stated in the Pro Bono Resolution.
2. Change (b) (1), (2) and (3) to reflect the Pro Bono Institute definition of pro bono. If the Commission is inclined to retain the ABA Model Rule language as proposed, or to adopt the language of the Pro Bono Resolution, then PIC strongly encourages the Commission to first seek input and public comment specifically on the pro bono definition from stakeholders.

### **Recommendations on the Comments to the Proposed Rule**

Comment [1]: PIC supports the proposed language.

Comment [2]: Replace "a substantial majority" with "all." Also, PIC recommends adding language with respect to "legislative lobbying" and "administrative rule making" that relates those activities to increasing access to justice for persons of limited means or addressing other systemic issues on behalf of clients of limited means.

Comment [3]: PIC supports the proposed language.

Comment [4]: Retain the last sentence and replace "to contribute an appropriate portion of such fees" with "to make a contribution". Donation of statutory attorneys' fees to the legal services organization through which the attorney is doing pro bono work has been a widely accepted practice in California and nationally. By not linking the contribution to the award of attorneys' fee, there is no fee sharing issue and thus no violation of proposed Rule 5.4.

Comment [5]: Delete both references to "judges". Proposed Rule 6.1 applies only to lawyers.

Comment [6]: PIC supports the proposed language.

Comment [7]: No longer applicable with the elimination of (b)(1), (2) and (3).

Comment [8]: Same as Comment [7]. Additionally, serving on bar association committees, taking part in Law Day activities, acting as a legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are not generally considered pro bono activities and should not be included in the comments.

Comment [9]: PIC supports the comments but recommends inserting "at least" before "reasonably equivalent."

Comment [10]: PIC supports the proposed language.

Comment [11]: After "law firms", add "corporate and governmental legal departments, and other employers of lawyers" and delete "in the firm". The comment should be broadened to include lawyers in other practice settings and not limited to law firms.

Comment [12]: PIC supports the proposed language.

PIC thanks the State Bar and the Commission for this opportunity to provide comment on this important proposed Rule.

Sincerely,

Julia R. Wilson  
Executive Director

Comparison of the Three Potential Definitions of Pro Bono:

<u>Proposed Rule 6.1</u>	<u>PBI Pro Bono Law Firm Challenge</u>	<u>State Bar Pro Bono Resolution</u>
<p>(1) Delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their</p> <p>(2) organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise in appropriate;</p> <p>(3) Delivery of legal services at a substantially reduced fee to persons of limited means, or</p> <p>(4) Participation in activities for improving the law, the legal system or the legal profession, or increasing access to justice.</p>	<p>7 (a) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means;</p> <p>(b) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties or public rights; and</p> <p>(c) the provision of legal assistance to charitable, religious, civic, community, governmental or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.</p>	<p>(1) ...the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;</p>



THE STATE BAR OF  
CALIFORNIA

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

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March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions.~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

**~~Rule 4.1 Truthfulness in Statements to Others.~~**

- ~~1. OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].~~
- ~~2. The Comments to this rule are too general and should be eliminated.~~

**~~Rule 4.4 Respect for the Rights of Third Persons.~~**

- ~~1. OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct. The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(e); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9<sup>th</sup> Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.~~
- ~~2. OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.~~
- ~~3. Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.~~

**~~Rule 6.1 Voluntary Pro bono Publico Service.~~**

~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

**~~Rule 6.2 Accepting Appointments.~~**

~~OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.~~

**~~Rule 8.2 Judicial and Legal Officials. (Current rule 1 700.)~~**

- ~~1. OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~

The California Young Lawyers Association's (CYLA) Executive Committee and Pro Bono Committee oppose the addition of proposed rule 6.1, "Voluntary Pro Bono Service," to the Rules of Professional Conduct of the State Bar of California. While CYLA actively encourages and supports pro bono service amongst its members through various efforts as an organization, we believe the rule is duplicative and misplaced as an amendment to the Rules of Professional Conduct.

CYLA encourages pro bono activity through co-sponsored trainings with legal aid organizations that prepare CYLA members and others for pro bono opportunities across the state. In addition, CYLA supports pro bono activity by publicizing pro bono opportunities to our members on our website at [http://www.calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10105&id=10610](http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10105&id=10610). CYLA is committed to promoting and facilitating the completion of 50 hours of pro bono service per year by each of its members.

Currently, there are three pro bono standards in California, all of which are aspirational. California Business and Professions Code section 6073 encourages lawyers to provide pro bono legal services and in the alternative to provide financial support to organizations providing free legal services. The California State Bar's Board of Governors Pro Bono Resolution sets forth an aspirational standard for pro bono service that exceeds the standard proposed in rule 6.1. Finally, the Pro Bono Institute Law Firm Challenge urges law firms with more than 50 lawyers to aspire to meet pro bono service targets. The addition of proposed rule 6.1 is duplicative and unnecessary.

Moreover, the placement of proposed rule 6.1 in the Rules of Professional Conduct of the State Bar of California is inappropriate. The Rules of Professional Conduct are attorney conduct rules the violation of which subject an attorney to discipline. The proposed rule is aspirational and states in Comment 12, that "the responsibility set forth in this Rule is not enforceable through disciplinary process." An aspirational goal is misplaced within the Rules of Professional Conduct and is better located in a formal policy statement or Board of Governors' resolution.

Based on the foregoing, the CYLA Executive Committee and Pro Bono Committee oppose the addition of proposed rule 6.1, "Voluntary Pro Bono Service," to the Rules of Professional Conduct of the State Bar of California.

**Disclaimer :**

**This position is only that of the California Young Lawyers Association. 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.**



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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

RE: Proposed Rule 6.1

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 6.1 and offers the following comments.

COPRAC supports adoption of proposed Rule 6.1. While several members of our committee are sympathetic to the view of the Commission's minority and question whether this aspirational statement should be included in the rules, the majority supports the Rule. Given the importance of our professional obligation to improve access to justice, and recognizing the enormous unmet need for counsel for persons of limited means, we favor adoption of the Rule.

Recognizing, however, that there remains some controversy about including this Rule with other rules which are obviously concerned with potential disciplinary issues, we have four suggestions for changes that would make it clearer that Rule 6.1 is aspirational. First, we would retain the ABA language in the opening paragraph stating that lawyers are to "aspire to" provide pro bono services. We think this is sufficiently important to be included in the text of the rule. Second, we recommend incorporating the language of Comment [12] into the body of the Rule. Third, we would also change Comment [12] to state that the rule is not enforceable through the "disciplinary process or otherwise." Fourth, we would preface the last sentence of Comment [12] with "Notwithstanding Rule 1.0(b)(2),".

By making very clear that this rule is different from most of the other rules, the Commission need not further address other concerns raised by COPRAC members regarding the terminology in the Rule which is, in some parts, somewhat vague and unclear. (For example, eligibility for group representation in (b)(1) is not well-defined.) Since no one would be subject to punishment

for an incorrect interpretation of the Rule, we agree that retention of the imprecise ABA language is appropriate.

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 style with a large, looping initial "C".

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

cc: Members, COPRAC



# THE STATE BAR OF CALIFORNIA

OFFICE OF LEGAL SERVICES

Standing Committee on the Delivery of Legal Services

Chair, Maureen Alger, Palo Alto

180 Howard Street, San Francisco, California 94105

Telephone (415) 538-2267 Fax (415) 538-2552

March 12, 2010

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

Re: Proposed Rule 6.1, Voluntary Pro Bono Publico Service

Dear Ms. Hollins:

The State Bar Standing Committee on the Delivery of Legal Services (SCDLS) has reviewed proposed Rule 6.1 and offers the attached comments. SCDLS very much appreciates the opportunity to comment and commends the Rules Revision Commission for their efforts.

Should you have any questions about the attached comments, please do not hesitate to contact Maureen Alger, SCDLS Chair, at [malger@cooley.com](mailto:malger@cooley.com) or 650-843-5201, Tiela Chalmers, SCDLS Vice Chair, at [tchalmers@sfbar.org](mailto:tchalmers@sfbar.org) or 415-782-9000, ext. 8117, or me at 415-538-2267 or [sharon.ngim@calbar.ca.gov](mailto:sharon.ngim@calbar.ca.gov).

## Disclaimer

**This position is only that of the State Bar of California's Standing Committee on the Delivery of Legal Services. 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.**

Sincerely,

*Sharon Ngim*

Sharon Ngim  
Staff Liaison to the Standing Committee on the  
Delivery of Legal Services

Attachment

## **SCDLS Comments on Proposed Rule 6.1: Voluntary Pro Bono Publico Service**

The State Bar's Standing Committee on the Delivery of Legal Services (SCDLS) strongly supports the inclusion of an aspirational rule on pro bono in the Rules of Professional Conduct of the State Bar of California. SCDLS believes that even an aspirational rule not intended to be the basis for discipline would be valuable because it would provide formal recognition in California that all lawyers have a professional responsibility to perform pro bono work.

### Background

SCDLS began working with COPRAC in late 2001 to develop a two-part approach to increasing pro bono participation in California. The first component was to revise and strengthen the State Bar's 1989 Pro Bono Resolution by (1) acknowledging leadership for pro bono at the judicial, executive and legislative levels, (2) linking the resolution to existing authority, and (3) adding a financial contribution option to the resolution. The Board of Governors adopted these revisions in June 2002.

The second component was to work with the Commission for the Revision of the Rules of Professional Conduct on the possibility of adopting an aspirational pro bono rule similar to ABA Model Rule 6.1 but with "California adjustments." In a letter dated April 4, 2002 to COPRAC, SCDLS observed that "re-publication of a revised Board resolution will not garner the far-reaching and sustained attention as a policy articulated in the Rules of Professional Conduct, even an aspirational policy not subject to discipline." Now eight years later, SCDLS welcomes the opportunity to comment on proposed Rule 6.1 as the Commission nears completion of its work.

### Comments Regarding the Proposed Rules

Pro bono participation and financial support by lawyers are needed now more than ever in California. The need for legal services to the poor continues to increase especially in the current economic recession. However, funding for legal services at the state level remains tenuous at best as California faces a multi-billion dollar deficit in 2009 - 2010 and 2010 - 2011, and interest on lawyers trust accounts continues to drop, from \$22 million in 2008 -2009 to \$7 million in 2009 - 2010. All but a handful of states including California have adopted some form of ABA Model Rule 6.1 and the time is ripe for California to adopt an aspirational rule that encourages pro bono. SCDLS supports an aspirational pro bono rule. We have significant concerns, however, about the definition of pro bono used in this proposed rule.

There are already two other definitions of “pro bono” in wide use in California. The first is the national Pro Bono Institute’s (“PBI”) definition, which is employed in the [Pro Bono Law Firm Challenge](#) that many large California law firms have signed, committing these firms to provide pro bono legal services to low-income and disadvantaged individuals and families and non-profit groups in an amount equal to 5 or 3 percent of the firm's total billable hours. Many localities have adopted a local version of the pledge using the same definition. Many large firms use the Pro Bono Institute definition not only in California, but nationally, and have adopted firm-wide pro bono policies, pro bono approval procedures, and reporting mechanisms based on this definition. Firms have indicated that they would not be able to monitor or report on pro bono activity based on a different definition because of the degree to which the Pro Bono Institute definition has been institutionalized within their firms.

The second definition of pro bono already in use in California is the definition set forth in the [State Bar Pro Bono Resolution](#) that this organization adopted in 1989 and reaffirmed in 2002. This definition is used by local bar associations, IOLTA funded legal services and pro bono programs, and State Bar certified lawyer referral services throughout the state.

SCDLS strongly advocates that proposed Rule 6.1 employ either the definition of pro bono set forth in the Resolution or the PBI Law Firm Pro Bono Challenge, as opposed to a modified version of the ABA Model Rule. The Resolution definition and the PBI definition were both intentionally drafted to be narrower than the definition in the Model Rule, excluding certain categories of volunteer legal work that are not focused on providing legal services to those with limited means or addressing issues of significant public importance. Both the Resolution and the PBI definitions are consistent with criteria for the [President’s Pro Bono Service Awards](#) established by the Board of Governors in 1983 as well as the [Wiley W. Manuel Certificate for Pro Bono Legal Services](#). (This certificate program was created shortly after the 1989 Resolution was adopted to recognize California attorneys who contribute at least 50 hours of pro bono service annually.)

SCDLS believes it is critical for the State Bar of California to maintain a consistent and unified voice with respect to pro bono, and introducing a third definition of pro bono that is broader than both the Resolution definition and the PBI definition is likely to cause confusion and divert attention from the key goal here, which is to encourage more pro bono activity for people of limited means and related to issues of significant public importance.

### Recommendations on the Proposed Rule

1. (a): Delete “a substantial majority of the” and replace with “at least”. SCDLS believes 50 hours of pro bono legal services should be the minimum as stated in the Pro Bono Resolution.
2. Change (b) (1), (2) and (3) to reflect either the PBI definition or the State Bar Pro Bono Resolution definition . If the Commission wants to retain the ABA Model Rule language as proposed, SCDLS strongly encourages the Rules Revision Commission to seek input on the pro bono definition from stakeholders.

## COMPARISON OF PRO BONO DEFINITIONS

<a href="#">Proposed Rule 6.1</a>	<a href="#">PBI Pro Bono Law Firm Challenge</a>	<a href="#">State Bar Pro Bono Resolution</a>
<p>(b) provide any additional services through:</p> <p>(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise in appropriate;</p> <p>(2) delivery of legal services at a substantially reduced fee to persons of limited means, or</p> <p>(3) participation in activities for improving the law, the legal system or the legal profession, or increasing access to justice.</p>	<p>7. As used in this statement, the term pro bono refers to activities of the firm undertaken normally without expectation of fee and not in the course of ordinary commercial practice and consisting of</p> <p>(a) the delivery of legal services to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means;</p> <p>(b) the provision of legal assistance to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties or public rights; and</p> <p>(c) the provision of legal assistance to charitable, religious, civic, community, governmental or educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.</p>	<p>(1) ...to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;</p>

## Recommendations on the Comments to the Proposed Rule

Comment [1]: SCDLS supports the proposed language.

Comment [2]: Replace “a substantial majority” with “all.” Also, SCDLS recommends adding language with respect to “legislative lobbying” and “administrative rule making” that relates those activities to increasing access to justice for persons of limited means or addressing other systemic issues on behalf of clients of limited means.

Comment [3]: SCDLS supports the proposed language.

Comment [4]: Retain the last sentence and replace “to contribute an appropriate portion of such fees” with “to make a contribution”. Donation of statutory attorneys’ fees to the legal services organization through which the attorney is doing pro bono work has been a widely accepted practice in California and nationally. By not linking the contribution to the award of attorneys’ fee, there is no fee sharing issue and thus no violation of proposed Rule 5.4.

Comment [5]: Delete both references to “judges”. Proposed Rule 6.1 applies only to lawyers.

Comment [6]: SCDLS supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition.

Comment [7]: SCDLS supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition.

Comment [8]: SCDLS supports language that is consistent with its recommendation to change (b)(1), (2) and (3), which is to reflect either the PBI definition or the State Bar Pro Bono Resolution definition. Additionally, serving on bar association committees, taking part in Law Day activities, acting as a legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are not considered pro bono activities and should not be included in the comments.

Comment [9]: SCDLS supports the comments but recommends inserting “at least” before “reasonably equivalent” per the Pro Bono Resolution (see Recommendations to Proposed Rule, 1. above).

Comment [10]: SCDLS supports the proposed language.

Comment [11]: After “law firms”, add “corporate and governmental legal departments, and other employers of lawyers” and delete “in the firm”. SCDLS believes the comment should be broadened to include lawyers in other practice settings and not limited to law firms.

Comment [12]: SCDLS supports the proposed language.

## Disclaimer

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## Rule 6.2 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380j SDCBA [6.2]

F-2010-382l SCCBA [6.2]

F-2010-385j OCBA [6.2]

F-2010-392i State Bar OCTC [6.2]

F-2010-397j COPRAC [6.2]



# 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: MARCH 12, 2010**

## 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:

- |                                    |                                   |                                |  |
|------------------------------------|-----------------------------------|--------------------------------|--|
| <a href="#">Rule 1.0.1 [1-100]</a> | <a href="#">Rule 1.11 [n/a]</a>   | <a href="#">Rule 4.1 [n/a]</a> | <a href="#">Rule 6.5 [1-650]</a>             |
| <a href="#">Rule 1.4.1 [3-410]</a> | <a href="#">Rule 1.17 [2-300]</a> | <a href="#">Rule 4.4 [n/a]</a> | <a href="#">Rule 7.6</a>                     |
| <a href="#">Rule 1.8.4 [n/a]</a>   | <a href="#">Rule 1.18 [n/a]</a>   | <a href="#">Rule 6.1 [n/a]</a> | <a href="#">Rule 8.2 [1-700]</a>             |
| <a href="#">Rule 1.8.9 [n/a]</a>   | <a href="#">Rule 3.9 [n/a]</a>    | <a href="#">Rule 6.2 [n/a]</a> | <a href="#">Discussion Draft [all rules]</a> |

\* 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 agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

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**Conference 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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

**Proposed New Rule No./ Title: Rule 6.2 – Accepting Appointments**

(5) Proposed Rule 6.2 is substantively identical to the ABA Model Rule.

The Commission notes that some of its members do not recommend this Rule, because it would allow a lawyer to reject an appointment to represent a client the lawyer considers “repugnant.” This minority argues that lawyers are traditionally obliged to represent people they may consider “repugnant,” such as some criminal or unpopular clients.

However, the policy behind proposed Rule 6.2 correctly recognizes that, in some cases, a client may be so repugnant to a lawyer as to impair the lawyer’s ability to represent the client. In these cases, it would be a conflict of interest for the lawyer to represent the client. Thus, Rule 6.2, while it permits lawyers to decline appointments by a tribunal in limited circumstances, does so for a proper purpose—and a purpose that may be in the “repugnant” client’s best interests. After all, another appointed attorney may not find the client so repugnant that the attorney-client relationship would be impaired.

Furthermore, the comments to the proposed rule contain a substantive exception that helps to address the minority’s concerns. Specifically, Comment 1 to proposed Rule 6.2 contains a cross-reference to Cal. Bus. & Prof. Code § 6068(h), which states that it is the duty of a lawyer “[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.” Thus, the comments acknowledge that an attorney cannot decline an appointment simply because a client is unpopular.

**CONCLUSION:** We approve the new rule in its entirety.

---

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

~~**Old Rule No./Title: CRPC 1-650 Limited Legal Services Programs**~~

~~**Proposed New Rule No./ Title: CRPC 6.5 Limited Legal Services Programs**~~

~~(5) Proposed CRPC 6.5 largely embodies recently adopted CRPC 1-650. This is not surprising. The Rules Revision Commission was involved in the rule’s inception in the spring of 2009, approval and adoption of which was pursued on an expedited basis under the auspices of meeting a demand for *pro bono* legal services in view of the recent economic downturn. Existing CRPC 1-650 was adopted by the California Supreme Court by order dated June 29, 2009, modified by the Court for clarification.~~

~~Its objective is to relax the general application of conflict of interest rules, and their imputing effects in connection with provision of “short term limited legal services to a client without [reasonable] expectation by either the lawyer or the client that the lawyer will provide continuing representation in the manner.” For its own sake, MR 6.5, upon which the proposed California rule is based, has evoked little controversy, and has been adopted little variation in nearly all Model Rule jurisdictions.~~

~~As was true with CRPC 1-650, the coverage of proposed CRPC 6.5 is slightly broader than its~~



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

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\* Date

03/01/2010



Period

PC



File :

F-2010-3821 SCCBA [6.2]

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**ORANGE COUNTY  
BAR ASSOCIATION**

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LEI LEI WANG EKVALL

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**TREASURER**

DIMETRIA A. JACKSON

**SECRETARY**

WAYNE R. CROSS

**PAST-PRESIDENT**

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**ADA REPRESENTATIVES**

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**STATE BAR BOARD OF**

**GOVERNORS DISTRICT J**

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J. REUBEN CLARK LAW SOCIETY

LUX ROMANA

OC ASIAN AMERICAN LAW

OC DEPUTY PUBLIC DEFENDERS

OC TRIAL LAWYERS ASSOC.

OC WOMEN LAWYERS ASSOC.

March 9, 2010

Audrey Hollins

Office of Professional Competence, Planning and Development

The State Bar of California

180 Howard Street

San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 6.2 – Accepting Appointments**

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 and Ethics Committee.

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

The OCBA generally supports the Commission's effort to expand the ability of lawyers to decline appointments where the representation of a particular client would be "so repugnant to the lawyer as to... likely... impair the lawyer's ability to represent the client." The OCBA has several concerns, however, regarding the scope of this proposed Rule and, in particular, to whom it applies.

For example, it is not clear whether the proposed Rule applies to any attorney who is asked by a judicial officer to take on a particular representation, or only to those lawyers who voluntarily place themselves on panels for such appointments. In the former case, we believe the ability of a lawyer to decline the "appointment" should be even broader than stated in this proposed Rule.

In addition, it is not clear whether the proposed Rule also would apply to public defenders and, if so, how the Rule would intersect with a criminal defendant's constitutional right to counsel.

We urge the Commission to consider and address these questions before adopting this or any similar Rule.



THE STATE BAR OF  
CALIFORNIA

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions.~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

~~**Rule 4.1 Truthfulness in Statements to Others.**~~

- ~~1. OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].~~
- ~~2. The Comments to this rule are too general and should be eliminated.~~

~~**Rule 4.4 Respect for the Rights of Third Persons.**~~

- ~~1. OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct. The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(e); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9<sup>th</sup> Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.~~
- ~~2. OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.~~
- ~~3. Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.~~

~~**Rule 6.1 Voluntary Pro bono Publico Service.**~~

~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

~~**Rule 6.2 Accepting Appointments.**~~

OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.

~~**Rule 8.2 Judicial and Legal Officials. (Current rule 1 700.)**~~

- ~~1. OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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

RE: Proposed Rule 6.2

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 6.2, Accepting Appointments, and we support adoption of such proposed rule. However, we would recommend that the last two sentences in Comment [1] of the proposed Rule 6.2 be deleted. A lawyer's acceptance of "unpopular matters" or "indigent or unpopular clients", as stated in the Comment [1], does not equate with compliance of proposed Rule 6.1. Such references imply that a lawyer can meet her pro bono obligations in these ways, which may be misleading.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

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

cc: Members, COPRAC

## Rule 6.5 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380k SDCBA [6.5]

F-2010-381d Sandra McIntyre [6.5]

F-2010-382m SCCBA [6.5]

F-2010-385k OCBA [6.5]

F-2010-397k COPRAC [6.5]



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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**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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

**2010 Board of Directors**

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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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~**Proposed New Rule No./ Title: Rule 6.2 Accepting Appointments**~~

~~(5) Proposed Rule 6.2 is substantively identical to the ABA Model Rule.~~

~~The Commission notes that some of its members do not recommend this Rule, because it would allow a lawyer to reject an appointment to represent a client the lawyer considers “repugnant.” This minority argues that lawyers are traditionally obliged to represent people they may consider “repugnant,” such as some criminal or unpopular clients.~~

~~However, the policy behind proposed Rule 6.2 correctly recognizes that, in some cases, a client may be so repugnant to a lawyer as to impair the lawyer’s ability to represent the client. In these cases, it would be a conflict of interest for the lawyer to represent the client. Thus, Rule 6.2, while it permits lawyers to decline appointments by a tribunal in limited circumstances, does so for a proper purpose and a purpose that may be in the “repugnant” client’s best interests. After all, another appointed attorney may not find the client so repugnant that the attorney-client relationship would be impaired.~~

~~Furthermore, the comments to the proposed rule contain a substantive exception that helps to address the minority’s concerns. Specifically, Comment 1 to proposed Rule 6.2 contains a cross-reference to Cal. Bus. & Prof. Code § 6068(h), which states that it is the duty of a lawyer “[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.” Thus, the comments acknowledge that an attorney cannot decline an appointment simply because a client is unpopular.~~

~~**CONCLUSION:** We approve the new rule in its entirety.~~

---

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

**Old Rule No./Title: CRPC 1-650 Limited Legal Services Programs**

**Proposed New Rule No./ Title: CRPC 6.5 Limited Legal Services Programs**

(5) Proposed CRPC 6.5 largely embodies recently adopted CRPC 1-650. This is not surprising. The Rules Revision Commission was involved in the rule’s inception in the spring of 2009, approval and adoption of which was pursued on an expedited basis under the auspices of meeting a demand for *pro bono* legal services in view of the recent economic downturn. Existing CRPC 1-650 was adopted by the California Supreme Court by order dated June 29, 2009, modified by the Court for clarification.

Its objective is to relax the general application of conflict of interest rules, and their imputing effects in connection with provision of “short-term limited legal services to a client without [reasonable] expectation by either the lawyer or the client that the lawyer will provide continuing representation in the manner.” For its own sake, MR 6.5, upon which the proposed California rule is based, has evoked little controversy, and has been adopted little variation in nearly all Model Rule jurisdictions.

As was true with CRPC 1-650, the coverage of proposed CRPC 6.5 is slightly broader than its

Model Rules counterpart, not limited to non-profit programs, but defined to include programs “sponsored by a court, government agency, bar association, law school or non-profit organization.”

The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted and, its proposal in this context follows conclusions based on that deliberate process, (2) it has since been approved (following pointed, deliberate modification) by the California Supreme Court (3) it is consistent with a national standard that developed without California’s participation, but which promotes worthy public and professional interests worthy of California’s joinder.

**CONCLUSION:** We approve the new rule in its entirety.

---

~~LEC Rule Volunteer Name(s): David McGowan~~

~~Old Rule No./Title: 1 700 (Member as candidate for judicial office)~~

~~Proposed New Rule No./ Title: 8.2 “Judicial and Legal Officials”~~

~~(5) The proposed rule requires candidates for judicial office to comply with the canons of judicial ethics and requires that lawyers not lie about judges. The proposed rule tracks the ABA rule except that it adds provisions for appointed rather than elected judges.~~

~~CONCLUSION: We approve the new rule in its entirety.~~



# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

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[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

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[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.

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\* Date

02/19/2010 

Period

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File :

F-2010-381d Sandra McIntyre [6.5]

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# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

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\* Date

03/01/2010



Period

PC



File :

F-2010-382m SCCBA [6.5]

Commented On:

Specify:

Submitted via:

Online

---

\* Required



**ORANGE COUNTY  
BAR ASSOCIATION**

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**PRESIDENT-ELECT**  
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March 9, 2010

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

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Rule 6.2	Accepting Appointments [N/A]
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Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 6.5 -- Limited Legal Services Programs**

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 and Ethics Committee.

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

Proposed Rule 6.5 facilitates a lawyer's participation in limited legal services programs, such as call-in hotlines. The proposed Rule is based upon current Rule 1-650, and the changes being proposed are either non-substantive or intended to conform the Rule to well-settled California law.

The proposed Rule permits lawyers to participate in limited legal services programs, such as call-in hotlines, which are sponsored by a court, government agency, bar association, law school, or non-profit organization without reasonable expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter.

Because such programs are normally operated under circumstances where it is not feasible for the lawyer to systematically check for conflicts of interest, as is generally required before undertaking a representation, the otherwise applicable conflict rules are not imposed upon the lawyer unless the lawyer **knows** that the limited service representation presents a conflict of interest with his or her clients or clients of his or her law firm. Other Rules of Professional Conduct, such as those requiring that the lawyer secure the client's informed consent to the limited scope of the representation, are applicable.

The OCBA supports the adoption of proposed Rule 6.5 and agrees with the recommendations of the Commission.



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

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

RE: Proposed Rule 6.5

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 6.5 (which is substantially similar to recently adopted Rule 1-650), and we support adoption of such proposed rule. Please see our letter dated April 17, 2009, to Ms. Audrey Hollins, Office of Professional Competence, Planning and Development of the State Bar of California, in support of Rule 1-650 (a copy of which is attached hereto). In particular, we appreciate and support the addition of the last sentence of Comment [4], which COPRAC had suggested be added to the corresponding paragraph of the Discussion for Rule 1-650 at the time it was being proposed.

Thank you for your consideration of our comments.

Very truly yours,

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

cc: Members, COPRAC

## Rule 7.6 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-381f Sandra McIntyre [7.6]

F-2010-382n SCCBA [7.6]



# 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: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

# OFFICE USE ONLY.

\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

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\* Required



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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## Your Information

Professional Affiliation

Commenting on behalf of an organization

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\* Name

\* City

\* State

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

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[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

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\* Date

02/19/2010 

Period

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File :

F-2010-381f Sandra McIntyre [7.6]

Commented On:

Specify:

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Online

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\* Required



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

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[Rule 3.9 \[n/a\]](#)

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[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.

We support the Rule Revision Commission recommendation not to adopt this proposed rule.

# OFFICE USE ONLY.

\* Date

03/01/2010



Period

PC



File :

F-2010-382n SCCBA [7.6]

Commented On:

Specify:

Submitted via:

Online



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\* Required

## Rule 8.2 – Public Comment – File List

F-2010-378 Esther [multiple]

F-2010-380l SDCBA [8.2]

F-2010-381e Sandra McIntyre [8.2]

F-2010-382o SCCBA [8.2]

F-2010-385l OCBA [8.2]

F-2010-392j State Bar OCTC [8.2]

F-2010-397l COPRAC [8.2]



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

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[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

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[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

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[Rule 6.2 \[n/a\]](#)

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

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

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\* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

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\* Required



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

February 12, 2010

**2010 Board of Directors**

**President**

Patrick L. Hosey

**President-Elect**

Dan F. Link

**Vice-Presidents**

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Thomas M. Buchenau

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Marvin E. Mizell

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Representative**

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**State Bar Board of Governors  
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Wells B. Lyman

**Conference 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 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 6 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,

Patrick L. Hosey, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6**  
**LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010**  
**SDCBA Deadline March 12, 2010**

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

**Format for Analyses:**

- (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:

**Format for Recommendations:**

- [ ] 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.\*

**Summaries Follow:**

~~Model Rules counterpart, not limited to non-profit programs, but defined to include programs “sponsored by a court, government agency, bar association, law school or non-profit organization.”~~

~~The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted and, its proposal in this context follows conclusions based on that deliberate process, (2) it has since been approved (following pointed, deliberate modification) by the California Supreme Court (3) it is consistent with a national standard that developed without California’s participation, but which promotes worthy public and professional interests worthy of California’s joinder.~~

~~CONCLUSION: We approve the new rule in its entirety.~~

---

LEC Rule Volunteer Name(s): David McGowan

**Old Rule No./Title: 1-700 (Member as candidate for judicial office)**

**Proposed New Rule No./ Title: 8.2 “Judicial and Legal Officials”**

(5) The proposed rule requires candidates for judicial office to comply with the canons of judicial ethics and requires that lawyers not lie about judges. The proposed rule tracks the ABA rule except that it adds provisions for appointed rather than elected judges.

**CONCLUSION:** We approve the new rule in its entirety.



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010**

## 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 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

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[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[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.

# OFFICE USE ONLY.

\* Date

02/19/2010 

Period

PC

File :

F-2010-381e Sandra McIntyre [8.2]

Commented On:

Specify:

Submitted via:

Online

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\* Required



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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Professional Affiliation

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

\* Email address   
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DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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\* Date

03/01/2010 

Period

PC

File :

F-2010-382o SCCBA [8.2]

Commented On:

Specify:

Submitted via:

Online

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\* Required



**ORANGE COUNTY  
BAR ASSOCIATION**

**PRESIDENT**  
LEI LEI WANG EKVALL

**PRESIDENT-ELECT**  
JOHN C. HUESTON

**TREASURER**  
DIMETRIA A. JACKSON

**SECRETARY**  
WAYNE R. CROSS

**PAST-PRESIDENT**  
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TIRZAH ABÉ LOWE  
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TERESA A. MCQUEEN  
LORENA C. PEÑALCZA  
SOLANGE E. RUTCHIE  
ERIC TRAUT  
CHERRIE I. TSAI  
J. EDWARD WILSON

**ABA REPRESENTATIVES**  
MARTHA K. GOODING  
RICHARD W. MILLAR, JR.

**STATE BAR BOARD OF  
GOVERNORS DISTRICT J**  
JOSEPH L. CHAIREZ

**EXECUTIVE DIRECTOR**  
TRUDY C. LEVINDOFSKE

**AFFILIATE BARS**  
ASSOC. OF OC DEPUTY  
DISTRICT ATTORNEYS  
CRETEIC BAR ASSOC.  
FEDERAL BAR ASSOC.,  
OC CHAPTER  
HISPANIC BAR ASSOC. OF OC  
J. REUBEN CLARK LAW SOCIETY  
LEX ROMANA  
OC ASIAN AMERICAN LAW  
OC DEPUTY PUBLIC DEFENDERS  
OC TRIAL LAWYERS ASSOC.  
OC WOMEN LAWYERS ASSOC.

March 9, 2010

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

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske  
Executive Director

**MEMORANDUM**

Date: February 24, 2010

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 8.2 – Judicial and Legal Officials**

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 and Ethics Committee.

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

Proposed Rule 8.2, which imposes duties on lawyers with respect to judicial and legal officials, and when a lawyer is a candidate for judicial office, closely tracks Model Rule 8.2, but also carries forward provisions in current Rule 1-700. Paragraph (a) incorporates the concept of respect for the judiciary more generally stated in Business and Professions Code section 6068(b), but also adds an obligation not to make false statements concerning candidates for judicial office. Paragraphs (b) through (d) provide means by which the State Bar can discipline lawyers who violate ethical duties imposed by Canons 5 and 5B of the California Code of Judicial Ethics when seeking appointment or election to judicial office. The comments to the proposed Rule are virtually identical to those of Model Rule 8.2.

The OCBA supports the adoption of proposed Rule 8.2 and agrees with the recommendations of the Commission.



THE STATE BAR OF  
CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

OFFICE OF THE CHIEF TRIAL COUNSEL  
ENFORCEMENT

Russell G. Weiner, Interim Chief Trial Counsel

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

March 12, 2010

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:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

**~~Rule 1.0.1 Terminology/Definitions.~~**

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] - [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

**~~Rule 4.1 Truthfulness in Statements to Others.~~**

- ~~1. OCTC's concern is one it has stated before: that this proposed rule requires *knowing* conduct and is thus inconsistent with well-established law that gross negligence can support a finding of moral turpitude and culpability under section 6068(d). (See, for example, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174 [respondent's unqualified and unequivocal statements under circumstances that should have caused him at least some uncertainty were at minimum deceptive, in violation of section 6068(d) and 6106]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282 [violation of section 6068(d) and 6106 through gross negligence].~~
- ~~2. The Comments to this rule are too general and should be eliminated.~~

**~~Rule 4.4 Respect for the Rights of Third Persons.~~**

- ~~1. OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's paragraph (a). The Commission states that they are concerned about vagueness and over breadth of the ABA's language. OCTC finds this concern unwarranted; and when balanced against the needs to prevent litigation abuse, believes the ABA is correct. The State Bar Act already prohibits counseling or maintaining unjust proceedings (section 6068(e); advancing facts prejudicial to the honor or reputation of a party or witness (section 6068(f)); and encouraging the commencement or the continuance of actions for any corrupt motive (section 6068(g)). The current Rules of Professional Conduct similarly prohibits an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9<sup>th</sup> Cir. 1981) 638 F2d 1190, 1197.) OCTC believes the ABA's paragraph (a) should be adopted.~~
- ~~2. OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.~~
- ~~3. Comments 1 and 3 seem unnecessary as the rule is clear and unambiguous.~~

**~~Rule 6.1 Voluntary Pro bono Publico Service.~~**

~~This is a noble goal, but it does not belong in a rule of professional conduct since it is merely advisory and not enforceable. It dilutes the rest of the rules. The Comments have the same problem.~~

**~~Rule 6.2 Accepting Appointments.~~**

~~OCTC appreciates the intent of this rule, but is concerned that this rule as written is not enforceable. OCTC would also strike the Comments as unnecessary.~~

**~~Rule 8.2 Judicial and Legal Officials. (Current rule 1-700.)~~**

- ~~1. OCTC agrees with requiring a lawyer who seeks a judicial appointment shall comply with Canon 5B of the California Code of Judicial Ethics. OCTC, however, would eliminate Comments 1 and 2 as unnecessary.~~

2. Comment 3 is confusing. Comment 3 states: To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized. See Business and Professions Code section 6068(b).” This is misleading because nothing in Business and Professions Code section 6068(b) requires lawyers to defend judges, just not disrespect them. If the intent of this Comment is to remind lawyers of the duty not to unjustly criticize judges, OCTC supports that but the comment should just state that. If the intent of the Comment is to encourage lawyers to defend the judges and the court, then the reference to Business and Professions Code section 6068(b) should be stricken.
3. Comment 4 states that nothing in this rule shall be deemed to limit the applicability of any other rule or law. It should not be a comment, but part of the rule.

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,



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

March 12, 2010

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 8.2

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 8.2. COPRAC generally supports the adoption of proposed Rule 8.2 subject to the following comment.

Canon 5B employs a definition of "candidate" that only applies to persons seeking judicial office by election and not to persons seeking judicial office by appointment. Therefore, the reference in 8.2(c) to Canon 5B is ambiguous. We propose replacing the first sentence of 8.2(c) with the actual language from Canon 5B so that it reads as follows: "A lawyer who seeks appointment to judicial office shall not make statements to the appointing authority that commit the lawyer with respect to cases, controversies, or issues that could come before the courts, or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the lawyer."

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

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

cc: Members, COPRAC



# Position Taken on Proposed Rules (Batch 6)

Figure 1

