# ATTACHMENT 2

Full Text of the Public Comments
Received on the Proposed Rules

# Rule 1.0 – Public Comment – File List

X-2010-414 Manuel Sillas [1.0]

X-2010-421c COPRAC [1.0]

X-2010-145 SDCBA [1.0]

X-2010-450a Bradley Paulsen [1.0]

X-2010-513-1 OCTC [1.0]

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** disabled and going to be evicted next monday

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

*** Name** manuel sillas

*** City** san diego

*** State** California

*** Email address** (You will receive a copy of your comment submission.) lawmaker2009law@gmail.com

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.0 Purpose and Scope of the Rules of Professional Conduct [1-100]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

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

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This dirt bag lawyer (REGAN FURCOLO) REPRESENTING THE LANDLORD, THAT THEY EVICTED ME
BY NEXT MONDAY, I HAVE THE PROOF OF PERJURY AND THAT HE ALLOWED HIS CLIENT: JAMES
AND JAMIE HUGHES (HUGHES MANAGEMENT) THEY LIED UNDER OATH, ON 03/29/10.
THIS ARROGANT, PIECE OF DIRT, IT IS ASHAMED FOR THE LEGAL COMMUNITY, I AM GOING TO
FILE CRIMINAL CHARGES WITH THE DISTRICT ATTORNEY, VS. THE THREE:
1) REGAN FURCOLO (ATTORNEY FOR HUGHES MANAGEMENT)
2) JAMES HUGHES (FATHER BUSINESS)
3) JAMIE HUGHES (CRYING BABY WITH A VERY BIG MOUTH.

MANUEL SILLAS
PLAINTIFF IN PRO PER AND DISABLED FOR LIFE.
I WANT JUSTICE.
```

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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

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 - Purpose and Scope of the Rules of Professional Conduct. COPRAC supports the adoption of proposed Rule 1.0 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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**CYLA District Nine Representative**
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**Conference of Delegates of California Bar Associations District Nine Representative**
Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

**MEMORANDUM**

Date: October 16, 2006

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

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

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

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

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

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

* * * * *

Comment 1:

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

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

Rationale for Comment 1:

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

Dissent 1:

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

Rationale for Dissent 1:

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

Dissent 2:

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

Rationale for Dissent 2:

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

June 4, 2010

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

Bradley T. Paulsen
4945 Pinnacle St.
Riverside, CA 92509
(707) 673-6982

ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar**
**State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice**. Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone,** costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

**lawsuit. If they are not aware of the claim, how did their name end up in the filing?** Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***"Some of our clients' homeowners are being added to suits without even being aware of it,"*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. ***"I can't tell you the number of times I've seen a defect claim that says 'defective stucco', and the house doesn't even have stucco".***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner's Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

**(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**

**(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

**and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.**

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned. There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**
Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*
Litigation/Claims cause insurance to go up.
Litigation/Claims force builders to raise their prices.
Litigation/Claims burden the judicial system and expend judicial resources.
Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.
*As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.*

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.
*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

**Rule 1.1 Competence**

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

*The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved,* ***so it goes on.***

**Rule 1.4 Communication**

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

*As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.*

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.*

**Rule 1.5 Fees For Legal Services**

Rule 1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

*In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.*

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

**Rule 1.7 Conflict of Interest: Current Clients**
Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
*The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.*

Rule 1.7 (b) (4) Each affected client gives informed written consent.
*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

*the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.*

**Rule 1.8.6 Payments Not From Client**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

**Comment (noted in the proposed new or amended rules)**

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of $10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately $500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

Bradley T. Paulsen
Concerned Citizen

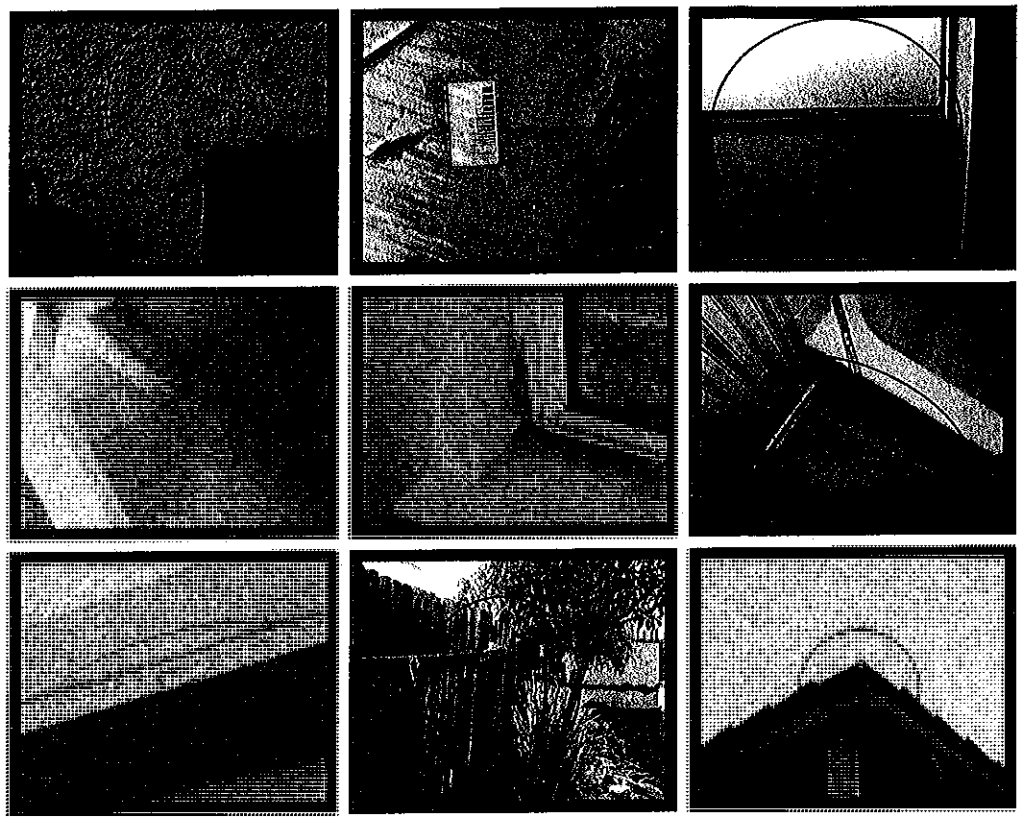
/encl

# MAK

www.maklawyers.com

MILSTEIN, ADELMAN & KREGER, LLP

# NEWSLETTER



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

## NUMEROUS [redacted] HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners. Original ownership is not required to participate. Each home will be inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:


**Anneke Stewart, Esq. extension 135 or**

**Lisa Appelbaum extension 146 or**

**2800 Donald Douglas Loop North Santa Monica, California 90405**

**Toll Free: (888) 835-8055**

**Fax: (310) 396-9635**

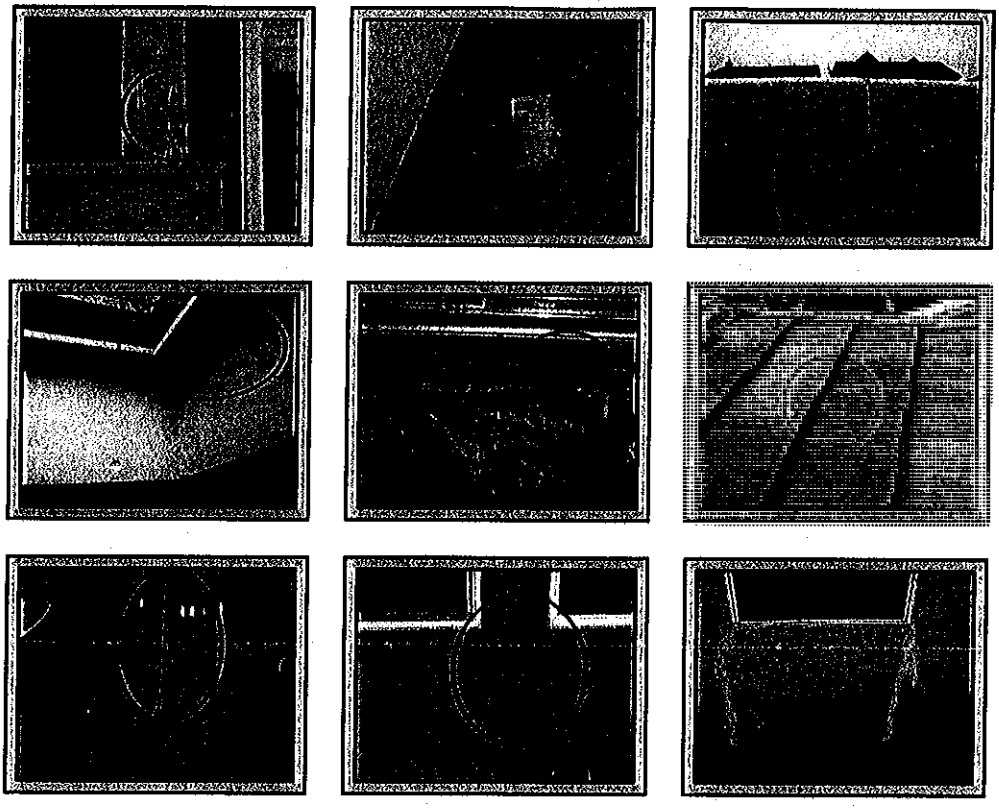

**Numerous [redacted] homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.**

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

# NEWSLETTER

MILSTEIN, ADELMAN & KREGER, LLP

January 2009



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

## HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

[redacted]

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either fax or in the postage-paid envelope we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:


David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop North

Santa Monica, California 90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635


[redacted]

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

*MILSTEIN, ADELMAN & KREGER, LLP*

[redacted]

## HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____ NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

[redacted]

[redacted]

Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sinkinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICIES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

[redacted]

June 27, 2008

**Re:** [redacted] **Construction Defects***
**Our File Reference # P 119-LMRO**

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within t[redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / RL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW
*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners. Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME [redacted] | CASE NUMBER |
|---|---|

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By:_____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

**FOR A&K USE ONLY**

GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0405

Anderson & Kriger
ATTORNEYS AT LAW

# Homeowner's Contingent Attorney Fee Agreement



*A Professional Law Corporation*

THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is: [redacted]

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

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***(Continued on reverse)***

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| [redacted] | |

Anderson & Kriger

*A Professional Law Corporation*
**Construction Defect & Community Association Law**
2155 Chicago Avenue, Suite 300
Riverside, CA 92507
**(951) 787-7146**
Fax: (951) 787-7168

# *FINAL NOTICE !*

**The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [redacted] Housing Development on behalf of many of your neighbors.** We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks** and/or **loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

**Anderson & Kriger** has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger
Rhonda Harrington
Rhonda Harrington

*This advertising communication is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

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REAL ESTATE • May. 26, 2010

# Searching For Cracks In Construction Law

**Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects**

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kreger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

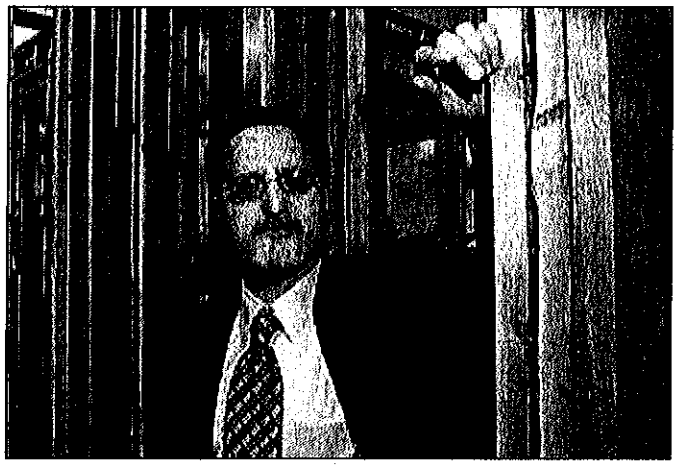
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow,* E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

jason_armstrong@dailyjournal.com



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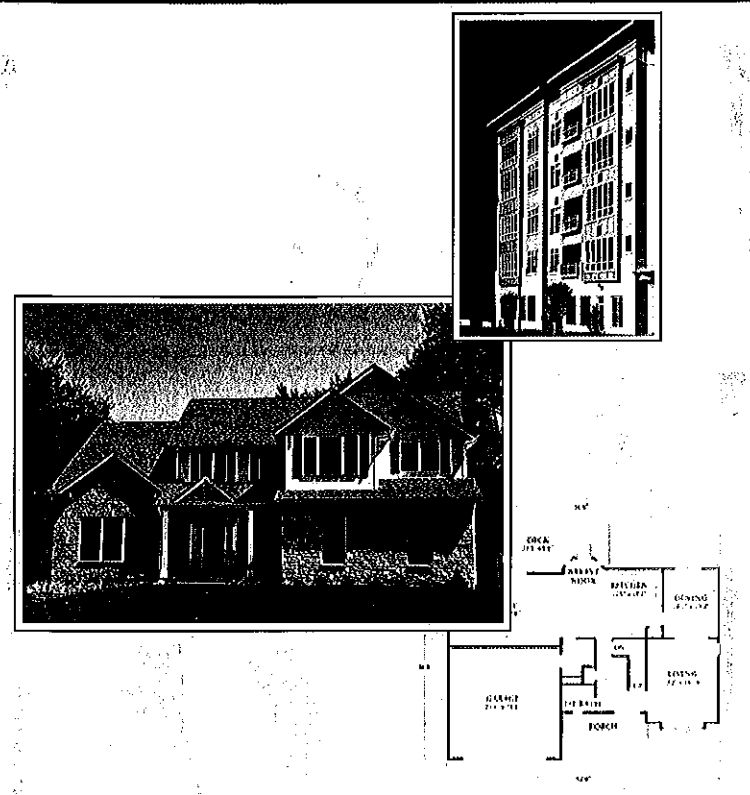
# Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association




BIA Orange County Chapter
17744 Sky Park Circle, Suite 170


Construction Quality and Sustainable Building Committee

## For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

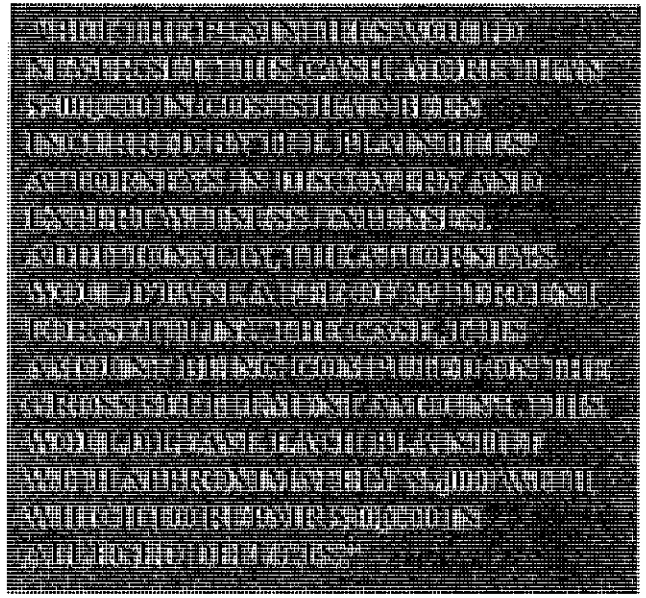
This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

## Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate $30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-fifth of the amount claimed. After attorneys' fees were deducted, the homeowners were left with only $5,000 to repair $30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.[1]



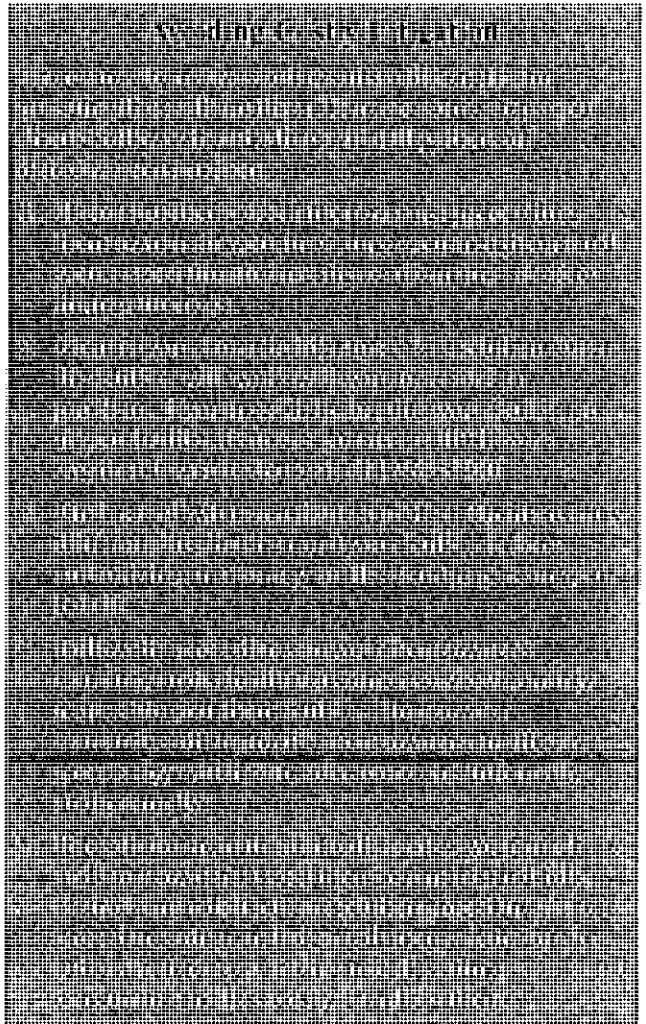
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.[2]

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

## Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.[3]

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



## Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

## When The Construction Defect Lawyers Call

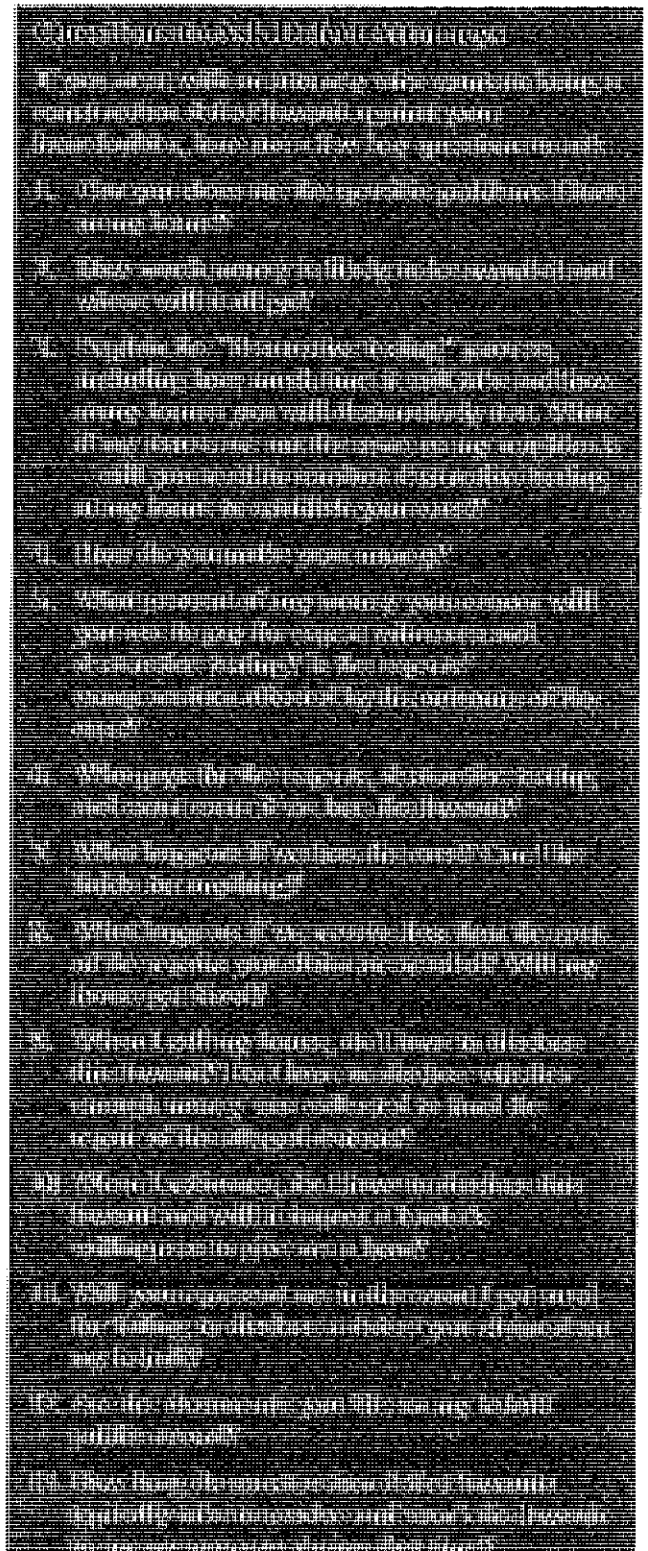
You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

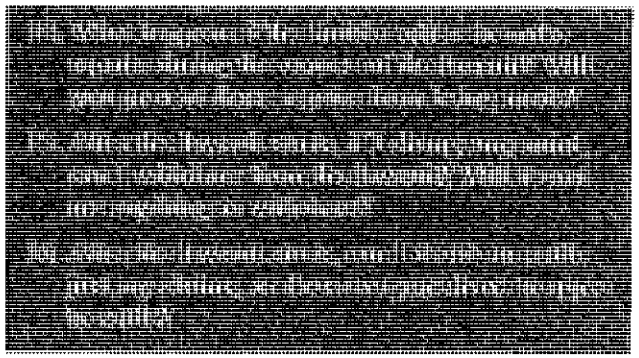
Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?





## Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.[4]

How would you feel about paying a contractor nearly $90 just to have your showerhead tightened? In one case, the trial attorneys sought $28,000 for showerhead repairs, or $90 per showerhead. The same case sought $12,000 for squeaky floors, $28,000 for bathtub repairs and $215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

## You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.[5]

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

## Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

## California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

## The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

## About Our Sponsors

**Citizens Against Lawsuit Abuse** (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

**The Trade Contractor Council of Southern California** (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

**The Associated General Contractors of California** (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

**The Building Industry Association of Southern California** (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

**The Construction Quality Committee** (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

## We'd Like To Hear From You!

Comments: _____

_____

_____

_____

Name: _____

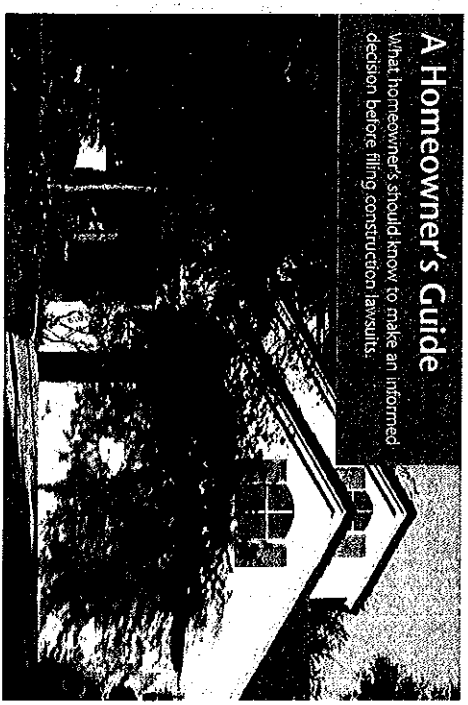
Address: _____

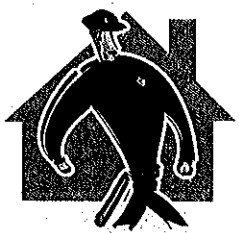
City/State/Zip: _____

Phone: _____ E-mail: _____

Your Builder/HOA/Property Mgmt. Co: _____

# Think Before You Litigate!





Neighbors Protecting

HOME VALUES

www.NeighborsProtectingHomeValues.com

# Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

# And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California, causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate -

***Neighbors Protecting Home Values***

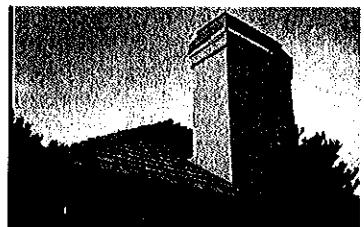
# Be an Informed Homeowner

Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

1. Contact your homebuilder first to solve your problem.
2. Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
3. Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



*Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.*

# *What Questions Should I Ask?*

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?

# Frequently Asked Questions:

### *Will a lawsuit harm my home's value or my neighborhood?*

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

*(The Business Journal / August 30, 1999)*

*Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.*

### When I sell my house, will these litigated "defects" require disclosure to potential buyers?

Under California law you are required to fill out a disclosure statement regarding your home, which includes everything regarding [illegible] and lawsuits relating to your home. The seller of the home must provide any potential buyer with a complete disclosure statement – listing all defects in the property known to the seller. The statement must be presented to the potential buyer prior to entering into any contract. Buyers usually waive the mandated cooling time for the property and discuss the potential selling price on the property. Here, the buyer may have discovered the defect first.

### Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage/home equity loan?

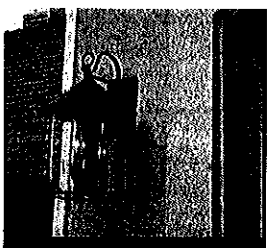
Title in California will disclose how your lender will be just as [illegible] as many lenders previously have not financed by anyone in your town due to the loss in home value as a result of the suit. [illegible] to an unnecessary lawsuit may also prevent homeowners from being able to sell or refinance a home, at least until and pending all of the applicable statutes have been met.

### How long does it take to settle a lawsuit?

[redacted]

### How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

[redacted]



*Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.*

### *Will the lawsuit affect my ability to obtain homeowners insurance?*

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

### *Shouldn't the City building codes and inspectors prevent construction defects from occurring?*

City's are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments and available for the homeowner's review. In order to protect future homebuyers city's often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.

*Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.*

### *What if I have a legitimate concern about my home?*

There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

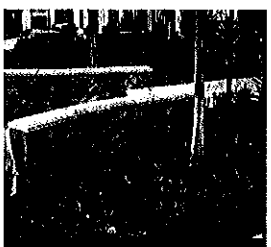
### *Will proper home maintenance prevent defects?*

Under California law homeowners are expected to maintain their homes – performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete – doing it properly the first time will save homeowners time and money in the long run.

*Withdrawal From A Lawsuit*

## *How do you withdraw from a lawsuit?*

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



*Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.*

# *THINK BEFORE YOU LITIGATE!*

Give your homebuilder a call – you will be pleasantly surprised!

For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at ***www.neighborsprotectinghomevalues.com***

*Think Before you Litigate!*

## Frequently Called Phone Numbers

My Homebuilder _____

Homebuilder's Customer Service _____

Licensed Maintenance Person _____

Gardener _____

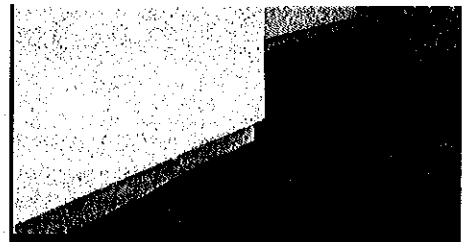
Pool Maintenance _____

City Services _____

Other _____

Other _____

Other _____



*Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.*

Neighbors Protecting
HOME VALUES

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.0. Purpose and Scope of The Rules of Professional Conduct.**

Proposed Rule 1.0 sets forth four purposes of the rules. However, it appears that there is one more purpose to the rules not explicitly mentioned in proposed rule 1.0: maintaining high professional standards.

The Supreme Court has held that the primary purposes of imposing discipline includes maintaining the highest possible professional standards for attorneys. (See e.g. *Berry v. State Bar* (1987) 43 Cal.3d 802, 815; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514; see also Standard 1.3 of the Standards for Attorney Sanctions for professional Misconduct.) The Supreme Court has also stated that "[t]he rules are designed to establish ethical standards for the bar and to prohibit unprofessional conduct." (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 793; see also *Higgins v. State Bar* (1956) 46 Cal.2d 241, 246; *Millsberg v. State B*ar (1971) 6 Cal.3d 65, 75. See also *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4$^{th}$ 419, 431.) OCTC believes that maintaining high professional standards should be stated as an explicit purpose of the rules.

# Rule 1.0.1 – Public Comment – File List

X-2010-425-2b SDCBA [1.0.1]

X-2010-431a BASF [1.0.1]

X-2010-488d Andrew Dilworth-Bill Balin [1.0.1]

X-2010-513-2 OCTC [1.0.1]

X-2010-517c Zitrin-Multiple [1.0.1]

X-2010-525a LA Public Defender [1.0.1]

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

February 12, 2010

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): 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

## 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** San Francisco Bar Association Legal Ethics Committee

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

*** Name** William M. Balin

*** City** San Francisco

*** State** California

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

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.0.1 Terminology [1-100(B)]

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

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

---

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

# BALIN & KOTLER, LLP
Attorneys at Law

**William M. Balin**
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June 14, 2010

**Via Facsimile: (415) 538-2171 and U.S. Mail**

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

Re: **Public Comment on Proposed Rule of Professional Conduct 1.0.1(m) (Definition of "Tribunal")**

Dear Ms. Hollins and Members of the Rules Revision Commission:

I and Drew Dilworth, are submitting this letter to comment on the proposed rule, 1.0.1, subdivision (m), the definition of "tribunal." We are, respectively, Chairperson and Vice-Chair of the Ethics Committee of the Bar Association of San Francisco, but we are sending this letter to you as individuals since the BASF Board of Governors has not yet had an opportunity to review and consider our comments. Should BASF adopt these letters, we will advise the Commission.

We are concerned that the present version of the proposed rule defines the term too narrowly, thereby rendering the obligations embodied in other proposed rules, such as rule 3.3 (Candor Toward the Tribunal) inapplicable to conduct carried out by lawyers in proceedings in which such obligations should be imposed.

The Commission's proposed definition significantly deviates from ABA Model Rule 1.0(m)'s definition of tribunal. ABA Model Rule 1.0(m) provides:

"'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity."

The rule goes on to explain that "[a] legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral officer, after the presentation of evidence or legal argument by a party or parties, will tender a binding legal judgment directly affecting a party's interest in a particular matter."

In contrast, the Commission's proposed rule 1.0.1(m) states:

"'Tribunal' means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court."

Accordingly, the Commission's proposed definition omits, and would not cover, adjudicative proceedings conducted by administrative agencies, legislative bodies or "other bodies." In contrast, the ABA definition applies to all proceedings that are adjudicative of a party's legal rights or interests *regardless of the specific body* that is entrusted with carrying out the adjudicative proceeding. The Commission's materials do not articulate any reason why an adjudicative proceeding that is not carried out by a court, arbitrator, administrative law judge or special master, but that nonetheless adjudicates a party's legal rights or interests, should not be included within the definition of "tribunal."

There are many bodies that are authorized to adjudicate the legal rights or interests of a party that do not fall within the Commission's proposed definition. These include, for example, the various medical boards that hear complaints of misconduct of licensed practitioners, from doctors and osteopaths to nurses, radiologists and dentists. Virtually all disciplinary proceedings conducted by these agencies are decided by members of the particular profession in issue, not by judges, arbitrators, administrative law judges or special masters. Yet they determine very significant issues, such as a professional's ability to continue to practice. Most of the time the case against the respondent facing disciplinary action is presented by a deputy attorney general, and all respondents have the right to be represented by counsel at the hearings.

The impact of the Commission's proposed definition is significant when considered in the context of other proposed rules. Proposed Rule 3.3, for example, generally prohibits a lawyer from making false statements of fact or law to a tribunal, failing to correct a false statement of fact or law made by the lawyer to the tribunal, failing to disclose legal authority in the controlling jurisdiction known to be directly adverse to the lawyer's client and not disclosed by opposing counsel, offering evidence the lawyer knows to be false, and taking reasonably remedial measures with respect to criminal or fraudulent conduct (to the extent permitted by the duty of confidentiality). As it now stands, the proposed definition would not require the attorneys prosecuting and defending against disciplinary actions in the aforementioned professions to be truthful to the boards before whom they appear.

Candor to courts and tribunals is a fundamental precept of our legal jurisprudence. It fosters the procurement of just results and promotes confidence in the veracity of administrative proceedings. Furthermore, where a person's ability to practice in his or her chosen profession is at stake, the concept of fundamental fairness rises to the level of due process. (See, e.g., *Clare v. Board of Accountancy* (1992) 10 Cal.App.4th 294, 300.) Unfortunately, under the Commission's

proposed definition of "tribunal", lawyers would be exempted from these important obligations if, and when, they advocate before bodies that *are acting in an adjudicative manner* but do not fall within the current proposed definition. Why, for example, should a lawyer not be precluded from making false statements of law or fact to the State Franchise Tax Board or to a licensing agency?

We understand that certain concerns have been raised about defining the term "tribunal" in a manner that would apply to adjudicative bodies before which both lawyers and non-lawyers appear, thus ostensibly placing lawyers at a disadvantage, since the non-lawyers would not be subject to the same limitations. This concern does not persuade us that the ABA definition should be so limited.

First, the fundamental principles at issue here, so core to our legal system, should not be displaced simply by the fact that a lawyer's opponent may not be limited by the ethical constraints that bind attorneys. The threat of disciplinary action does not always deter unscrupulous lawyers from acting dishonestly; this does not mean that no lawyers should be subject to a rule prohibiting such conduct. Simply because non-lawyers may feel free to act unscrupulously does not mean that lawyers should also be free to do so.

Second, the rule even as proposed, does not apply to non-lawyers in any venue. If the concern is that lawyers are therefore at a disadvantage when opposing lay people representing themselves, then we should not promulgate any rule at all regarding candor to a tribunal.

Third, we are not convinced that a non-lawyer would get away with dishonesty before a tribunal where the lawyer opposing that person must conform to the rule. The lawyer can still question and challenge the non-lawyer's conduct and attempt to discredit it.

The bottom line is that lawyers are held to higher standards than other individuals. These standards apply even to acts that do not strictly constitute the practice of law. (See, e.g., *Crawford v. State Bar* (1960) 54 Cal.2d 659.) Being a lawyer carries both special privileges and special responsibilities. That an adversary may not be held to the same high standard does not mean that our ethical obligations must therefore be diminished. An attorney must be truthful even when his or her opponent is not.

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

Very truly yours,

William M. Balin
Andrew Dilworth

cc: BASF Bd. of Governors

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.0.1. Terminology / Definitions.**

1. OCTC is concerned with the definition in proposed rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature's authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4th 40.) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.
2. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.
3. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sm

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

were not as carefully vetted.

Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense, puzzling, or otherwise lacking. We believe more study of the verbiage of these comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.

2. *Rule 1.8.1 – Doing business with a client*

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.

The phrase relating to modifications of fee contracts in Comment ¶ 5 must be stricken.

C. Inappropriate use of independent counsel

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule – with limiting language that is absent from the ABA rule, MR 1.8(a)(2) – states that if the client is already represented by independent counsel, there need be no notice. This, read together with Comments 13 and 14 of the proposed rule, substantially diminishes client protection.

Comments 13 and 14 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction. Moreover, under the ABA's Comment, ¶ 4, written disclosure is still required from one of the involved lawyers. This is not true of the current California comments.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA rule language in MR 1.8(a)(2) and Comment ¶ 4 should replace the ill-advised Commission language.

3. *Rule 1.0.1(e) – Definition of informed consent*

While the definition of "informed consent" contained in Rule 1.0.1(e) conforms to the ABA Model Rule, it is something of a retrenchment of the broader – and more client-protective – existing California definition currently contained in the conflicts of interest rule. At least in this one case, the Commission has chosen ABA congruence over better California language more protective of clients' interests.

The existing definition of informed consent in the case of conflicts of interest is embodied in current CRPC 3-310(A), which combines disclosure and consent:

> (1)"Disclosure" means informing the client or former client of the *relevant circumstances and of the actual and reasonably foreseeable adverse consequences* to the client or former client; (Emphasis added.)
>
> (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure....

The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1(e), in the redlined language below:

> 'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained ~~adequate information and explanation about~~ the relevant circumstances and the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

This will provide a more clearly informed consent to clients not only as to conflicts of interest, as the current rule now stands, but in all informed-consent situations.

4. *Rule 3.7 – Lawyer as witness – conflicts of interest – jury trial vs. tribunal*

We note that the proposed California rule remains broader than the ABA rule in that it allows clients to give informed written consent to allow a lawyer to testify as a witness. The ABA rule narrowly allows lawyers to testify on broadly substantive matters only when the lawyer's disqualification, essentially in order to enable testimony, "would work substantial hardship" on the client, even when the lawyer's testimony could be significantly helpful to the client's case.

We agree with the California construction. We note that the client *should* be able to get the full assistance of counsel, including testimony, *so long as* informed consent is given.

Nevertheless, conflicts of interest can and may occur despite informed consent. For example, the lawyer might be impeached based on collateral issues relating to credibility, a circumstance that would have been included the document obtaining the client's informed consent. However, *if* such conflict of interest exists or occurs between lawyer and client, the distinction between testimony at a *jury trial* vs. other adjudicative proceedings makes little if any sense. The issue is the conflict of interest by virtue of the lawyer's testimony, not the forum. The rule should be modified to strike the word "jury" and add the word "tribunal."[3]

## II. Rules relating to able representation

1. *Rule 1.1 – Competence*

This comment is closely connected to the next comment, on MR 1.3, Diligence.

The competence rule, as modified, gives an unfortunate and overly broad "free pass" to a lawyer committing any first act of negligence, or any first "mistake," *no matter how egregious* that mistake may be. Section (a) of the rule remains unchanged: "A lawyer shall not *intentionally*, *recklessly*, or *repeatedly* fail to perform legal services with competence." (Emphasis added.) However, Comment ¶ 6 has been added, explicitly stating that the rule is "not intended to apply to *a single act* of negligent conduct *or a single mistake*...." (Emphasis added.)

This comment is seriously misguided. The comment is supported by the Commission's rules introduction, which claims that "most jurisdictions" apply the competence rule only to intentional, reckless, or repeated acts." Evidence is to the contrary, however, as is the ABA rule. At best the Commission relies on an unsupported anecdotal statement.

Moreover, Comment ¶ 6 would forbid discipline even if the "single act" would meet a "gross negligence" standard. Use of the common non-legal word "mistake," muddies the scope of 1.1(a) and creates the possibility that *any* single mistake, however great, would fall outside the rule.

Fixing this rule is not difficult. First, we strongly recommend that this Board eliminate ¶ 6 of the Comment. At the very least, the Board should strike the words "or a single mistake" and add the word "simple" before "negligent conduct," so that the comment would only excuse a first act of simple negligence.

Second, we recommend that the Board add the words "gross negligence" to 1.1(a): "A lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence...."

---

[3] We see no reason to limit application to "trial," as under the ABA Model Rule, as opposed to "tribunal." We note, however, that the definition of "tribunal," as it has been proposed by the Commission, is seriously flawed in its narrow construction. See *infra*.

2. *Rule 1.3 – Diligence*

Most unfortunately, the Commission also determined not to approve Rule 1.3 on diligence. The Commission's explanation, in its document updated May 17, 2010 entitled "Rules and Concepts that Were Considered, But Are Not Recommended for Adoption" ("*May 2010 Non-Adoption Summary*") argues that "diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence." This is not so.

Although proposed Rule 1.1 pays lip service to the concept of diligence in subsection (b) and Comment ¶ 2, this is not close to adequately replacing the diligence rule. For instance, while proposed Comment ¶ 2 is similar to ABA Rule 1.3's Comment ¶ 1, other important components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work overload (ABA Rule 1.3, Comment ¶ 2), procrastination and delay (ABA Comment ¶ 3), and following through on matters to completion (ABA Comment ¶ 4).

We strongly agree with the Commission's minority report with respect to this rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: *paying adequate attention*. MR 1.3 and its comments need to be approved by the Board.

## III. Rules omitted in whole or part by the Commission

1. *Rule 1.0.1(m) – Definition of Tribunal*

The excellent definition of "tribunal" under the ABA Model Rules "denotes a court, an arbitrator ... or a legislative body, administrative agency or other body acting in an adjudicative capacity," that is, where the body "will render a binding legal judgment directly affecting a party's interests...."

Unfortunately, that broad and appropriate definition was not followed by the Commission. The Commission's definition is limited to courts, arbitrators, administrative law judges and special masters referred by the court. The result is that adjudications may occur in other forums that are simply deemed by the Commission *not* to be tribunals.

The effect of this can be enormous. The limited definition of "tribunal" could have a significant effect on how Rules 3.7, 3.9 and, if passed, 4.1 (see *infra*) are interpreted. Most tellingly, however, is the substantial and material effect on the vitally important Model Rule 3.3, "Candor to a Tribunal." If the definition of tribunal is unduly limited, lawyers in California will not have any ethical requirement to be candid towards a number of adjudicative bodies that are making binding decisions.

Surely, we hope and expect that California's integrated State Bar would not want to convey to its lawyers or the public that members of the California bar may be less than candid before certain adjudicative bodies. Nevertheless, that is what the current proposal implies. This definition must be changed to conform to the broader ABA definition.

2. *Rule 4.1 – Truthfulness to others*

Similar issues about the integrity of California bar members are raised by the absence of Model Rule 4.1. This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.

The Commission in its *May 2010 Non-Adoption Summary* argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.

We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.

3. *Rule 3.3 – Duty of candor*

Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.

Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.

The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.

Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.

4. *Rule 3.9 – Advocate in non-adjudicative proceeding*

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance *is* required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

5. *Rule 4.4(a) – Barring use of embarrassment, delay, or burden*

Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the *May 2010 Non-Adoption Summary* – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule

might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses "means that have *no substantial purpose other than*" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

*6. Rule 5.7 – Rule application to "law-related services"*

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

*7. Rule 2.1 – Lawyer as advisor*

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" – two vital and important concepts that are nevertheless not the same.

## IV. Rules related to confidentiality

*1. Rule 1.6 – Basic confidentiality*

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.[4] The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

[4] The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.

2. *Rule 1.13 – Organization as client*

Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.

## V. Rules related to lawyers' financial interests

1. *Rule 1.5 – Use of the term "unconscionable"*

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."

2. *Rule 1.15 – Trust accounts*

The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.

However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary *and wary* practitioners.

We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.

The Board should return this rule to the Commission with appropriate instructions.

3. *Rule 1.17 – Sale of a law practice*

A. Geographical area

The Commission has conflated the reference to "geographic area of practice" in the ABA rule – allowing a selling lawyer to cease practice in a state or particular "geographic area" – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.

Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing

in a wide variety of circumstances.

This rule was designed to allow lawyers or law firms that are retiring or moving or materially changing their practice to forward their practices to other qualified lawyers. The geographical area sale proposed by CRPC 1.17 is far too broad, allowing buying and selling of areas as if the practice of law were only a business and not also a profession, and clients were products to be bought and sold.

This breadth should be narrowed substantially.

B. No increase of fees

Section (e) of the current proposed rule says that the fee to the client shall not be increased "solely" by reason of the purchase of the practice. Section (d) of the ABA rule makes this fee increase absolute. We strongly believe that the California language should also be absolute, and that the word "solely" should be stricken.

Respectfully submitted,

Drafters:

Geoffrey C. Hazard
*Thomas E. Miller Distinguished Professor of Law*
*University of California, Hastings College of the Law*
*Executive Director (1984-1999) of the American Law Institute*
*Reporter for the American Bar Association Model Rules of Professional Conduct (1983)*

Deborah L. Rhode
*Director, Center on the Legal Profession and E.W. McFarland Professor of Law*
*Stanford Law School*
*Former President of the Association of American Law Schools*
*Author of over 20 books on the legal profession*

Richard Zitrin
*Adjunct Professor of Law*
*University of California, Hastings College of the Law*
*Founding Director (2000-2004), Center for Applied Legal Ethics, University of San Francisco*
*Lead Author, Legal Ethics: Rules, Statutes and Comparisons (2010) and other legal ethics books*

Co-signers:

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*Clinical Professor of Law*
*Loyola Law School*

Steven Berenson
*Associate Professor of Law*
*Thomas Jefferson School of Law*

Susan Smith Bakhshian
*Clinical Professor of Law*
*Loyola Law School*

Bruce Budner
*Lecturer, Legal Ethics*
*University of California, Berkeley, Boalt Hall School of Law*

Erwin Chemerinsky
*Dean and Distinguished Professor of Law*
*University of California, Irvine, School of Law*

Robert F. Cochran, Jr.
*Louis D. Brandeis Professor of Law and*
*Director, Herbert and Elinor Nootbaar Institute on Law, Religion, and Ethics*
*Pepperdine University School of Law*

Scott L. Cummings
*Professor of Law*
*UCLA School of Law*

Steven K. Derian
*Lecturer in Law*
*UCLA School of Law*

Andrew Dilworth
*Adjunct Professor of Law*
*University of San Francisco School of Law*

Sharon Dolovich
*Professor of Law*
*UCLA School of Law*

Paul T. Hayden
*Professor of Law and Jacob J. Becker Fellow*
*Loyola Law School*

Richard J. Heafey
*Adjunct Professor*
*University of San Francisco School of Law*

Peter Keane
*Dean Emeritus and Professor of Law*
*Golden Gate University School of Law*

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*William T. Dalessi Professor of Law and Philosophy*
*University of Southern California, Gould School of Law*

Carol M. Langford [except as to Item V(1)]
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*University of San Francisco School of Law, and*
*University of California, Hastings College of the Law*

Daniel W. Martin
*Professor of Law and Director of the Law Library*
*Loyola Law School*

Kelley Mauerman
*Assistant Professor of Legal Writing*
*Whittier Law School*

Michele Benedetto Neitz
*Associate Professor*
*Golden Gate University School of Law*

Gregory L. Ogden
*Professor of Law*
*Pepperdine University School of Law*

Rex R. Perschbacher
*Daniel J. Dykstra Chair in Law and Former Dean*
*UC Davis School of Law*

Jeff Selbin
*Clinical Professor of Law and*
*Faculty Director, East Bay Community Law Center*
*University of California, Berkeley, Boalt Hall School of Law*

John Cary Sims
*Professor of Law*
*University of the Pacific, McGeorge School of Law*

Dennis J. Ventry, Jr.
*Associate Professor of Law*
*UC Davis School of Law*

Maureen Weston
*Associate Dean for Research & Professor of Law*
*Pepperdine University School of Law*

Gary Williams
*Professor and Johnnie L. Cochran Jr. Chair in Civil Rights*
*Loyola Law School*

Scott Wood
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*Loyola Law School*

Richard C. Wydick
*Emeritus Professor of Law*
*University of California, Davis*

**LAW OFFICES**
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CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
210 W. TEMPLE STREET, SUITE 19-513
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(213) 974-2801 / FAX (213) 625-5031
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**MICHAEL P. JUDGE**
PUBLIC DEFENDER

**EXECUTIVE OFFICE**

June 14, 2010

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

Dear Ms. Hollins:

This letter address the public comment provided for the 69 proposed new or amended Rules of Professional Conduct developed by the Commission for the Revision of the Rules of Professional Conduct.

There is a rule and comment that seem to be internally inconsistent. Rule 3.8(e), concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the rule, saying it is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

There is no "genuine need" exception written into the Rule and it should not swallow up the Rule's protections.

There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.

Comments [7] and [8] to Rule 3.6 seem duplicative.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

# Rule 1.1 – Public Comment – File List

X-2010-421ii COPRAC [1.1]

X-2010-425-3c SDCBA [1.1]

X-2010-450b Bradley Paulsen [1.1]

X-2010-488b Andrew Dilworth-Bill Balin [1.1]

X-2010-511a State Bar LPMT [1.1]

X-2010-513-3 OCTC [1.1]

X-2010-517e Zitrin-Multiple [1.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 1.1

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 1.1 - Competence. COPRAC supports the adoption of proposed Rule 1.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule 1.1 Competence [3-110]**

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

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

* * * * *

Comment 1:

We approve the new/proposed rule in its entirety.

Dissent 1:

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

Rationale for Dissent 1:

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

Dissent 2:

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

June 4, 2010

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

Bradley T. Paulsen
4945 Pinnacle St.
Riverside, CA 92509
(707) 673-6982

ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar**
**State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice**. Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone,** costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

**lawsuit. If they are not aware of the claim, how did their name end up in the filing?** Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***"Some of our clients' homeowners are being added to suits without even being aware of it,"*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. ***"I can't tell you the number of times I've seen a defect claim that says 'defective stucco', and the house doesn't even have stucco".***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner's Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

**(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**

**(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

**and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.**

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned. There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**
Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*
Litigation/Claims cause insurance to go up.
Litigation/Claims force builders to raise their prices.
Litigation/Claims burden the judicial system and expend judicial resources.
Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.
*As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.*

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.
*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

**Rule 1.1 Competence**

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

*The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved,* ***so it goes on.***

**Rule 1.4 Communication**

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

*As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.*

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.*

**Rule 1.5 Fees For Legal Services**

Rule 1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

*In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.*

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

**Rule 1.7 Conflict of Interest: Current Clients**
Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
*The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.*

Rule 1.7 (b) (4) Each affected client gives informed written consent.
*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

*the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.*

**Rule 1.8.6 Payments Not From Client**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

**Comment (noted in the proposed new or amended rules)**

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of $10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately $500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

Bradley T. Paulsen
Concerned Citizen

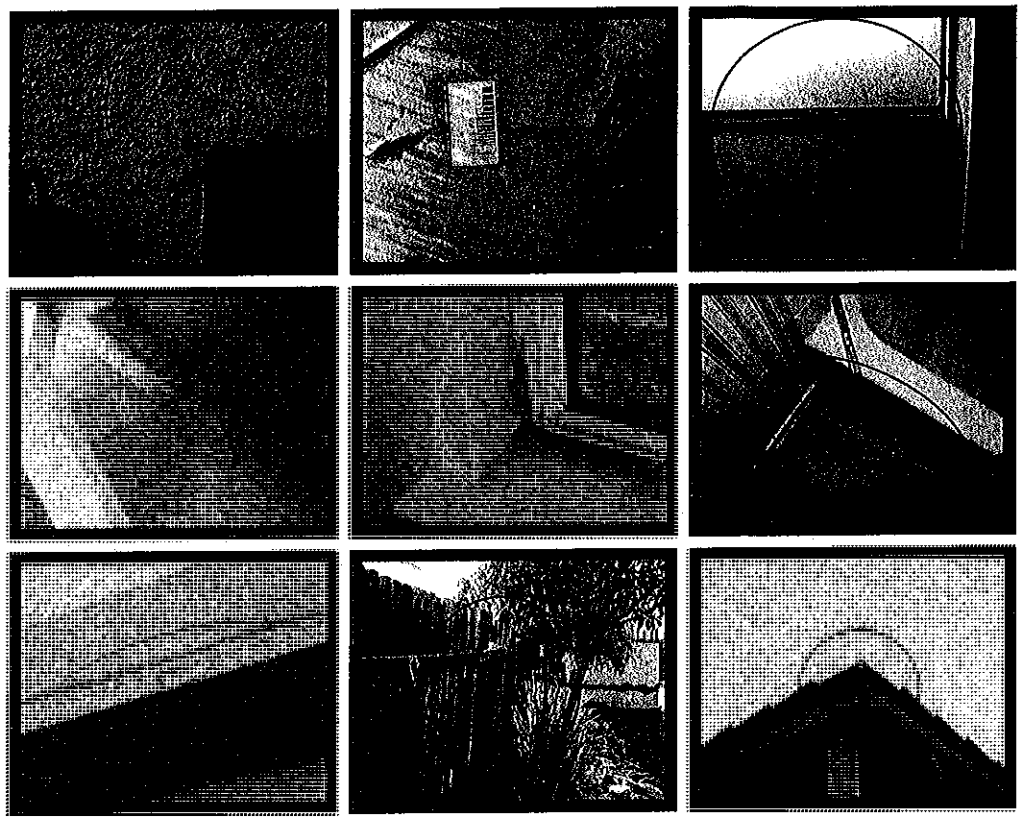
/encl

# MAK

www.maklawyers.com

MILSTEIN, ADELMAN & KREGER, LLP

# NEWSLETTER



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

## NUMEROUS [redacted] HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners. Original ownership is not required to participate. Each home will be inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:


**Anneke Stewart, Esq. extension 135 or**

**Lisa Appelbaum extension 146 or**

**2800 Donald Douglas Loop North Santa Monica, California 90405**

**Toll Free: (888) 835-8055**

**Fax: (310) 396-9635**

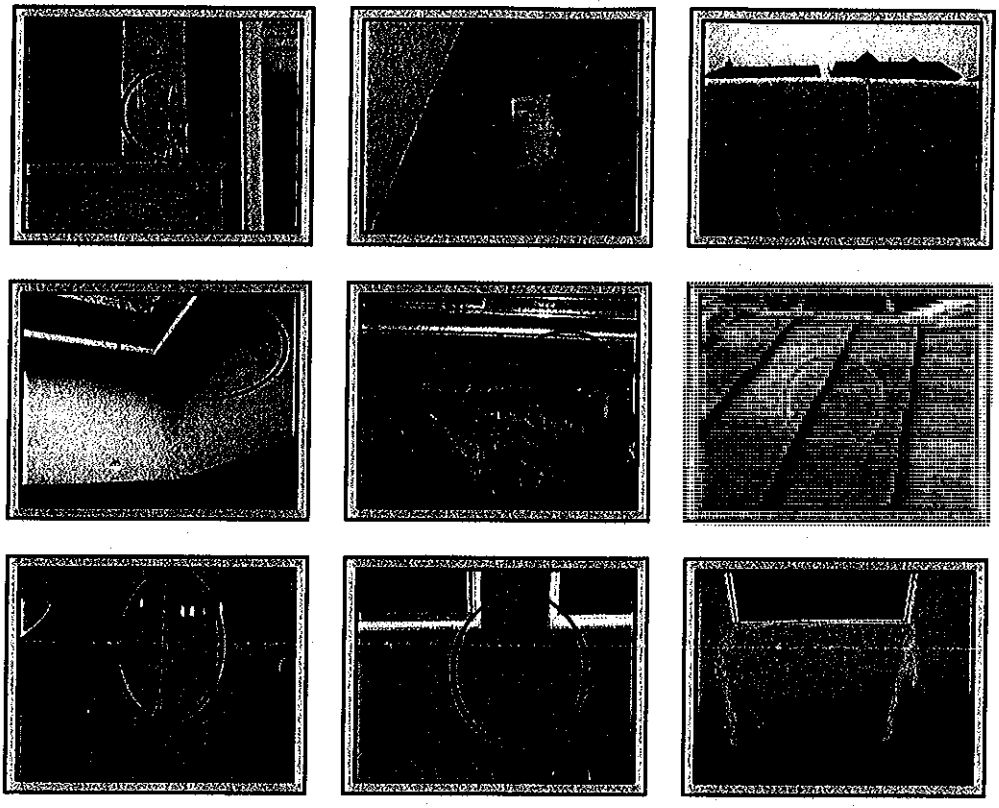

**Numerous [redacted] homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.**

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

# NEWSLETTER

MILSTEIN, ADELMAN & KREGER, LLP

January 2009



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

## HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

[redacted]

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either fax or in the postage-paid envelope we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:


David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop North

Santa Monica, California 90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635


[redacted]

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

*MILSTEIN, ADELMAN & KREGER, LLP*

[redacted]

## HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____ NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

[redacted]

[redacted]

Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sinkinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICIES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

[redacted]

June 27, 2008

**Re:** [redacted] **Construction Defects***
**Our File Reference # P 119-LMRO**

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within t[redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / RL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW
*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners. Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME [redacted] | CASE NUMBER |
|---|---|

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By:_____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

**FOR A&K USE ONLY**

GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0405

Anderson & Kriger
ATTORNEYS AT LAW

# Homeowner's Contingent Attorney Fee Agreement



*A Professional Law Corporation*

THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is: [redacted]

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

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***(Continued on reverse)***

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| [redacted] | |

Anderson & Kriger

*A Professional Law Corporation*
**Construction Defect & Community Association Law**
2155 Chicago Avenue, Suite 300
Riverside, CA 92507
**(951) 787-7146**
Fax: (951) 787-7168

# *FINAL NOTICE !*

**The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [redacted] Housing Development on behalf of many of your neighbors.** We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks** and/or **loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

**Anderson & Kriger** has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger
Rhonda Harrington
Rhonda Harrington

*This advertising communication is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

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REAL ESTATE • May. 26, 2010

# Searching For Cracks In Construction Law

**Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects**

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kreger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

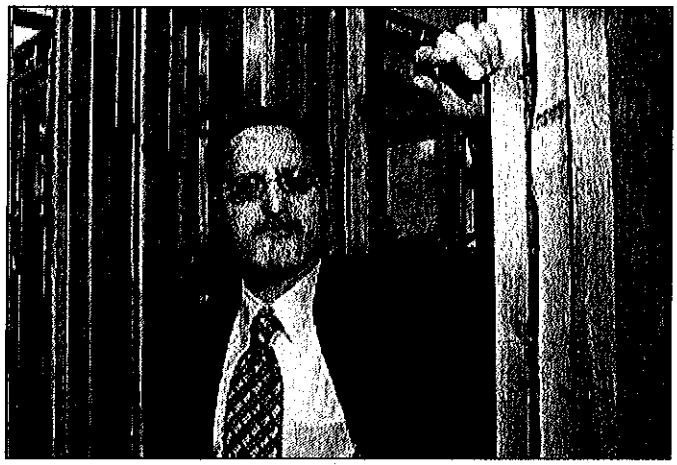
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow,* E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

jason_armstrong@dailyjournal.com



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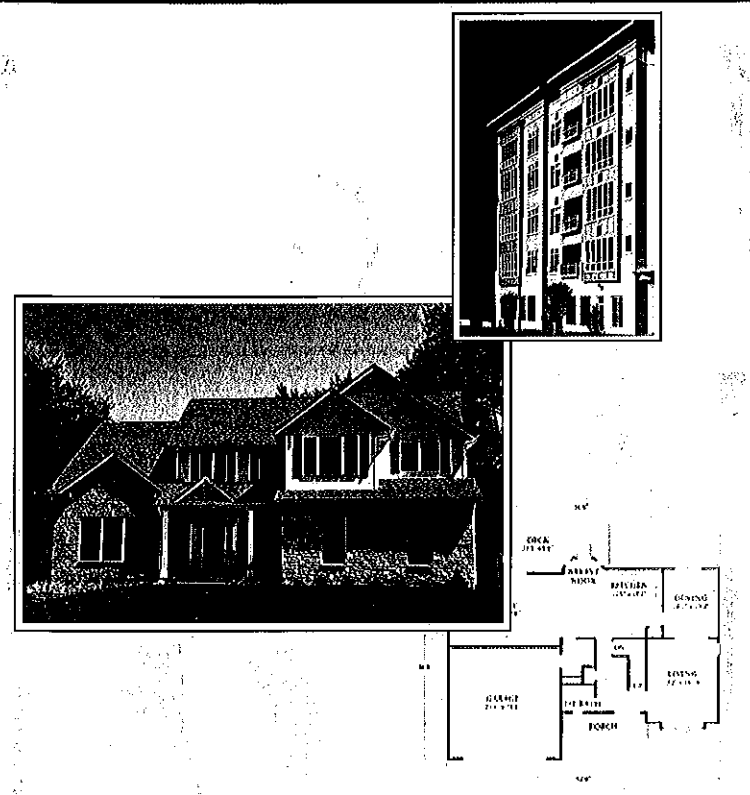
# Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association




BIA Orange County Chapter
17744 Sky Park Circle, Suite 170


Construction Quality and Sustainable Building Committee

## For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

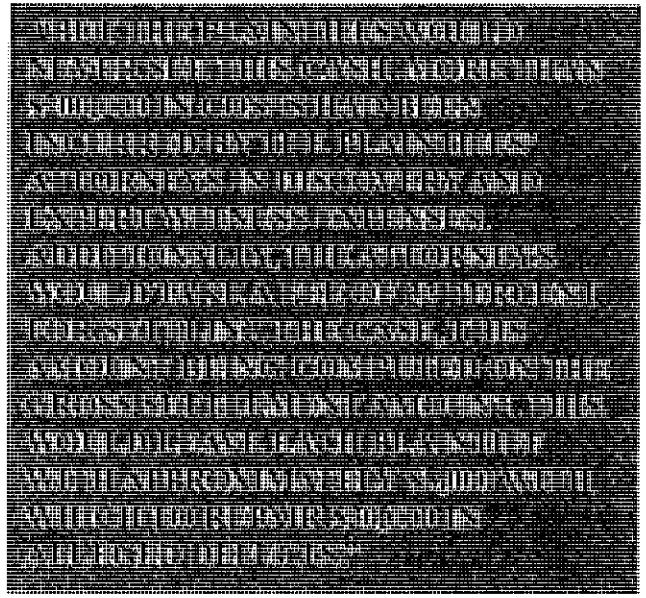
This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

## Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate $30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-fifth of the amount claimed. After attorneys' fees were deducted, the homeowners were left with only $5,000 to repair $30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.[1]



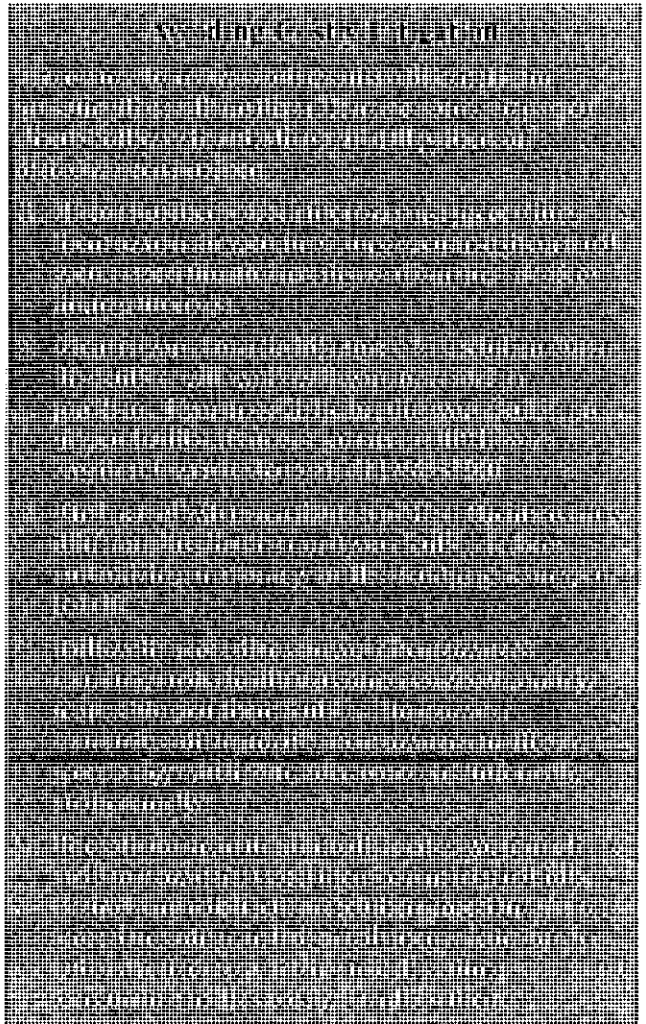
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.[2]

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

## Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.[3]

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



## Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

## When The Construction Defect Lawyers Call

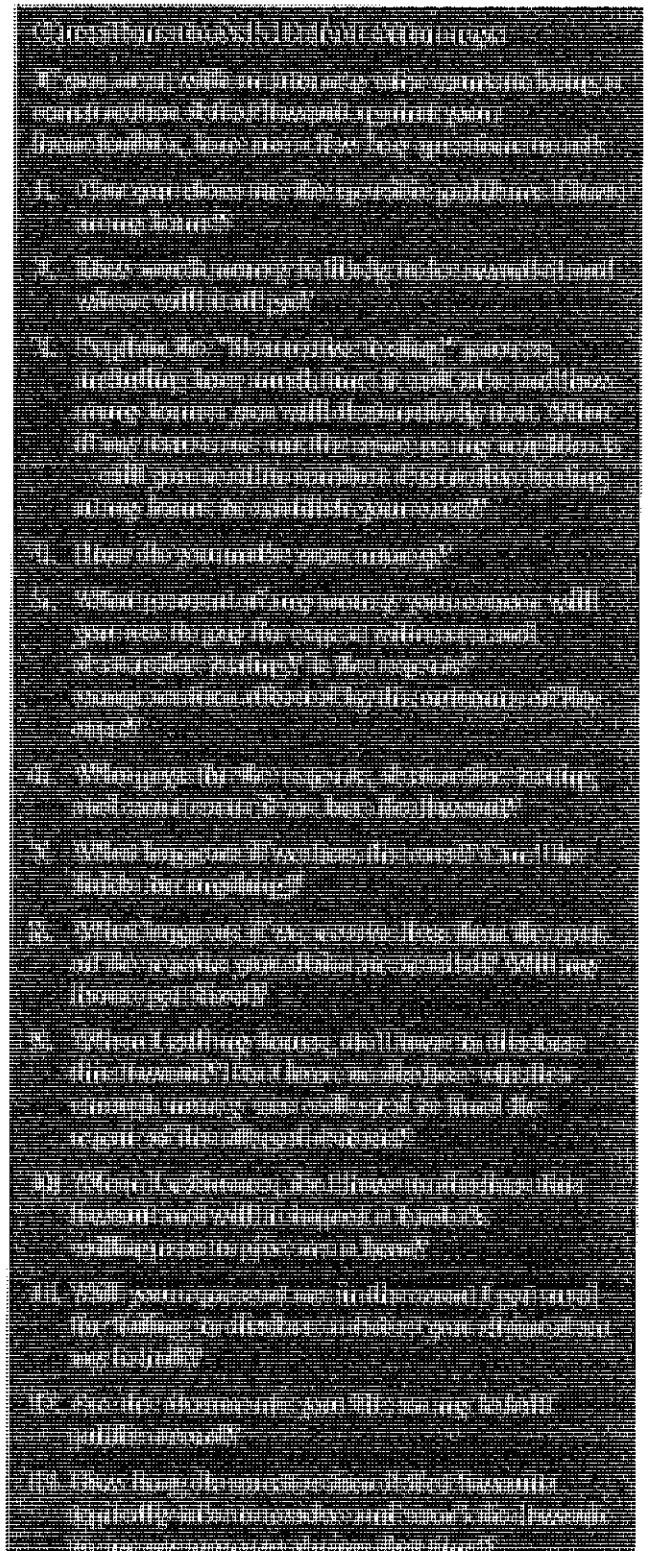
You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

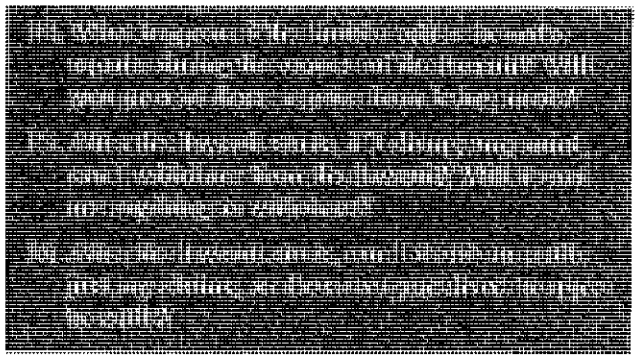
Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?





## Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.[4]

How would you feel about paying a contractor nearly $90 just to have your showerhead tightened? In one case, the trial attorneys sought $28,000 for showerhead repairs, or $90 per showerhead. The same case sought $12,000 for squeaky floors, $28,000 for bathtub repairs and $215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

## You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.[5]

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

## Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

## California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

## The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

## About Our Sponsors

**Citizens Against Lawsuit Abuse** (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

**The Trade Contractor Council of Southern California** (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

**The Associated General Contractors of California** (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

**The Building Industry Association of Southern California** (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

**The Construction Quality Committee** (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

## We'd Like To Hear From You!

Comments: _____

_____

_____

_____

Name: _____

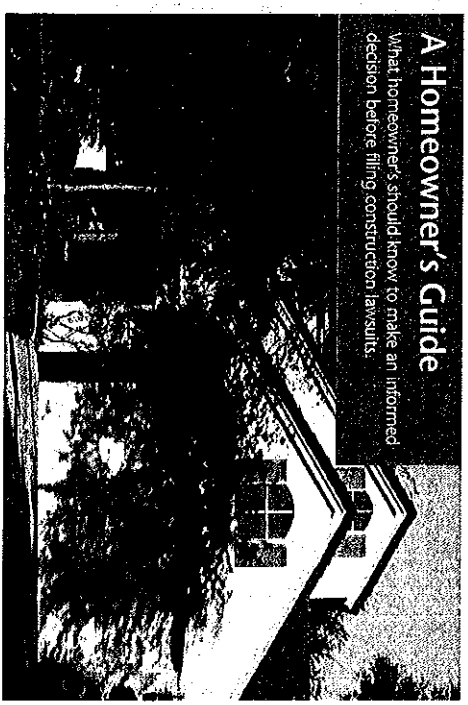
Address: _____

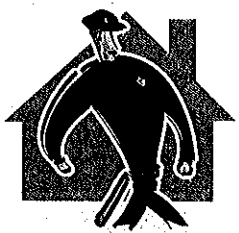
City/State/Zip: _____

Phone: _____ E-mail: _____

Your Builder/HOA/Property Mgmt. Co: _____

# Think Before You Litigate!





Neighbors Protecting

HOME VALUES

www.NeighborsProtectingHomeValues.com

# Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

# And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California, causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate -

***Neighbors Protecting Home Values***

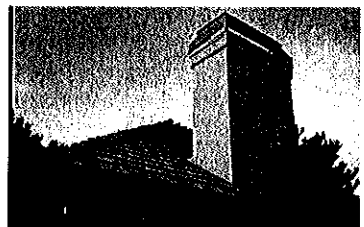
# Be an Informed Homeowner

Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

1. Contact your homebuilder first to solve your problem.
2. Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
3. Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



*Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.*

# *What Questions Should I Ask?*

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?

# Frequently Asked Questions:

### *Will a lawsuit harm my home's value or my neighborhood?*

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

*(The Business Journal / August 30, 1999)*

*Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.*

### When I sell my house, will these litigated "defects" require disclosure to potential buyers?

Under California law you are required to fill out a disclosure statement regarding your home, which includes everything regarding [illegible] and lawsuits relating to your home. The seller of the home must provide any potential buyer with a complete disclosure statement – listing all defects in the property known to the seller. The statement must be presented to the potential buyer prior to entering into any contract. Buyers usually waive the mandated cooling time for the property and discuss the potential selling price on the property. Here, the buyer may have discovered the defect first.

### Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage/home equity loan?

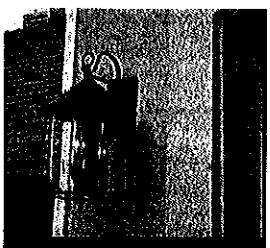
Title in California will disclose how your lender will be just as [illegible] as many lenders previously have not financed by anyone in your town due to the loss in home value as a result of the suit. [illegible] to an unnecessary lawsuit may also prevent homeowners from being able to sell or refinance a home, at least until and pending all of the applicable statutes have been met.

### How long does it take to settle a lawsuit?

[redacted]

### How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

[redacted]



*Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.*

### *Will the lawsuit affect my ability to obtain homeowners insurance?*

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

### *Shouldn't the City building codes and inspectors prevent construction defects from occurring?*

City's are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments and available for the homeowner's review. In order to protect future homebuyers city's often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.

*Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.*

### *What if I have a legitimate concern about my home?*

There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

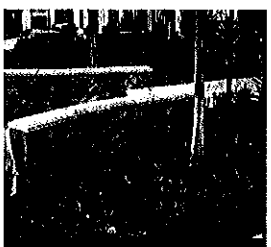
### *Will proper home maintenance prevent defects?*

Under California law homeowners are expected to maintain their homes – performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete – doing it properly the first time will save homeowners time and money in the long run.

*Withdrawal From A Lawsuit*

## *How do you withdraw from a lawsuit?*

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



*Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.*

# *THINK BEFORE YOU LITIGATE!*

Give your homebuilder a call – you will be pleasantly surprised!

For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at ***www.neighborsprotectinghomevalues.com***

*Think Before you Litigate!*

## Frequently Called Phone Numbers

My Homebuilder _____

Homebuilder's Customer Service _____

Licensed Maintenance Person _____

Gardener _____

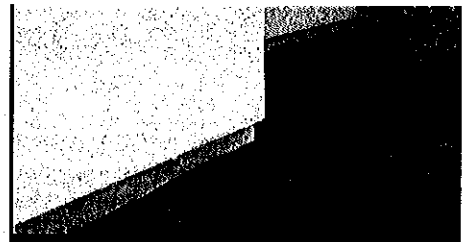
Pool Maintenance _____

City Services _____

Other _____

Other _____

Other _____



*Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.*

Neighbors Protecting
HOME VALUES

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June 14, 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 1.1 (Competence)**

Dear Ms. Hollins and members of the Rules Revision Commission:

Mr. Balin and I respectfully submit the following comments on Proposed Rule of Professional Conduct 1.1 (Competence). We are members of the Bar Association of San Francisco's Legal Ethics Committee. Mr. Balin is the Chair and I am the Vice-Chair. These comments are submitted in our individual capacity. We oppose the proposed rule and Comment [6], as presently drafted.

As a preliminary matter, we note that most jurisdictions have adopted the language of the ABA Model Rule regarding competence (Model Rule 1.1). Competence is one of the fundamental duties owed by a lawyer to a client. The requirement that lawyers act with competence is integral to preserving public confidence and trust in the administration of justice. It also fosters a willingness by clients to enter into attorney-client relationships and to entrust the handling of their legal matters to lawyers.

In our view, the proposed rule, as drafted, tends to undermine this confidence. The ABA Model Rule articulates an *affirmative* duty in the handling of all legal matters: "[a] lawyer *shall* provide competent representation to a client." (Emphasis added). In contrast, the Commission's proposed rule states: "[a] lawyer shall not *intentionally, recklessly, or repeatedly* fail to perform legal services with competence." (Emphasis added). Unlike the Model Rule, the proposed rule speaks only to a prohibition against a

"subset" of incompetent conduct. The directive of the rule is not an affirmative obligation to act competently in all matters but rather a prohibition against acting incompetently *if* the incompetence is intentional, reckless or repeated.

Comment [1] of the proposed rule states, without qualification: "[i]t is the duty of every lawyer to provide competent legal services to the client." It is unclear why, if this is the position of the Commission, this duty is not affirmatively stated in the body of the proposed rule. The Comment's language is facially inconsistent with the substantive language of the rule which indicates that the rule does *not* apply unless the conduct is intentional, reckless or repeated. At a minimum, putting the general duty in the Comment, and having the language of the rule speak to only a subset of such conduct, is confusing. We respectfully suggest that the substance of the rule should set forth the affirmative obligation of the attorney, and if there are exceptions or nuances to be provided with respect to the application of the rule they should be in the Comments.

The dichotomy between the language of the rule and Comment [1] is heightened by the language in Comment [6]. Comment [6] provides: "[t]his rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter." This statement is problematic for several reasons. First, the rules of professional conduct are rules of discipline, not a basis for civil liability. Linking the application of the rule to the civil concept of "negligence" is unnecessary and likely to create confusion. Second, the substance of the rule suggests that a single act of negligent conduct that is "intentional" or "reckless" *can* constitute a violation of the rule. The Comment's generalized statement that the rule is "not intended to apply to a single act of negligent conduct" is at odds with this language. Third, the language of the Comment does not articulate the full scope of conduct that could fall within the rule and is therefore likely to create confusion.

We appreciate the Commission's comments regarding the thinking behind the proposed rule, and the desire to reconcile the rule with the California Supreme Court's holding in *Lewis v. State Bar* (1981) 28 Cal.3d 683. We respectfully suggest, however, that the rule and its comments do not fully reflect the body of law surrounding the issues raised in *Lewis*, and may not provide the guidance to practitioners that is intended by the Commission. See Proposed Rule 1.0, Comment [2] ("The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline."). A review of the *Lewis* decision is instructive.

*Lewis* involved a young solo practitioner who was found to have violated a precursor to CRPC 3-110 (then Rule 6-101). Rule 6-101 provided, in pertinent part: "[a] member of the State Bar shall not willfully or habitually (1) perform legal services for a client if he knows or reasonably should know that he does not possess the learning and

skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer who he reasonably believes does possess the requisite learning and skill." *Lewis*, *supra*, 28 Cal.3d at 685, fn. 1.

The lawyer in *Lewis* ("Rider") was charged with having violated his oath and duties as an attorney (Bus. & Prof. C. section 6067) by: (1) negligently and improperly conducting the administration of an estate without any previous probate experience and without associating or consulting a sufficiently experienced attorney (then rule 6-101), (2) obtaining a loan from a client without appropriate disclosure and consent (then rule 5-101), and (3) failing to maintain complete and accurate records of funds belonging to the client (then rule 8-101). *Lewis*, *supra*, 28 Cal.3d at 685. Rider was retained by the client to handle the administration of the client's deceased wife's estate in November 1973. Rider had himself appointed as administrator of the estate and retained an attorney ("Middleton") who was familiar with probate practice to serve as the attorney for the estate. Middleton prepared the petition requesting Rider's appointment as administrator, and caused notice to creditors to be published. After that, however, Rider did not consult Middleton, and Middleton rendered no further services. Thereafter, Rider made various disbursements of funds of the estate without proper notice or approval from the Court.[1]

The sole issue presented by the petition to the California Supreme Court was the propriety of the discipline recommended by the State Bar (a thirty day suspension, stayed, and one year probation). *Lewis*, *supra*, 28 Cal.3d at 688. The California Supreme Court noted that with respect to the personal loan, it appeared that most of the loan had been repaid by the time of the disciplinary hearing and that Rider continued to make payments as required under the terms of the note. *Lewis*, *supra*, 28 Cal.3d at 687, fn. 9. In assessing the appropriate level of discipline, the court stated that a review of the record

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[1] The disciplinary board hearing panel found that Rider's performance in administering the estate was a violation of 6-101 in that Rider, knowing he did not possess sufficient skill in probate matters, failed to associate or consult another lawyer who did possess the requisite learning and skill, and that Rider willfully failed and refused to perform all of the services for which he was retained. *Lewis*, *supra*, 28 Cal.3d at 687-688. The board also found that Rider had violated rule 5-101 in connection with a personal loan he obtained from the estate, and rule 8-101 by failing to keep accurate account of the estate proceeds. *Ibid.*

revealed "one major area of concern: petitioner's violation of rule 6-101." The court then explained that it had long recognized the problems inherent in using disciplinary proceedings to punish attorneys for negligence, citing to *Call v. State Bar* (1955) 45 Cal.2d 104, 110-111 and *Friday v. State Bar* (1943) 23 Cal.2d 501, 505-508. It went on to note that "[i]n *Friday*, however, much of the court's expressed concern dealt with the absence of any statute or disciplinary rule permitting the imposition of discipline for "mere ignorance of the law." [Citation omitted]. *Lewis*, *supra*, 28 Cal.3d at 688-689. It then stated "*[i]n the case at bar, such authorization is present in the form of rule 6-101.*" *Lewis*, *supra*, 28 Cal.3d at 689 (emphasis added). The court then explained that there was no showing that any of petitioner's actions were motivated by bad faith or a desire to benefit himself at the expense of his client and that "[n]early all of his problems appear to be a direct or indirect result of his complete lack of familiarity with probate law." *Lewis*, *supra*, 28 Cal.3d at 689. Based on the lawyer's good faith and the fact that rule 6-101 had become effective some 13 months *after* the lawyer was retained to handle the probate of the estate, the court *adopted* the recommended discipline rather than imposing a harsher penalty. *Lewis*, *supra*, 28 Cal.3d at 689.

Significantly, the decision in *Lewis* had a concurrence drafted by Chief Justice Bird, who fully agreed with the court's opinion but wrote to note additional concerns she had with rule 6-101. She stated that the rule "*seems to provide for the discipline of careless, negligent, or incompetent attorneys.* Its interpretation, however, has never been an issue before this court since the rule's enactment in 1975. As a result, the applicability of the rule to specific fact situations is far from clear." *Lewis*, *supra*, 28 Cal.3d at 689 (emphasis added). Judge Bird noted that the burden of the rule appears to fall disproportionately on younger members of the legal profession who are unable to easily "associate" or "professionally consult" another lawyer possessing the requisite learning and skill. *Lewis*, *supra*, 28 Cal.3d at 690. She further stated "[a]nother major problem with rule 6-101 lies in determining what mental state is necessary for a violation. Specifically, *I am unclear as to whether and under what circumstances 'mere negligence' is punishable under the rule.*" *Id.* (Emphasis added).

Given the factual circumstances involved in *Lewis*, and the comments of both the majority and concurring opinions, it is not clear that *Lewis* stands for, or mandates, the proposition that "a single act of negligent conduct" could not be actionable, or that only conduct that is intentional or repeated may serve as a basis for discipline. See *Murray v. State Bar* (1985) 40 Cal.3d 575, 582, fn. 6 (the *Lewis* decision did not support petitioner's contention that intent is a required element for violations of the rules of professional conduct, "[i]n fact, the holding in that case tends to undermine petitioner's argument. In *Lewis*, this Court noted that rule 6-101 *permits* the imposition of discipline for 'mere ignorance of the law.' [Citation omitted]." (Emphasis in original); see also *Murray*,

*supra*, at 582 ("... this Court has consistently held that '[g]ross carelessness and negligence constitute violations of the oath of an attorney to faithfully discharge his duties to the best of his knowledge and ability, and involve moral turpitude as they breach the fiduciary relationship owed to clients.' [Citations omitted]").

Accordingly, to the extent Comment [6] is intended to recognize the holding in *Lewis*, it appears to be overbroad in its' suggestion that a "single act of negligence conduct" could not constitute a violation of the duty of competence under California law. In that regard, it may be confusing in the guidance it provides to practitioners.

Additionally, members of our Committee who are frequently involved with State Bar disciplinary proceedings have noted that as a practical matter the State Bar will and does, at times, prosecute single acts of incompetence when the conduct is egregious enough. Accordingly, we respectfully suggest that Comment [6], as drafted, is in tension with the substantive language of the proposed rule, as well as existing California law and the practical realities of State Bar disciplinary proceedings.

The issues addressed above could be resolved by adopting an affirmative rule on competence that mirrors ABA Model Rule 1.1, and leaves out Comment [6]. This approach is consistent with the Commission's charge to try and heighten uniformity with the ABA Model Rules. Alternatively, if the Commission believes Comment [6] should remain, we suggest modifying the Comment to acknowledge that, while a single act of "ordinary negligence" or a single mistake in a particular matter is not "generally" intended to constitute a violation of the rule, such conduct could violate the rule if it is intentional, reckless, repeated, or rises to the level of gross negligence.

This approach would provide a baseline obligation of competence in all matters, while acknowledging that a single act of ordinary negligence may not warrant discipline, but also provide practitioners with notice that it *could* - if it rises to the level of being intentional, reckless, or grossly negligent. We respectfully suggest that this type of rule is more likely to ensure public confidence in the administration of justice, while also recognizing existing law and providing meaningful guidance to practitioners.

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

Very truly yours,

Andrew I. Dilworth
William M. Balin

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management Secti

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

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.1 Competence

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

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

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

Please see attached 2 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 1.1 [3-110]**
**"COMPETENCE"**
**(DRAFT #7, 06/18/07)**

***INTRODUCTION***

The State Bar of California Law Practice Management & Technology Section (LPMT) comment on Proposed Rule 1.1 concerns 1.1(b):

> For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

LPMT believes that Proposed Rule 1.1(b) should expressly recognize that differences that may still exist between communities.

***ANALYSIS***

**Standards of "Competence" Should Expressly Recognize Differences That May Exist Between Communities**

LPMT believes that the Proposed Rule 1.1(b) definition of "competence" does not adequately account for differences in legal resources, skills, and expectations that may exist as between different communities. Accordingly, LPMT recommends that the Commission revise paragraph (b)(1) to clarify that "competence" is to be assessed by reference to the particular locality in which a lawyer is practicing.

***CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE***

For the foregoing reasons, we recommend that Proposed Rule 1.1(b) be amended as follows:

> For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service in the locality in which the legal services are provided.

Clean version of amended Proposed Rule 1.1(b):

> For purposes of this Rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service of such service in the locality in which the legal services are provided.

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.1. Competence.**

1. OCTC supports this rule so long as diligence is included either in this rule or elsewhere as in the Model Rules. OCTC does not find the Comments to this rule necessary.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

~~4. Rule 3.7 – Lawyer as witness – conflicts of interest – jury trial vs. tribunal~~

~~We note that the proposed California rule remains broader than the ABA rule in that it allows clients to give informed written consent to allow a lawyer to testify as a witness. The ABA rule narrowly allows lawyers to testify on broadly substantive matters only when the lawyer's disqualification, essentially in order to enable testimony, "would work substantial hardship" on the client, even when the lawyer's testimony could be significantly helpful to the client's case.~~

~~We agree with the California construction. We note that the client *should* be able to get the full assistance of counsel, including testimony, *so long as* informed consent is given.~~

~~Nevertheless, conflicts of interest can and may occur despite informed consent. For example, the lawyer might be impeached based on collateral issues relating to credibility, a circumstance that would have been included the document obtaining the client's informed consent. However, *if* such conflict of interest exists or occurs between lawyer and client, the distinction between testimony at a *jury trial* vs. other adjudicative proceedings makes little if any sense. The issue is the conflict of interest by virtue of the lawyer's testimony, not the forum. The rule should be modified to strike the word "jury" and add the word "tribunal."[3]~~

## II. Rules relating to able representation

### 1. Rule 1.1 – Competence

This comment is closely connected to the next comment, on MR 1.3, Diligence.

The competence rule, as modified, gives an unfortunate and overly broad "free pass" to a lawyer committing any first act of negligence, or any first "mistake," *no matter how egregious* that mistake may be. Section (a) of the rule remains unchanged: "A lawyer shall not *intentionally*, *recklessly*, or *repeatedly* fail to perform legal services with competence." (Emphasis added.) However, Comment ¶ 6 has been added, explicitly stating that the rule is "not intended to apply to *a single act* of negligent conduct *or a single mistake*...." (Emphasis added.)

This comment is seriously misguided. The comment is supported by the Commission's rules introduction, which claims that "most jurisdictions" apply the competence rule only to intentional, reckless, or repeated acts." Evidence is to the contrary, however, as is the ABA rule. At best the Commission relies on an unsupported anecdotal statement.

Moreover, Comment ¶ 6 would forbid discipline even if the "single act" would meet a "gross negligence" standard. Use of the common non-legal word "mistake," muddies the scope of 1.1(a) and creates the possibility that *any* single mistake, however great, would fall outside the rule.

Fixing this rule is not difficult. First, we strongly recommend that this Board eliminate ¶ 6 of the Comment. At the very least, the Board should strike the words "or a single mistake" and add the word "simple" before "negligent conduct," so that the comment would only excuse a first act of simple negligence.

Second, we recommend that the Board add the words "gross negligence" to 1.1(a): "A lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence...."

---

[3] ~~We see no reason to limit application to "trial," as under the ABA Model Rule, as opposed to "tribunal." We note, however, that the definition of "tribunal," as it has been proposed by the Commission, is seriously flawed in its narrow construction. See *infra*.~~

# Rule 1.2 – Public Comment – File List

X-2010-425-4d SDCBA [1.2]

X-2010-469-1a OCBA [1.2]

X-2010-473 CPDA [1.2]

X-2010-503a HALT [1.2]

X-2010-513-4 OCTC [1.2]

X-2010-529a SCCBA [1.2]

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of Delegates of California Bar Associations District Nine Representative**
James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 1.2

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

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

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

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

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

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

CONCLUSIONS (pick one):

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

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 1.2 – Scope of Representation and Allocation of Authority between Client and Lawyer**

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 1.2 and supports the adoption of ABA Model Rule 1.2. The Commission proposes changing paragraph (d)(1) of the Model Rule by adding "or a violation of any law, rule, or ruling of a tribunal" after "fraudulent," and by adding "rule or ruling of a tribunal" at the end of paragraph (d)(2) after "law." The OCBA believes that the additional language proposed by the Commission may introduce a degree of ambiguity into the rule, and may make it overbroad and difficult to enforce, inasmuch as the added language could be construed to encompass rules and rulings of tribunals having no jurisdiction over the particular cause at issue. Furthermore, the added language may be unnecessary, because the remedies of contempt and sanctions are available for violations of a tribunal's rules and rulings by those practitioners before that tribunal. The Commission's response expressed disagreement with the OCBA's position, but the only reason given was that the language of proposed Rule 1.2(d)(1) adopts the language of current Rule 3-210. The objections raised by the OCBA do not appear to have been addressed.

In addition, the OCBA recommends that Comment [5] be stricken in its entirety. Comment [5] purports to relate to paragraph (b) of the proposed Rule. Paragraph (b) states that a lawyer's representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities." The first sentence of Comment [5] states that legal representation should not be denied to people "who are unable to afford legal services." This statement is not germane to the language of paragraph (b), which has nothing to do with ability to pay for legal services. Moreover, this part of the Comment could be construed as creating an obligation to provide legal services with little or no compensation. The rest of the Comment merely restates paragraph (b), and is thus unnecessary. The Commission's response expressed disagreement with the OCBA's position, on the grounds that Comment [5] is identical to Comment [5] for Model Rule 1.2, and it is consistent with the legislative policy of B&P Code section 6068(h). The OCBA believes that if Comment [5] is not stricken, it should at least be

modified to clarify that Rule 1.2(d)(2) does not create any obligation for a particular individual attorney to provide legal services to any particular client for little or no compensation, but rather provides a general goal that that clients in general not be denied legal services by the legal community as a whole on the basis of inability to pay.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** California Public Defenders Association

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

*** Name** Garrick Byers

*** City** Fresno

*** State** California

***** Email address (You will receive a copy of your comment submission.) gbyers@co.fresno.ca.us

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

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

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 California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

Subdivision (a) of Rule 1.2 ends with a sentence with which CPDA agrees, but CPDA also believes that an official Comment should be added to further explain a portion of that sentence.

**ENTER COMMENTS HERE.**

---

The California Public Defenders Association (CPDA) is the largest organization of criminal defense lawyers in California. It has approximately 4,000 members, composed of public defenders, appointed indigent defense counsel, privately retained lawyers, and others. (Address and other contact information is at the bottom of this Public Comment)

The author of this comment, Garrick Byers, is a member of CPDA's Board of Directors, and Chairperson of CPDA's Ethics Committee, and is authorized to make this public comment on behalf of CPDA. (Address and other contact information is at the bottom of this Public Comment.)

Subdivision (a) of Rule 1.2 ends with a sentence with which CPDA agrees, but CPDA also believes that an official Comment should be added to further explain a portion of that sentence.

The entire sentence is "Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."

The official Comment that CPDA believes should be added pertains to decision whether to waive jury trial.

The setence in Rule 1.2 upon which CPDA is commenting wisely begins "Except as otherwise provided by law...." But many prosecutors and criminal defense lawyers (and judges) do not know of the basic California law concerning waiver of jury trial.

That basic law is at California Constitution article I, section 16, first paragraph, second sentence: "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."

Thus, in addition to the defendant, California law requires that both the prosecution and the defense (but not the judge) consent before jury can be waived in a criminal case. This can, of course, be a matter of considerable importance, whether the case is a misdemeanor or a death penalty case.

CPDA's proposed comment can be placed part of Rule 1.2's existing Comment [1], but would be more appropriate as a separate Comment, perhaps Comment [13].

CPDA's proposed text for this comment is simple:

"California Constitution article I, section 16, first paragraph, second sentence, provides that "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."

CPDA believes that it would also be appropriate for the Comment to add a reference to the leading California treatise on criminal law, as follows: "See, generally, 5 Witkin & Epstein, California Criminal Law (3d Ed., 2000), Ch. XIV, §§ 452 – 459 ('Waiver of Right [to Jury Trial]')."

Thank you for your consideration,

California Public Defenders Association by
Garrick Byers, Member, Board of Directors, Chair, Ethics Committee

Address information:

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

Garrick Byers, Senior Defense Attorney
Fresno County Public Defenders Office
2220 Tulare Street, Suite 300
Fresno, California 93721
Phone: Personal Office (559) 442–6915
Main Office (559) 488–3546
Fax: (559) 262–4104
e–mail gbyers@co.fresno.ca.us

HALT *Simple · Affordable · Accountable · Justice for All*

June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,

Theresa Meehan Rudy
Executive Director

1612 K STREET, NW • SUITE 510 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

June 15, 2010

**Comments by**
**HALT—*an Organization of Americans for Legal Reform***
**on**
**Proposed California Rules of Professional Conduct**

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

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(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

**Rule 1.4 Communication.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

**Rule 1.4.1 Disclosure of Professional Liability Insurance.** HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Propose Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

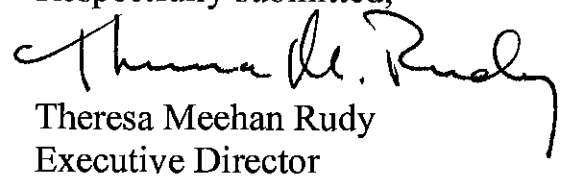
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

**Rule 1.8.10 Sexual Relations With Client.** There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy
Executive Director
HALT, Inc.—
*an Organization of Americans for Legal Reform*
1612 K Street NW
Suite 510
Washington, DC 20006

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer.**

1. OCTC is concerned that subparagraphs (a) and (b), although in the Model Rules, are not rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. Further, OCTC believes that the concepts in subparagraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while subparagraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521.) While Comment 8 states this, it should be in the rule, not just a Comment.
3. OCTC believes that the consent in paragraph (c) should be in writing or at least by written documentation, not just informed consent. This would protect both the client and the attorney and impress upon the client the limitation and the importance of the limitation. This is not more than is being required when the attorney informs the client that he or she does not have professional liability insurance or when an attorney enters into a true retainer agreement. (See e.g. proposed rules 1.4.1 and 1.5(e).) Given that limited scope representation is an important exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with subparagraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, subparagraph (d), unlike rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; *Zitny v. State Bar*, *supra*, 64 Cal.2d at 793.) While the Commission's Comments show that it intends to keep a good faith defense, Comments are not rules or authority and OCTC believes that if the Commission wants this defense it should be in the rule and not in a comment.
5. OCTC is concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. It has never been that the attorney must consult (or advise) on every step and action, just the significant ones.
6. OCTC is concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930, 940.)
7. The rest of the Comments seem more appropriate in other forums, such as treatises, law reviews, and ethics opinions.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

> This e-mail may contain confidential and privileged material for the
sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| Rule | SCCBA Comment | Current Version |
|---|---|---|
| | | |
| Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Attorney | Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."<br><br>Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections, 825; 995; 996. This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version. | The current version does not require informed "written" consent; it retains the "informed consent" standard. |
| ~~Rule 1.4: Communication~~ | ~~Approve the proposed rule as written. However, comment [7] to the rule should be either deleted or should be included in the rule itself. *Rationale*: Comment [7] states "Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant." This comment expands the rule itself. A comment should not create a duty that is not specifically and clearly set forth in the rule.~~ | ~~The current version of the rule still only requires in the main body of the rule that written offers of settlement be communicated to the client and still retains Comment [7] as noted.~~ |
| ~~Rule 1.6: Confidentiality of Information~~ | ~~The SCCBA opposes the revisions make by the RRC in completely deleting subsections (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic~~ | ~~The current version keeps the rule as it is now adopted in California and does not adopt the ABA Model Rule version.~~ |

# Rule 1.3 – Public Comment – File List

X-2010-517f Zitrin-Multiple [1.3]

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

2. *Rule 1.3 – Diligence*

Most unfortunately, the Commission also determined not to approve Rule 1.3 on diligence. The Commission's explanation, in its document updated May 17, 2010 entitled "Rules and Concepts that Were Considered, But Are Not Recommended for Adoption" ("*May 2010 Non-Adoption Summary*") argues that "diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence." This is not so.

Although proposed Rule 1.1 pays lip service to the concept of diligence in subsection (b) and Comment ¶ 2, this is not close to adequately replacing the diligence rule. For instance, while proposed Comment ¶ 2 is similar to ABA Rule 1.3's Comment ¶ 1, other important components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work overload (ABA Rule 1.3, Comment ¶ 2), procrastination and delay (ABA Comment ¶ 3), and following through on matters to completion (ABA Comment ¶ 4).

We strongly agree with the Commission's minority report with respect to this rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: *paying adequate attention*. MR 1.3 and its comments need to be approved by the Board.

~~III.~~ **~~Rules omitted in whole or part by the Commission~~**

~~1.~~ *~~Rule 1.0.1(m) – Definition of Tribunal~~*

~~The excellent definition of "tribunal" under the ABA Model Rules "denotes a court, an arbitrator … or a legislative body, administrative agency or other body acting in an adjudicative capacity," that is, where the body "will render a binding legal judgment directly affecting a party's interests…."~~

~~Unfortunately, that broad and appropriate definition was not followed by the Commission. The Commission's definition is limited to courts, arbitrators, administrative law judges and special masters referred by the court. The result is that adjudications may occur in other forums that are simply deemed by the Commission *not* to be tribunals.~~

~~The effect of this can be enormous. The limited definition of "tribunal" could have a significant effect on how Rules 3.7, 3.9 and, if passed, 4.1 (see *infra*) are interpreted. Most tellingly, however, is the substantial and material effect on the vitally important Model Rule 3.3, "Candor to a Tribunal." If the definition of tribunal is unduly limited, lawyers in California will not have any ethical requirement to be candid towards a number of adjudicative bodies that are making binding decisions.~~

~~Surely, we hope and expect that California's integrated State Bar would not want to convey to its lawyers or the public that members of the California bar may be less than candid before certain adjudicative bodies. Nevertheless, that is what the current proposal implies. This definition must be changed to conform to the broader ABA definition.~~

~~2.~~ *~~Rule 4.1 – Truthfulness to others~~*

~~Similar issues about the integrity of California bar members are raised by the absence of Model Rule 4.1. This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.~~

# Rule 1.4 – Public Comment – File List

X-2010-423 Michael Tracy [1.4]

X-2010-425-5e SDCBA [1.4]

X-2010-450c Bradley Paulsen [1.4]

X-2010-470-6f COPRAC [1.4]

X-2010-503b HALT [1.4]

X-2010-513-5 OCTC [1.4]

X-2010-529b SCCBA [1.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 11, 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

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 - Communication. COPRAC supports the adoption of proposed Rule 1.4 and the Comments to the Rule, subject to the following comments.

First, proposed Comment [4] provides that a "client" for purposes of communication of settlement offers "includes a person who possesses the authority to accept an offer of settlement or plea or, in a class action, all the named representatives of the class." This definition suggests that a lawyer must communicate a settlement offer to a person who possesses such authority. However, such a requirement may not be practical for lawyers representing entity clients. To clarify this point, we propose to revise the Comment to provide that a client "includes a person who possesses the authority to accept an offer of settlement or plea or, in a class action, all the named representatives of the class or a representative authorized by the client to communicate with the lawyer regarding settlement offers."

Second, with respect to proposed Comment [6], COPRAC is concerned that the Comment includes language that is not sufficiently protective of clients. Specifically, the Comment states:

> Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a written offer of a settlement in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client.

COPRAC believes that a client should always be told of a settlement offer, regardless of whether authority to accept or reject the authority may have been previously provided. The lawyer may not be aware of a change of circumstances that would cause the client to reconsider the authority previously provided if told of the offer. COPRAC believes that a bright-line rule requiring all written offers of settlement in a civil matter to be communicated to clients is beneficial to both clients and lawyers. COPRAC thus respectfully suggests that this text be deleted. However, if the Commission elects to retain this language, COPRAC joins in the concern raised by the Los Angeles County Bar Association regarding the inclusion of this language in a Comment. The language appears to be an exception to the proposed Rule, and as such, should be clearly stated in the text of the Rule. Although we note that the Commission has concluded that this language provides an interpretation of the Rule and is not an exception, we respectfully disagree.

Third, COPRAC is concerned that the language in Comment [9] permitting a lawyer to "withhold" information from a client is overly broad. The Comment states, "In some circumstances, a lawyer may be justified in delaying or withholding transmission of information when the client would be likely to react imprudently to an immediate communication." It appears that the impetus for the Comment is to permit a lawyer to withhold information where delivery of the information could result in harm to the client. However, this is not clearly stated. COPRAC proposes replacing this sentence with the following text:

> A lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. In some circumstances, a lawyer may be justified in withholding transmission of information when the lawyer reasonably believes delivery of the information could result in harm to the client or others. *See also* proposed Rule 1.14.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** private attorney

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

*** Name** Michael Tracy

*** City** Irvine

*** State** California

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

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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

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

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

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

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

Rule 1.4 relating to communication of written settlement is a significant departure from current law and will likely lead to additional offers not being conveyed to a client. First, current law is that all written settlement offers must be communicated, no matter their content or whether they were previously rejected. In the Matter of Stephan Yagman 3 Cal. State Bar Ct. Rptr. 788 (1997).

The current rule that requires all written settlement offers to be communicated is far superior because it eliminates a judgment call by the attorney. For instance, if a client says "I want $1,000,000 or I will go to trial" at the beginning of the case, the proposed rule would mean that the attorney need not communicate any written settlement offer that is less than $1,000,000. In addition, the reality is that written settlement offers often contain terms that are slightly different from oral settlement offers. For instance, a party could orally offer $1,000 to settle the case which is rejected. That same party could them submit a written settlement offer pursuant to Cal. Code of Civ. Proc Section 998 for $1,000. The proposed rule

**ENTER COMMENTS HERE:**

Rule 1.4 relating to communication of written settlement is a significant departure from current law and will likely lead to additional offers not being conveyed to a client. First, current law is that all written settlement offers must be communicated, no matter their content or whether they were previously rejected. *In the Matter of Stephan Yagman* 3 Cal. State Bar Ct. Rptr. 788 (1997).

The current rule that requires all written settlement offers to be communicated is far superior because it eliminates a judgment call by the attorney. For instance, if a client says "I want $1,000,000 or I will go to trial" at the beginning of the case, the proposed rule would mean that the attorney need not communicate any written settlement offer that is less than $1,000,000. In addition, the reality is that written settlement offers often contain terms that are slightly different from oral settlement offers. For instance, a party could orally offer $1,000 to settle the case which is rejected. That same party could them submit a written settlement offer pursuant to Cal. Code of Civ. Proc Section 998 for $1,000. The proposed rule could lead attorneys to think that such an offer need not be conveyed.

In addition, Business of Professions Code Section 6103.5 makes written settlement communications discoverable. However, with the proposed rule, there would be no guarantee that the written settlement offer was ever conveyed and discovery could not be conducted as to prior oral settlement offers.

Finally, the proposed rule is not clear regarding written settlement offers to multiple parties outside the class context. That is, if Plaintiff makes a settlement offer to Joint Defendant A and Joint Defendant B for a total settlement of $1,000 and Joint Defendant A rejects the offer, it is not clear under the proposed rule that this offer must be conveyed to B. That is, as soon as A has rejected the offer, it would become "previously rejected" and not be required to be communicated to B -- who may wish to take the offer.

There is a problem with attorneys not communicating settlement offers -- hence the reason for the rule in the first place. There is not a epidemic of attorneys flooding the opposing party with written settlement offers that warrants this change. As it is, the rule is redundant in that (a)(2) already requires disclosure of "significant developments" and it is difficult to see how "circumstances that require the lawyer to consult with the client" is any different than a "significant development." As such, the proposed rule means that written settlement offers are now no different than oral settlement offers.

To the extent that the rule is designed to deal with the frequent exchange of settlement offers exclusively by email, the rule should be narrowly tailored to address this issue.

I would agree if modified as follows:

Comment [4] should read "As used in paragraph (c), 'client' includes all persons whose authority is required to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class."

Comment [6] should read: "Paragraph (c)(2) requires a lawyer to advise a client promptly of all written settlement offers, regardless of whether the offers are considered by the lawyer to be significant. Notwithstanding paragraph (c)(2), a lawyer need not inform the client of the substance of a offer of a settlement conveyed solely by electronic mail in a civil matter if the client has previously instructed that such an offer will be acceptable or unacceptable, or has previously authorized the lawyer to accept or to reject the offer, and there has been no change in circumstances that requires the lawyer to consult with the client. See Rule [1.2(a)]."

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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**Conference of Delegates of California Bar Associations District Nine Representative**
Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

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October 10, 2006

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Audry Hollins
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Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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**MEMORANDUM**

Date: October 16, 2006

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

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

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

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

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

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

* * * * *

Comment 1:

The modified rule is approved as proposed.

June 4, 2010

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

Bradley T. Paulsen
4945 Pinnacle St.
Riverside, CA 92509
(707) 673-6982

ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar**
**State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice**. Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone,** costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

**lawsuit. If they are not aware of the claim, how did their name end up in the filing?** Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***"Some of our clients' homeowners are being added to suits without even being aware of it,"*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. ***"I can't tell you the number of times I've seen a defect claim that says 'defective stucco', and the house doesn't even have stucco".***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner's Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

**(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**

**(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

**and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.**

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned. There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**
Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*
Litigation/Claims cause insurance to go up.
Litigation/Claims force builders to raise their prices.
Litigation/Claims burden the judicial system and expend judicial resources.
Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.
*As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.*

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.
*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

**Rule 1.1 Competence**

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

*The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved,* ***so it goes on.***

**Rule 1.4 Communication**

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

*As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.*

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.*

**Rule 1.5 Fees For Legal Services**

Rule 1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

*In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.*

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

**Rule 1.7 Conflict of Interest: Current Clients**
Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
*The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.*

Rule 1.7 (b) (4) Each affected client gives informed written consent.
*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

*the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.*

**Rule 1.8.6 Payments Not From Client**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

**Comment (noted in the proposed new or amended rules)**

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of $10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately $500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

Bradley T. Paulsen
Concerned Citizen

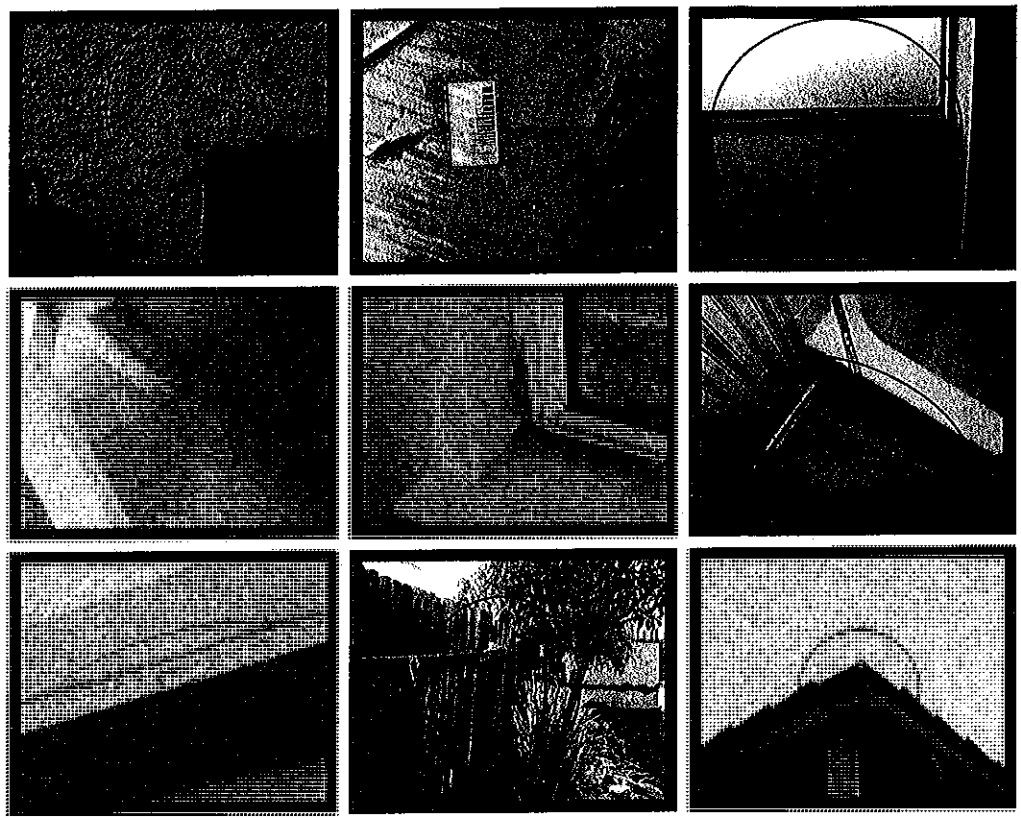
/encl

# MAK

www.maklawyers.com

MILSTEIN, ADELMAN & KREGER, LLP

# NEWSLETTER



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

## NUMEROUS [redacted] HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners. Original ownership is not required to participate. Each home will be inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:


**Anneke Stewart, Esq. extension 135 or**

**Lisa Appelbaum extension 146 or**

**2800 Donald Douglas Loop North Santa Monica, California 90405**

**Toll Free: (888) 835-8055**

**Fax: (310) 396-9635**

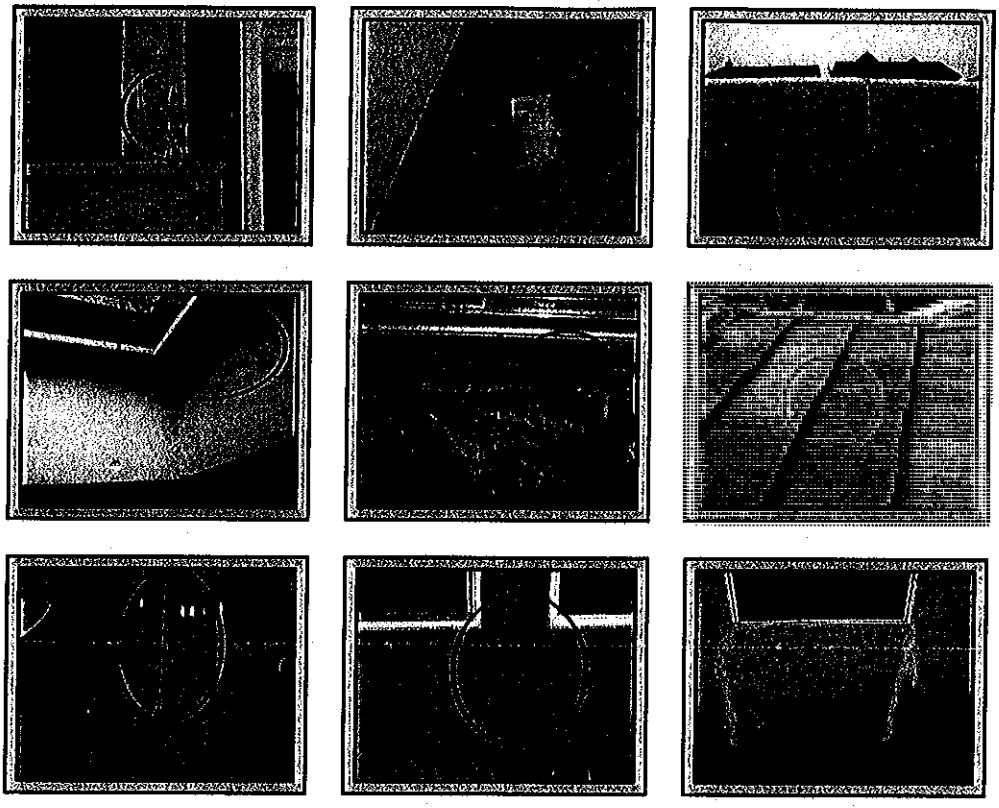

**Numerous [redacted] homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.**

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

# NEWSLETTER

MILSTEIN, ADELMAN & KREGER, LLP

January 2009



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

## HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

[redacted]

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either fax or in the postage-paid envelope we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:


David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop North

Santa Monica, California 90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635


[redacted]

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

*MILSTEIN, ADELMAN & KREGER, LLP*

[redacted]

## HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____ NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

[redacted]

[redacted]

Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sinkinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICIES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

[redacted]

June 27, 2008

**Re:** [redacted] **Construction Defects***
**Our File Reference # P 119-LMRO**

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within t[redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / RL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW
*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners. Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME [redacted] | CASE NUMBER |
|---|---|

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By:_____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

**FOR A&K USE ONLY**

GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0405

Anderson & Kriger
ATTORNEYS AT LAW

# Homeowner's Contingent Attorney Fee Agreement



*A Professional Law Corporation*

THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is: [redacted]

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

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***(Continued on reverse)***

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| [redacted] | |

Anderson & Kriger

*A Professional Law Corporation*
**Construction Defect & Community Association Law**
2155 Chicago Avenue, Suite 300
Riverside, CA 92507
**(951) 787-7146**
Fax: (951) 787-7168

# *FINAL NOTICE !*

**The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [redacted] Housing Development on behalf of many of your neighbors.** We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks** and/or **loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

**Anderson & Kriger** has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger
Rhonda Harrington
Rhonda Harrington

*This advertising communication is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

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REAL ESTATE • May. 26, 2010

# Searching For Cracks In Construction Law

**Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects**

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kreger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

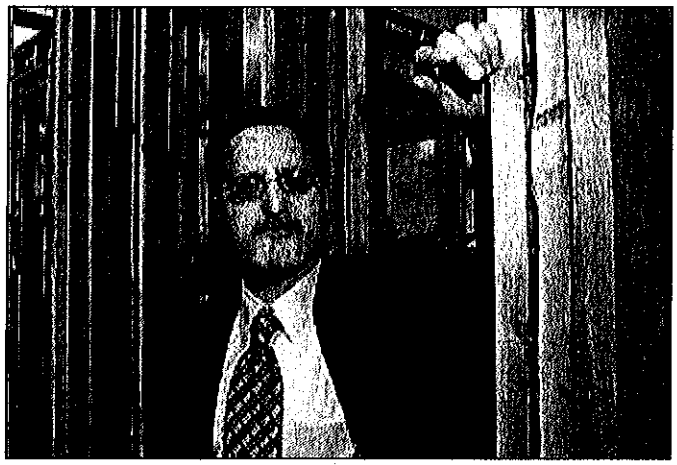
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow,* E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

jason_armstrong@dailyjournal.com



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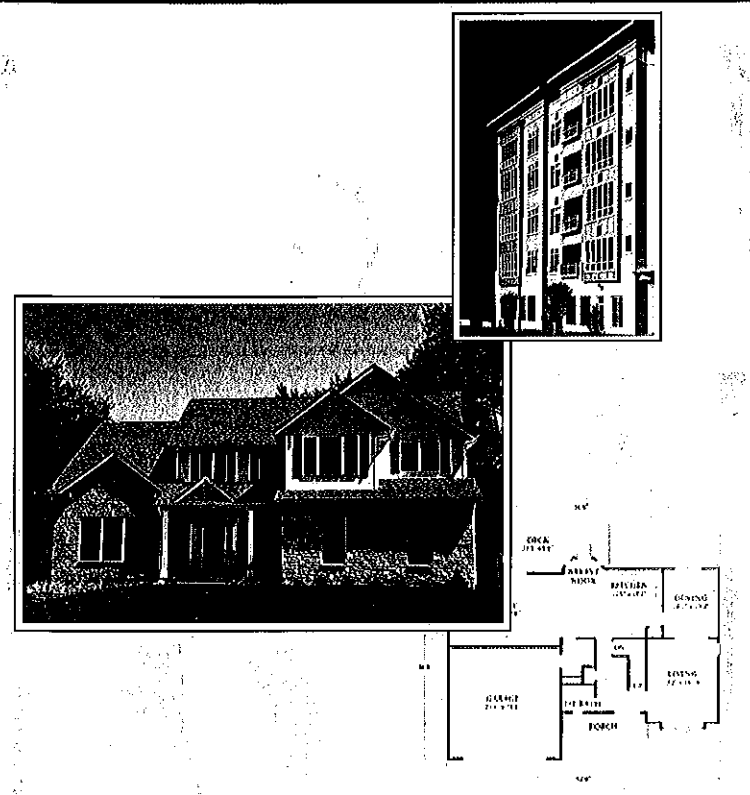
# Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association




BIA Orange County Chapter
17744 Sky Park Circle, Suite 170


Construction Quality and Sustainable Building Committee

## For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

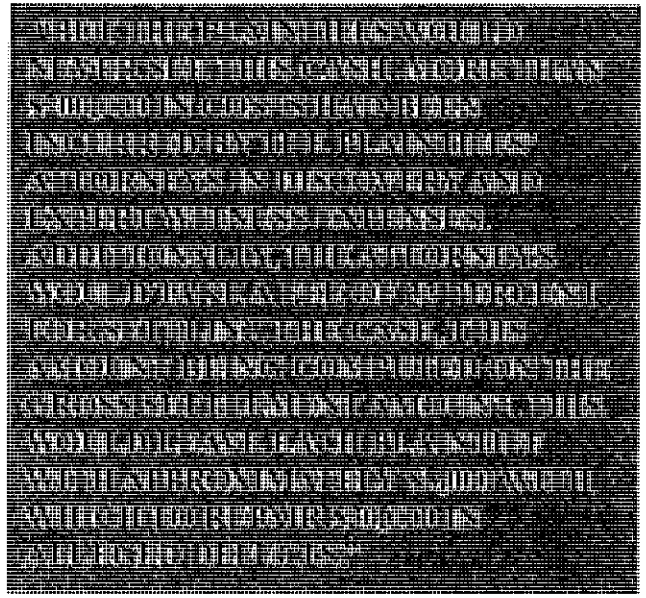
This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

## Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate $30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-fifth of the amount claimed. After attorneys' fees were deducted, the homeowners were left with only $5,000 to repair $30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.[1]



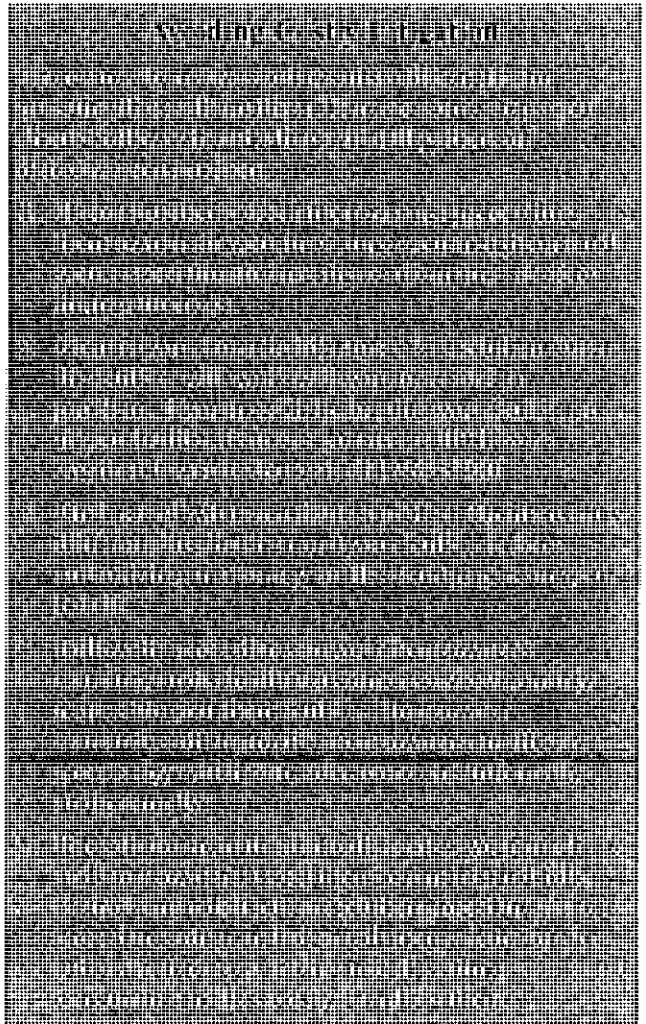
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.[2]

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

## Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.[3]

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



## Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

## When The Construction Defect Lawyers Call

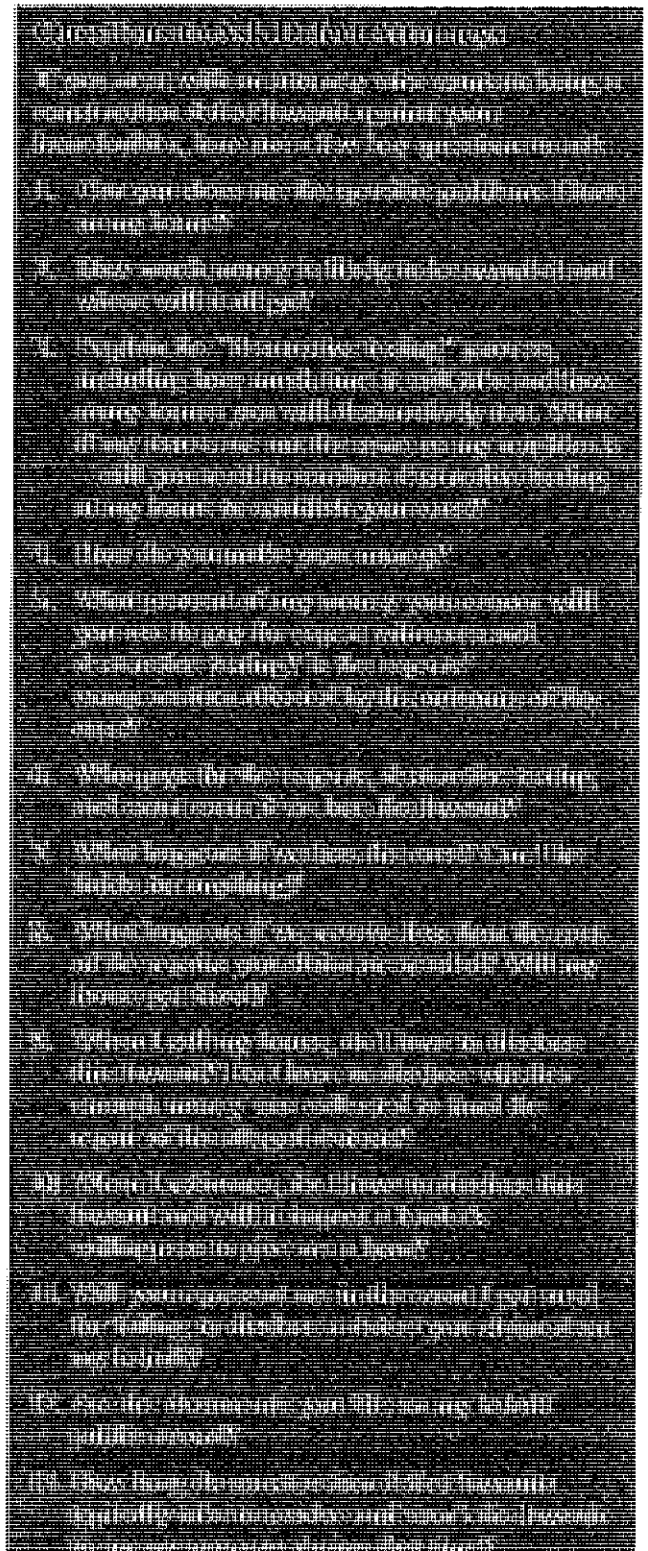
You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

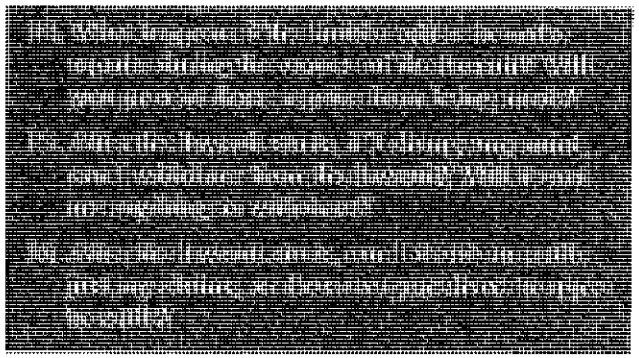
Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?





## Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.[4]

How would you feel about paying a contractor nearly $90 just to have your showerhead tightened? In one case, the trial attorneys sought $28,000 for showerhead repairs, or $90 per showerhead. The same case sought $12,000 for squeaky floors, $28,000 for bathtub repairs and $215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

## You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.[5]

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

## Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

## California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

## The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

## About Our Sponsors

**Citizens Against Lawsuit Abuse** (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

**The Trade Contractor Council of Southern California** (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

**The Associated General Contractors of California** (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

**The Building Industry Association of Southern California** (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

**The Construction Quality Committee** (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

## We'd Like To Hear From You!

Comments: _____

_____

_____

_____

Name: _____

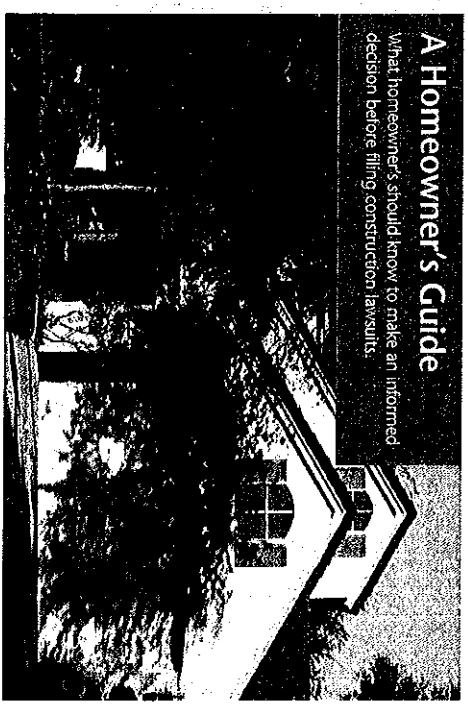
Address: _____

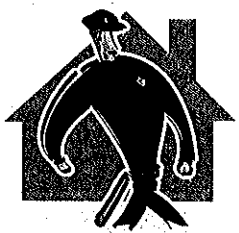
City/State/Zip: _____

Phone: _____ E-mail: _____

Your Builder/HOA/Property Mgmt. Co: _____

# Think Before You Litigate!





Neighbors Protecting

HOME VALUES

www.NeighborsProtectingHomeValues.com

# Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

# And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California, causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate -

***Neighbors Protecting Home Values***

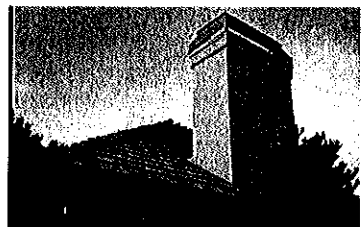
# Be an Informed Homeowner

Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

1. Contact your homebuilder first to solve your problem.
2. Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
3. Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



*Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.*

# *What Questions Should I Ask?*

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?

# Frequently Asked Questions:

### *Will a lawsuit harm my home's value or my neighborhood?*

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

*(The Business Journal / August 30, 1999)*

*Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.*

### When I sell my house, will these litigated "defects" require disclosure to potential buyers?

Under California law you are required to fill out a disclosure statement regarding your home, which includes everything regarding [illegible] and lawsuits relating to your home. The seller of the home must provide any potential buyer with a complete disclosure statement – listing all defects in the property known to the seller. The statement must be presented to the potential buyer prior to entering into any contract. Buyers usually waive the mandated cooling time for the property and discuss the potential selling price on the property. Here, the buyer may have discovered the defect first.

### Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage/home equity loan?

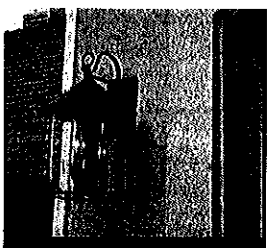
Title in California will disclose how your lender will be just as [illegible] as many lenders previously have not financed by anyone in your town due to the loss in home value as a result of the suit. [illegible] to an unnecessary lawsuit may also prevent homeowners from being able to sell or refinance a home, at least until and pending all of the applicable statutes have been met.

### How long does it take to settle a lawsuit?

[redacted]

### How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

[redacted]



*Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.*

### *Will the lawsuit affect my ability to obtain homeowners insurance?*

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

### *Shouldn't the City building codes and inspectors prevent construction defects from occurring?*

City's are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments and available for the homeowner's review. In order to protect future homebuyers city's often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.

*Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.*

### *What if I have a legitimate concern about my home?*

There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

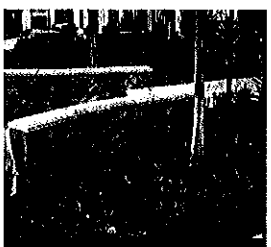
### *Will proper home maintenance prevent defects?*

Under California law homeowners are expected to maintain their homes – performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete – doing it properly the first time will save homeowners time and money in the long run.

*Withdrawal From A Lawsuit*

## *How do you withdraw from a lawsuit?*

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



*Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.*

# *THINK BEFORE YOU LITIGATE!*

Give your homebuilder a call – you will be pleasantly surprised!

For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at ***www.neighborsprotectinghomevalues.com***

*Think Before you Litigate!*

## Frequently Called Phone Numbers

My Homebuilder _____

Homebuilder's Customer Service _____

Licensed Maintenance Person _____

Gardener _____

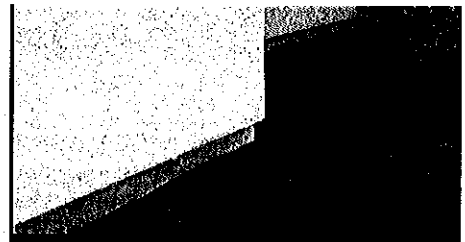
Pool Maintenance _____

City Services _____

Other _____

Other _____

Other _____



*Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.*

Neighbors Protecting
HOME VALUES

HALT *Simple · Affordable · Accountable · Justice for All*

June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,

Theresa Meehan Rudy
Executive Director

1612 K STREET, NW • SUITE 510 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

June 15, 2010

**Comments by**
**HALT—*an Organization of Americans for Legal Reform***
**on**
**Proposed California Rules of Professional Conduct**

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

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consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

**Rule 1.4 Communication.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

**Rule 1.4.1 Disclosure of Professional Liability Insurance.** HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Propose Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

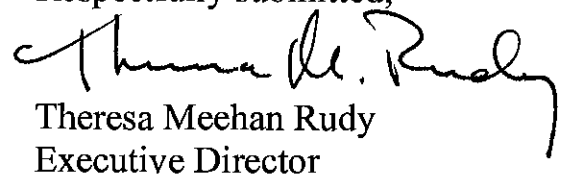
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

**Rule 1.8.10 Sexual Relations With Client.** There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy
Executive Director
HALT, Inc.—
*an Organization of Americans for Legal Reform*
1612 K Street NW
Suite 510
Washington, DC 20006

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.4. Communication.**

1. OCTC would suggest that the rule also include the language currently in rule 3-500 that attorneys inform the client about significant developments relating to the employment. While OCTC believes that employment is included in representation, it also believes that using employment as well as representation is clearer and will prevent arguments about whether employment issues are included in this rule. Further, since it is in the current rule, some may argue that the new rules removed any requirement that was included by the language in the old rule. (See *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684.)
2. We support Comments 8 and 10. OCTC is concerned that the first two sentences in Comment 9 are confusing and could be misconstrued by attorneys to think that they can make the decision to withhold information from a client. The other Comments seem more appropriate for treatises, law review articles, or ethics opinions.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

> This e-mail may contain confidential and privileged material for the
sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| Rule | SCCBA Comment | Current Version |
|---|---|---|
| | | |
| ~~Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Attorney~~ | ~~Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."~~<br><br>~~Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections, 825; 995; 996. This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version.~~ | ~~The current version does not require informed "written" consent; it retains the "informed consent" standard.~~ |
| Rule 1.4: Communication | Approve the proposed rule as written. However, comment [7] to the rule should be either deleted or should be included in the rule itself. *Rationale*: Comment [7] states "Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant." This comment expands the rule itself. A comment should not create a duty that is not specifically and clearly set forth in the rule. | The current version of the rule still only requires in the main body of the rule that written offers of settlement be communicated to the client and still retains Comment [7] as noted. |
| ~~Rule 1.6: Confidentiality of Information~~ | ~~The SCCBA opposes the revisions make by the RRC in completely deleting subsections (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic~~ | ~~The current version keeps the rule as it is now adopted in California and does not adopt the ABA Model Rule version.~~ |

# Rule 1.4.1 – Public Comment – File List

X-2010-421ll COPRAC [1.4.1]

X-2010-425-6f SDCBA [1.4.1]

X-2010-435 Maurice Rozner [1.4.1]

X-2010-503c HALT [1.4.1]

X-2010-513-6 OCTC [1.4.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 – Disclosure of Professional Liability Insurance. COPRAC supports the adoption of proposed Rule 1.4.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

February 12, 2010

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): 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. 4th 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App. 4th 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

## 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Individual attorney (inactive)

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

*** Name** Maurice Rozner

*** City** Long Beach

*** State** California

***** Email address (You will receive a copy of your comment submission.) mr1750@verizon.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct**.

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.4.1 Disclosure of Professional Liability Insurance [3-410]

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

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

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

This is a stupid proposed rule, most likely pushed by large firms to drive the sole practitioner out of business. The Bar has continually discriminated against the little guy. Obviously, such a disclosure to a client is no indication of competence. I rate myself as competent as anyone, but in litigation, for example, what client would remain with a sole practitioner who could not afford the exhorbitant fees of malpractice liability insurers ispecially when a malpractice suit is the greatest method of a client owing an attorney money not to have to pay even when there is no probable cause for such claim against the attorney? This is especially true when practicly no judge demands to see probable cause at the initiation of a malpractice suit. Probable cause is the basic requirement of a law suit but does a judge or the Bar follow the rules? The right answer is, NO.
I predict more and more sole practitioners will drop out of the profession. If that's what the Bar is shooting for, it has accomplished the world's greatest method.
Maurice Rozner, 52757

HALT *Simple · Affordable · Accountable · Justice for All*

June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,

Theresa Meehan Rudy
Executive Director

1612 K STREET, NW • SUITE 510 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

June 15, 2010

**Comments by**
**HALT—*an Organization of Americans for Legal Reform***
**on**
**Proposed California Rules of Professional Conduct**

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

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consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

**Rule 1.4 Communication.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

**Rule 1.4.1 Disclosure of Professional Liability Insurance.** HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Propose Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

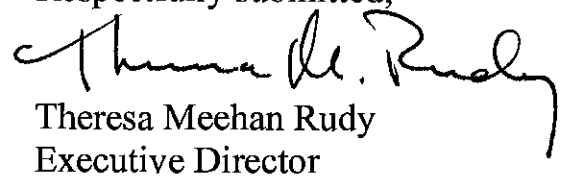
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

**Rule 1.8.10 Sexual Relations With Client.** There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy
Executive Director
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**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.4.1. Disclosure of Professional Liability Insurance.**

1. OCTC believes Comments 4 and 5 are more appropriate for treatises, law review articles, and ethics opinions.

# Rule 1.5 – Public Comment – File List

X-2010-402 Beverly Hills Bar Assoc [1.5e]

X-2010-403 Martin Martinez [1.5e]

X-2010-404 Frank Ragen [1.5e]

X-2010-407a Mark Borden [1.5e]

X-2010-407b Mark Borden [1.5e]

X-2010-408 Michael Perlis [1.5e]

X-2010-409 Kenneth G. Gordon [1.5e]

X-2010-412 Randolph Daar [1.5e]

X-2010-413 Joe Ingber [1.5e]

X-2010-415 Richard Moss [1.5e]

X-2010-419 Criminal Defense Lawyers Club SD [1.5e]`

X-2010-420 Barry Tarlow [1.5e]

X-2010-424 Multiple Signatures [1.5]

X-2010-425-7g SDCBA [1.5]

X-2010-426 LACBA [1.5e]

X-2010-428 Charles Sevilla [1.5e]

X-2010-429 Michael Pancer [1.5e]

X-2010-432 Nat'l Assoc. Crim. Def. Lawyers [1.5e]

X-2010-434 CACJ [1.5e]

X-2010-437 William Osterhoudt [1.5]

X-2010-440 Vince Imhoff [1.5]

X-2010-443 Shannon Dorvall [1.5e]

X-2010-444 Thomas Worthington [1.5e]

X-2010-447 Michael Hansen [1.5e]

X-2010-448 Leroy Davies [1.5e]

X-2010-450d Bradley Paulsen [1.5]

X-2010-452 John Duree [1.5]

# Rule 1.14 – Public Comment – File List (pg. 2)

X-2010-453 Jon Ash [1.5]

X-2010-454 J. Robert Gericke [1.5]

X-2010-455 Howard Van Elgort [1.5]

X-2010-456 CACJ [1.5]

X-2010-457 Antonio Garcia [1.5]

X-2010-458 E. Michael Linscheid [1.5]

X-2010-459 Scott Ball [1.5]

X-2010-460 Kenneth C. Gregory [1.5]

X-2010-461 James Webster [1.5]

X-2010-462 Edward Rojas [1.5]

X-2010-463 Aaron Hicks [1.5]

X-2010-464 Mark Borden [1.5]

X-2010-465 Gael G. Mueller [1.5]

X-2010-466 James Campbell [1.5]

X-2010-467 Paul Meltzer [1.5]

X-2010-468 James Cooper [1.5]

X-2010-469-2b OCBA [1.5]

X-2010-471 Paul Gabbert [1.5(e)]

X-2010-484 Phillip Heithecker [1.5]

X-2010-486 Carol Langford [1.5]

X-2010-487 Eric Schweitzer [1.5]

X-2010-488a Andrew Dilworth-Bill Balin [1.5]

X-2010-495 Louis Goodman [1.5]

X-2010-499 Alison Bermant [1.5]

X-2010-500 Melyssa Avola [1.5]

X-2010-502 Stephen Kolodny [1.5]

X-2010-503d HALT [1.5]

# Rule 1.5 – Public Comment – File List

X-2010-507 Allen Bloom [1.5]

X-2010-509 Richard Berman [1.5]

X-2010-511b State Bar LPMT [1.5]

X-2010-513-7 OCTC [1.5]

X-2010-515 Richard Loftus [1.5]

X-2010-516 John Breeze [1.5(f)]

X-2010-517p Zitrin-Multiple [1.5]

X-2010-523 Sheahen [1.5(e)]

X-2010-524 Spital [1.5(e)]

X-2010-525b LA Public Defender [1.5]

X-2010-528 James Thomson [1.5]

X-2010-530 Daryl Thompson [1.5]

Beverly Hills Bar Association

*Lead. Advocate. Serve.*

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*Deceased

March 24, 2010

The Commission on the Revision
of the Rules of Professional Conduct
c/o Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: **Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200) (Fees for Legal Services), Abolishing Non-Refundable Retainers**

Dear Commissioners:

The Beverly Hills Bar Association, representing nearly 4,000 California lawyers, appreciates your long and arduous process of reconciling our California Rules of Professional Conduct with the American Bar Association's Model Rules of Professional Conduct. We are grateful for the tremendous commitment of your time, the concern you have demonstrated during this decade-long endeavor, and your willingness to entertain opposing views.

We write in opposition to subdivision (e) of Proposed New Rule of Professional Conduct 1.5, "Fees for Legal Services." Subdivision (e) would subject lawyers to professional discipline for using the term "non-refundable" in their retainer agreements. We understand that Proposed Rule 1.5(e) would carve out exceptions for "true retainers" and "flat fees." However, we do not believe that lawyers who mistakenly employ the wrong term for an otherwise-proper fee agreement should be disciplined.

The reconciliation of our Rules with the ABA Model Rules is an important task. In considering the original charge to the Commission, it did not appear to authorize the enactment of regulations which are more stringent than the ABA Model Rules. ABA Model Rule 1.5 does not impose discipline for use of the term "non-refundable."

There are several good reasons not to push beyond the ABA Model Rules in this regard.

First, Proposed Rule 1.5(e) would discourage the use of written fee agreements. The Legislature, by enacting Business and Professions Codes sections 6147 and 6148, expressed public policy in favor of lawyers using written fee agreements. Numerous cases also support the use of written fee agreements, as they offer greater public protection.

However, the failure to use a written fee agreement is not a disciplinary event. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266.) Lawyers in California and throughout the United States have been permitted to recover fees for services provided without a written agreement, or even an express fee agreement, based on the conventional contractual theory of quantum meruit.[1] This well-accepted theory is adopted by the American Law Institute in its *Restatement Third of the Law Governing Lawyers*, section 39. And in *Flannery v. Prentice* (2001) 26 Cal.4th 572, 589, the California Supreme Court validated an award of attorney fees despite the absence of a fee agreement between the lawyer and the client.

Ironically, adoption of the Proposed Rule 1.5(e) would mean that a lawyer following public policy and using a written fee agreement, but selecting the term "non-refundable," would be subject to discipline, whereas a lawyer working without a written fee agreement would not be disciplined. That result would provide a disincentive for using written fee agreements and would be contrary to the expressed policy of the State of California.

Second, the distinction between "non-refundable" and "true retainer" is subtle. Ethics experts can and often do disagree. Enactment of Proposed Rule 1.5(e) would thus send another wrong message to the legal profession. Many criminal defense lawyers (and a host of other lawyers) do not know the nuanced issues that can be triggered by use of these terms, and in reality, many lawyers use the terms interchangeably. "[M]ost

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[1] Quantum meruit (quasi-contract) is an "equitable remedy implied by the law under which a plaintiff who has rendered services benefitting the defendant may recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant." (*In re De Laurentiis Entertainment Group Inc.* 963 F.2d 1269, 1272 (9th Cir. 1992).)

practitioners who wrongly identify a fee as nonrefundable simply do not understand the law of fees." (Giesel, *Nonrefundable Fees: The Substance, Not the Label Matters* (May 2007) Louisville Bar Association Bar Briefs, p. 10.) Lawyers are not and should not be subject to professional discipline for inadvertence or negligence.

Third, use of a non-refundable fee is not sanctionable conduct in other jurisdictions. As the Louisville Bar Association article notes, "[m]any jurisdictions, including Kentucky, allow an attorney to refer to a fee as nonrefundable." (Giesel, *supra*, p. 11.) A recent order from the Michigan Supreme Court validated a lawyer's non-refundable fee agreement in a disciplinary case, and dismissed the charges against the lawyer. (*Grievance Administrator, Attorney Grievance Commission, State of Michigan v. Patricia Cooper* (Mich. Dec. 12, 2008) [attached].) The Court cited the relevant rule, and stated that the "agreement is unambiguous because it clearly states that the $4,000 minimum fee is nonrefundable." (*Id.* at p. 2.) In addition, esteemed ethics professors Geoffrey Hazard (a California lawyer), and William Hodes, in their seminal treatise, *The Law of Lawyering*, section 8.5 (3d ed. 2001), conclude that "[s]everal situations may be imagined in which a substantial nonrefundable fee–better understood as a minimum fee–might be justified."

In sum, while we do not support or endorse gratuitous use of the term "non-refundable," we do oppose a rule that will discourage written fee agreements and subject to discipline numerous lawyers who misunderstand the sophisticated distinctions, particularly when this terminology is widely permitted throughout the United States.

Thank you for your consideration of this objection.

Sincerely,

Marc J. Poster
President, Beverly Hills Bar Association

MJP/ren
cc: Marc R. Staenberg,
Executive Director, BHBA and BHBF

# Order

**Michigan Supreme Court**
**Lansing, Michigan**

December 12, 2008

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

135053

GRIEVANCE ADMINISTRATOR,
ATTORNEY GRIEVANCE COMMISSION,
STATE OF MICHIGAN,
Petitioner-Appellee,

v

SC: 135053
ADB: 06-000036-GA

PATRICIA COOPER,
Respondent-Appellant.

/

On November 13, 2008, the Court heard oral argument on the application for leave to appeal the September 17, 2007 opinion and order of the Attorney Discipline Board. On order of the Court, the application is again considered. MCR 7.302(G)(1). In lieu of granting leave to appeal, we REVERSE the opinion and order of the Attorney Discipline Board and REINSTATE the August 1, 2006 order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. The Attorney Discipline Board erred in holding that the July 29, 2002 fee agreement was ambiguous as to whether the $4,000 minimum fee was nonrefundable. As written, the agreement clearly and unambiguously provided that the respondent was retained to represent the client and that the minimum fee was incurred upon execution of the agreement, regardless of whether the representation was terminated by the client before the billings at the stated hourly rate exceeded the minimum. So understood, neither the agreement nor the respondent's retention of the minimum fee after the client terminated the representation violated existing MRPC 1.5(a), MPRC 1.15(b) or MRPC 1.16(d).

KELLY, J. (*concurring*).

I concur in the Court's order reversing the opinion and order of the Attorney Discipline Board and reinstating the order of dismissal of the Attorney Discipline Board Hearing Panel No. 106. I write separately in the interest of curtailing future misunderstandings regarding attorney-client fee agreements similar to the one that occurred in this case.

The following is the relevant part of the fee agreement:

1. Client agrees to pay Attorney a MINIMUM FEE OF $4,000.00 which shall be payable as follows:

Retainer $4,000.00

Balance $-0-

* * *

This MIMIMUM FEE shall entitle Client to a combined amount of Attorney and Legal Assistant time computed in accordance with the hourly rate set forth in Paragraph 3 below.

2. Client understands that NO portion of the MINIMUM FEE referred to above is REFUNDABLE, to the client, under any circumstances.

3. Hourly rate: Attorney $195.00

Assistant $_____

4. In the event the combined Attorney and Legal Assistant time shall exceed the MINIMUM FEE, Client agrees to pay for such time at the rates set forth in Paragraph 3 above.

I agree that this agreement is unambiguous because it clearly states that the $4,000 minimum fee is nonrefundable.

However, counsel might be aided in knowing that the Attorney Grievance Commission believes that fewer grievances would be filed if a different fee agreement were substituted for the agreement used in this case. The commission recommends that the agreement explicitly designate the fee the attorney charges for being hired and state that the fee is nonrefundable under any circumstances. As the commission recommends, counsel may wish to designate the number of hours the attorney will work without additional charge, and specify an hourly rate to be charged thereafter.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 12, 2008

Corbin R. Davis

Clerk

# Martinez Law Office

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Eminent Counsel:

My colleague, Barry Tarlow has brought to my attention the changes that are to be imposed regarding an issue that has plagued numerous jurisdictions through out the country, the non-refundable retainers. The rule in question is Rule 1.5 (e). The purpose of this letter is to hopefully add some insight into the equipoise analysis as to the interests of the client, and that of counsel, in matters of money, an area that is always rife for problems. It is aspired that in the balance of these interests, all parties will be given their just due.

The proposed rules are cause for concern in as much as it will have detrimental effects on criminal defense attorneys, who work in the dark alleys of human nature, and who are generally the least paid of the profession. In this balance of equities, there is the words of Sir Francis Bacon who observed, "The greatest trust between people is the trust of giving counsel." (Bacon, ***Of Counsel***, Essays of Francis Bacon, at 181 (1846).

The guidance of Sir Francis Bacon has to be weighed in regard to the clientele, the criminal defense lawyer deals with on a daily basis. Years ago, I was in a neighborhood bar, a friend of mine from elementary school was celebrating. When I inquired as to the nature of his delight, he answered he had just received some money. He advised me that the word on the street was that a client could pay a lawyer their fees, and once the case was over, complain to the State Bar, and their money would be returned. Thus, the reason for his festivities, a cash windfall. Whether, he was entitled or not, is not the issue, the disturbing news to me was how the situation arose, and how the clientele on the street saw an opportunity to fleece counsel.

In ***Baranowski v. State Bar*** (1979) 24 Cal.3d 153, the question of whether or not an advance fee payment is correctly characterized as money "received or held for the benefit of clients" was left undecided since petitioner's violation of the various sections of the Business and Professions Code fully warranted recommendation of a six-month actual suspension. Thereafter, in the case of ***T & R Foods, Inc. v. Rose*** (1996) 47 Cal.App.4th Supp. 1, the court relying on Baranowski reasoned that the court had distinguished an advance fee payment from a classic retainer fee arrangement.

A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client. However, advance fee payments are payments "for the performance of a particular legal service. The court citing the case of ***In re Montgomery Drilling Co.*** (Bankr. E.D.Cal. 1990) 121 Bankr. 32 stated:

"Essentially, three types of retainers exist, being the classic or true retainers, security retainers, and advance payment retainers. Classic retainers refer to the payment of a sum of money to secure availability over a period of time. Entitlement to the fee exists whether or not services are ever rendered. The security retainer is typified by the fact that the retainer will be held by the attorneys to secure payment of fees for future services that the attorneys are expected to render. In such an agreement, the money given as a retainer is not present payment for future services. Rather, it remains property of the debtor until the attorney applies it to charges for services actually rendered, and any unearned funds are returned to the debtor. The third type of retainer, the advance payment retainer, is an agreement whereby the debtor pays, in advance, for some or all of the services that the attorney is expected to perform on the debtor's behalf. This type of retainer differs from the security retainer in that ownership to the funds is intended to pass to the attorney at the time of payment. Under California law, the issue of whether ownership of these funds passes to the attorney upon receipt is largely undecided".

Thus, if the rule allowing non-refundable retainers is to take effect, then how does this effect the status of the fees received. For example, a client walks into

counsel's office and gives a five-thousand dollar felony retainer. Unless it is called a true classic non-refundable retainer, the attorney upon the client leaving the office, in the abundance of caution, may have to place the funds in the trust account, rather then the general account. When the proposed rules were first being formulated, I had the opportunity to address the committee regarding the changes, and it's effect on the trust account versus general account. I was advised by the committee that the funds could go into the general account. It appears, that legally and ethically, that advise could best be supported by the nature of the non-refundable retainer.

I am fortunate in as much as I deal with trust account issues all the time in civil related cases. Retained criminal defense work is a very small portion of my practice. The bulk of my income is from court appointed criminal and civil cases. The full time retained criminal defense lawyer does not have this luxury. Given their limited exposure to trust account management, the stress of being in court every day, clients looking at years in the state penitentiary, and financial worries, is an ethical violation ready to happen. As it presently stands, it can be safe to assume that the general standard and practice is in criminal cases, the funds are deposited in the general account. Whereas, in civil practice, the funds are deposited in the trust account.

The best solution would be to continue to allow criminal retainers to be placed in the general account as a classic true non-refundable retainer. If the rules committee is still determined to eliminate the use of non-refundable retainers, then a workable compromise would be an amendment to the proposed rule that it is not a violation of the rules of professional responsibility, to place the retained funds in the general account in criminal defense matters. This would alleviate concerns of State Bar, of the chilling effects that a non-refundable retainer would have in the eyes of the client, thinking that they cannot change counsel. Yet, this amendment would allow criminal defense attorneys to continue to maintain an active law office. If the funds are placed in trust, it would hamper the every day operations of the criminal law office.

In summary, when I passed the bar in 1981, as the tears were rolling down my eyes as I was taking the oath, I still remember the words of the appellate court justice who swore us in as members of the Bar. In essence, he stated: " If you want to keep your licenses, do not steal your client's money, and do not plead a client guilty, if they are not guilty." These words of appellate wisdom sums up the essence of this letter. If a lawyer lacks the moral fabric to live up to their sworn oath, they will lose their license, no matter what the retainer rules state.

Those criminal defense lawyers who believe in the tenets of the profession, and who always act in an assiduous manner in the zealous representation in accordance with the sixth amendment right to counsel, will continue to do so, no matter how the committee finalizes the rules. They will continue to work tirelessly, be it in the jail cells, courtrooms, and all other bastions of human suffering, that befalls the criminal defense lawyer. Keeping the lights on in the office, should not be one of those bastions. The stress of being in the infantry of the legal profession, burns out to

many good and well intentioned lawyers.

Although the proposed amendment would only allow criminal defense lawyers to place retained funds in the general account, this is not inherently unfair to other members of the profession in other fields of law. As stated, civil lawyers tend to deposit the fees in the trust account. Moreover, they are dealing in the realm of property, whereas, the criminal defense lawyer is merging himself in the quest for liberty, the sweetest and purest form of human existence. As members of the Bar, it is our duty to preserve this inalienable right, that is really the essence of the law.

If the committee on professional competence, changes the rule, and does not allow for the proposed amendment, they may have won the battle, but have lost the war, as criminal defense lawyers leave the field, and clients are left with over worked public defenders. Great lawyers of our profession throughout history have come from the ranks of the Criminal Bar. It is not to say fine lawyers are not found in other areas of the practice, but due to the type of work, criminal defense lawyers are the ones most known to the public as they deal with gory details of life. If the profession begins to lose these mavericks of the profession, then we all suffer. I respectfully ask that this rule be more fully evaluated, before it becomes law.

Sincerely,

Martin James Martinez
Member of the California and New York Bars

cc: Barry Tarlow, Esq.

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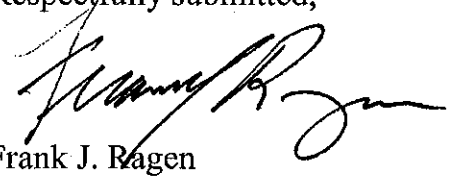
**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers**

I oppose the proposed new rule of Professional Conduct, Rule 1.5(e) (4-200), Abolishing Non-refundable retainers. A modification of the proposed rules of Professional Conduct which prohibits non-refundable retainers for legal service will do a disservice to the public, and create unnecessary litigation. Many times in my thirty-eight years of practice I have offered clients the option of a non-refundable retainer/flat fee for legal services or hourly billing. Many times the clients have selected the non-refundable retainer. The reason often voiced for choosing this option is that the amount of attorney fees is capped by the amount of the non-refundable retainer. When an hourly billing is selected there is no limit on what the attorney's fees might be. Attached hereto is an analysis of the proposed rule. I agree with the analysis and I incorporate it by reference.

In my years of practice I have never had a problem with a client when a client chose a non-refundable retainer as an option. You may contact me at the above listed

address and phone number.

Respectfully submitted,



Frank J. Ragen

FJR:lnh
Enclosure

# EXHIBIT 1

# SUMMARY ANALYSIS OF PROPOSED NEW RULE OF PROFESSIONAL CONDUCT, RULE 1.5(e) (4-200) (FEES FOR LEGAL SERVICES), ABOLISHING NON-REFUNDABLE RETAINERS

## A. The Proposal is the latest in a continuing effort by the Commission to prohibit non-refundable retainers[1] in California.

Paragraph (e) is the latest effort by the Commission to change fee agreements used by lawyers and clients in California for over 100 years by amending Rule 1.5 (4-200) to abolish non-refundable retainers. This seemingly endless process is a solution in search of a problem. Similar though somewhat different proposals were made: (1) in 1991 by the Commission, (2) in 1997 by the Committee on Professional Responsibility and Conduct ("COPRAC"), and (3) in 2008 by the Commission.[2] The 1991 and 1997 proposals were soundly rejected based on the negative responses from a wide cross section of California lawyers. In August 2008, in the face of widespread opposition, the Commission scrapped the proposed revision to Rule 1.5(f) and instead decided to completely redraft Rule 1.5, by adding and renumbering newly proposed paragraph (e) and adding a number of Comments. In November of 2009, without any meaningful notice to members of the Bar, the Commission presented this latest Proposal to the Board of Governors for approval along with 34 other separate rule revisions. As far as I can determine, almost no one in the general bar membership who opposed the discarded proposal was aware of the request to approve these revisions and therefore no one could or did submit their opposition or appear to oppose these extreme changes that had never been publicly circulated for comment.

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1 "Non-refundable retainer" refers to non-refundable retainers, advance fees earned when received, and minimum fees.

2 The 2008 Proposed Rule 1.5(f) stated:

> "A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter."

The latest Proposal (Ex. 2) begins with the statement that a lawyer "cannot make an agreement for, charge, or collect a non-refundable fee, except . . ." This language demonstrates the Commission's clear intent to abolish non-refundable retainers subject to the limited exceptions in (e). The relatively narrow exceptions of paragraph (e), however, do not permit traditional non-refundable fee arrangements that benefit clients.

### 1. Exception (e)(1) – "True Retainer"

Paragraph (e)(1) prohibits, for example, the long-established practice of charging a minimum fee to ensure availability (true retainer) where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. This arrangement benefits the client because the client does not need to pay additional attorney's fees until: (1) the true retainer is used up under the hourly calculation and/or (2) until some conditional event occurs (i.e. filing of criminal charges or a civil suit), even though the lawyer will remain available and do all work, under the initial true retainer, for agreed upon services (i.e. attempting to prevent the filing of a case). Paragraph (e)(1), however, does not permit this arrangement because if any portion of the original true retainer is used to pay for the attorney's work in the potential case, then the entire fee is automatically converted into an advance, unearned fee. *See* Comment [8]. Paragraph (e)(1), therefore, deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received.[3]

### 2. Exception (e)(2) – "Flat Fee"

Paragraph (e)(2) (*see* Exh. 2) is the product of the Commission's attempts to "assuage" their critics by attempting to make their attempted abolition of the

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[3] Paragraph (e) also reflects the lack of practical experience by the members of the drafting four-person subcommittee (which includes a law professor who served as a consultant and actually drafted Paragraph (e)) in how non-refundable retainer and fixed fees are set and earned in private practice.

non-refundable retainer "more palatable" to their critics.[4] This novel and convoluted fee arrangement appears at first to allow for non-refundable flat fee agreements "which constitute[] complete payment for those services" so long as there is a written fee agreement that states, "in a manner that can easily be understood by the client," a number of things including: "(v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed." The obvious problem with paragraph (e)(2) is that if any portion of a "non-refundable" fee "may be" refundable, then the entire fee cannot be the lawyer's property.

The less obvious but equally troubling problem is that when read in context of the entire Rule and Comment [5], Paragraph (e)(2) would often require that the proposed flat fee cover fees for services spanning the entire length of the case, including trial.[5] Particularly in complex cases, since this flat

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[4] *See, e.g.*, Dashboard for Paragraph (e) at p. 65 (when presenting Paragraph (e) to the California Bar Board of Governors, the Commission explained that the "changes" to the prior Proposed Rule 1.5(f) "may assuage the concerns raised" by public commenters in 2008).

[5] Comment [5] states, in part, that:

> "An agreement may not be made whose terms might induce the lawyer improperly curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction."

Paragraph (e), however, fails to provide any guidance on what it means to "adequately explain" that "more extensive services probably will be required." Unfortunately, it will certainly be clarified in the future bar complaints and fee disputes. In practice, it is often difficult to precisely estimate the work that needs to be done in any reasonably complex case since for example no one really knows if the case will be tried or not. In civil cases and in the criminal law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot obtain discovery before being retained, to assess the merits of the case (and also to determine whether or not a lawyer wants to take on the case). For this reason,

fee is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. If the attorney was either fired without cause or withdrew from the case before trial or the case resolved before trial, the fees that would have covered the trial would have to be refunded (either on a pre-tax or post-tax basis)[6] because they are not earned.[7]

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practitioners in complex civil or criminal cases often use hybrid fees which might use a true retainer, a nonrefundable retainer earned when received with hourly credits that would cover the provision of legal services through the different steps (i.e. pre-filing, discovery, pre-trial, trial, administrative hearings, post-trial, sentencing) of a complicated case. In these situations, non-refundable retainers are often used as a partial payment in combination with fixed fee payments or often hourly credits against the retainer.

Paragraph (e), however, would force attorneys not only to speculate about what services "probably will be required," but somehow also to "adequately explain" this "situation" to the client, without any guidance before being retained and without any meaningful analysis of the case. It is unclear how a lawyer can "adequately explain" the "situation" to the client when the attorney herself often cannot determine, with any reasonable degree of certainty, whether "more extensive services probably will be required" prior to meaningfully evaluating the case.

[6] Lawyers pay income taxes on non-refundable fees. Under Paragraph (e), the lawyer may have to pay income tax on the "non-refundable" flat fee paid when received from the client even though it may be refundable.

[7] One important purpose of a "flat fee" or "fixed fee" that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or based upon the time that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the "fixed fee" is often an educated but fair estimate, since there is no way to determine when or how, for example, a civil litigation or administrative matter or a criminal case will be resolved.

On closer examination, Paragraph (e)(2) does not actually permit truly non-refundable "flat fees" as the Commission asserts that it does. The Commission's effort to dress up the ban on non-refundable retainers in an attempt to make it more palatable to the critics fails and actually creates more problems for the lawyer and the client. My detailed and lengthy analysis of the significant, additional problems created by these proposed changes will be made available to you, if you would like to review it.

## B. Paragraph (e) is a Solution in Search of a Problem.

There simply has not been an identifiable pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the non-refundable retainer or which would be remedied by this sweeping change. With the latest Proposal, the Commission offers a one-sentence rationale, unsupported by any California case authority:

> "Paragraph (e) has no counterpart in the [ABA] Model Rule.[8] **The Commission recommends its adoption because charging a nonrefundable fee is inimical to California's strong policy of client protection. . .**" (Commission's Explanation of Changes to the ABA Model Rule, Ex. 2 to Executive Summary at p. 77)

The Commission, however, fails to demonstrate that clients need protection from the pattern of misconduct by the membership of the State Bar involving the non-refundable retainer. No recent California reported cases have demonstrated any pattern of abuse involving non-refundable retainers. The Commission has not only failed to cite a single, reported recent case to support the need for Paragraph (e) (despite our repeated requests since 1991), it ignores the reality that thousands of Californian lawyers have been using some form of the non-refundable retainer (that fall outside of the limited exceptions to

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[8] The ABA Model Rules contain no prohibition on "nonrefundable fees" and "earned upon receipt fees." *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt.[f] (2000) ("if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer" and need not be deposited in a client trust account).

Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)) since the 19th century without creating any identifiable pattern of abuse.[9]

The Commission ignores and does not even disclose that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."[10] See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments . . . to Rules of Professional Conduct."[11]

Indeed, in many jurisdictions, the use of non-refundable retainers is recognized as appropriate, if not essential in both civil and criminal cases.[12]

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[9] There are a myriad of examples of legal transactions other than criminal matters that have traditionally involved non-refundable retainers, fees earned when received, and minimum fees and are not calculated based on the time devoted to the assignment. These legal transactions are in a variety of practice areas, including: (1) real estate, (2) criminal law, (3) securities, (4) family law, (5) tax, (6) entertainment, (7) bankruptcy, (8) immigration, (9) appellate law, and (10) SEC matters.

[10] Ironically, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*

[11] "Although the proposed amendments would avoid use of the terms 'fixed fee,' 'flat fee' or 'non-refundable fee,' such types of retainer fee agreements would be permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid." Page 9.

[12] John M. Burkoff, Criminal Defense Ethics: Law & Liability, § 10.1, at 501-505 (2d ed. 2003); John Wesley Hall, Jr, Professional Responsibility of the Criminal

Although Paragraph (e) abolishes the well-recognized and long-utilized non-refundable retainer (with the exception of the extremely limited categories discussed above), the Commission: (1) has not, and indeed cannot, demonstrate any need to completely alter the way law has been practiced in California or (2) how well this novel procedure will work in the actual practice of law.

The critical question here is not whether a rogue lawyer can gouge, exploit, and steal from his/her client using a non-refundable retainer or whether non-refundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves and memorialized in a written fee agreement that meets the requirements of Cal. Bus. & Prof. Code §6148(a) and Rule 1.5(a).).[13] Rather, the critical inquiry is whether the non-fraudulent or ethical use of non-refundable retainers is nonetheless so corrosive as to require a per se prohibition. The answer to this question is a resounding no.

Paragraph (e) is a source of overreaching and proves too much. A few dishonest lawyers may cheat their clients by removing money from their trust

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Lawyer (2d. ed. 1996) at p. 163. *See also, e.g., Bunker v. Meshbesher,* 147 F.3d 691 (8th Cir. 1998) (Minnesota); *Grievance Administrator v. Cooper*, SC135053 (December 12, 2008) (Michigan Supreme Court rules a non-refundable minimum fee with credit against an hourly charge "incurred upon execution of the agreement, regardless of whether the representation was terminated by the client" is perfectly appropriate); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of non-refundable retainers); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Texas Op. 431 (1986) (affirming use of non-refundable retainers); Maryland Op. 87-9 (1987) (a non-refundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) ("When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid..."); Kentucky Op. 380 (1995) (affirming use of non-refundable retainers).

[13] Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?

accounts. Yet, no one has proposed that the solution is to abolish trust accounts.

## C. The Washington Rule

The Commission's claim that the Proposal relied on, and is supported, by the Washington Rule (Rule 1.5(f) of Washington's Rules of Professional Conduct), *see* Dashboard and Introduction to proposed Rule 1.5(e)), is simply incorrect. First, non-refundable fees, advance fees, and fees earned when received are not prohibited under the Washington Rule. This fact is supported by: (a) the plain language of the Washington Rule, (b) Washington Supreme Court's rejection of the proposal to ban the use of the terms "nonrefundable," "earned upon receipt," and "minimum," and, (c) the fact that the Washington Rule does not even mention the word non-refundable and the fact that Washington previously had no rule requiring written fee agreements. Second, the Washington Rule has little, if any application, to the stated purpose of the Commission's Proposal. Rather than preventing lawyers from "charging or collecting a nonrefundable fee" as the Proposal seeks to do, the Washington Rule instead was intended to (a) change the rule that prevented lawyers from placing a fee for future services in their trust accounts and (b) impose requirements requiring lawyers to inform the client about the nature of the fee arrangements since Washington (unlike California) does not have a statute requiring lawyers to explain the fee arrangement in a written fee agreement.

The Proposal is a solution in search of a problem. The unconscionable fee limitation already protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. In the absence of a pattern of demonstrable abuses that can be remedied by either a limitation or a ban on the use of the non-refundable retainer, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers.

## D. Significant Problems Created by Paragraph (e)

Paragraph (e), if codified, will impact on lawyers who practice in every area including entertainment law, matrimonial/divorce, immigration law, civil litigation, securities, bankruptcy, tax, real estate, appellate, and criminal law. In fact, prohibiting non-refundable retainers will in essence appear to make these

fee payments the property of the client until the work is performed, regardless of the intent of the lawyer or client set out in a written fee agreement. This will expose lawyers performing any type of legal work to great financial risk, by facilitating the restraint or seizure of their fees if the client has a potential problem involving securities law,[14] bankruptcy, criminal law[15] and jeopardy tax assessments[16] and even creditors' claims.

The forfeiture/restraining order problems raised by the previous Proposed Rule 1.5(f) have not been resolved by the Commission as it claims. Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (*see* proposed Rule 1.5(e)(2)(v)), the convoluted theoretically "non-refundable" flat fee structure created by the Commission in the proposed Rule 1.5(e)(2) requiring lawyers and clients to inaccurately describe that the fee is "the lawyer's property on receipt" actually will deprive the client from ever receiving a refund if these funds are the subject of any seizure, forfeiture, or restraining order arising out of any: (a) criminal case, state or federal, (b) SEC

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[14] *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determining whether the funds are subject to seizure).

[15] *See United States v. Saccoccia VI,* 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (discussing government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

[16] *See Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) (developed principles involving an "irrevocable assignment," the equivalent of a non-refundable retainer, in a jeopardy assessment case, enabling the client to receive representation and the lawyer to maintain the fee); *People v. Vermouth, supra*, 42 Cal. App. 3d at 359.and *People v. Vermouth*, 42 Cal. App. 3d 353, 359 (1974) (reversing conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a non-refundable retainer) of the seized funds that had priority over the IRS lien). This approach has been used by hundreds of California lawyers to protect their client's constitutional right to representation while collecting their fee. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976).

civil restraining order, or (c) a jeopardy assessment by the IRS or the Franchise Tax Board.

In fact, to make the situation even more egregious, if money to be paid to the lawyer is contingent on an event that never occurs (i.e. trial), in the face of either (a), (b), or (c) above, the lawyer cannot return these funds to the client. The attorney may not return any funds subject to restraint to the client even when she is fired by the client and even if they are necessary to retain a new lawyer. Lawyers have been accused of and charged with obstruction of justice and/or criminal contempt as well as being subject to discipline by the court which issued the restraining order if the money is returned to the client. The fee agreement required under Paragraph (e)(2) does not even attempt to focus on or resolve this significant problem.

A client's funds that are deposited in a trust or general account under this Proposal will often be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. Paragraph (e) will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust or who has deposited it in a general account even when it is owned by the client to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by any counsel in many civil and criminal matters.

Moreover, paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the fee by asserting that the fee "is the lawyer's property on receipt." The problem is not what the fee is called but who owns the funds.

There are a number of other, significant policy reasons why these changes should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints, arbitration proceedings and civil suits, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice.

In fact, on August 26, 2008, the Office of the Chief Trial Counsel of the State Bar ("OCTC"), recognized that the impact of a ban on non-refundable retainers is that "it will make members subject to discipline for charging or collecting a non-refundable retainer," when currently, any disputes related to the charging or retention of a non-refundable fee are "typically handled as either a fee arbitration matter or, in egregious cases . . . as a failure to return unearned fees in violation of current rule 3-700(D)(2)." OCTC's 8/26/08 comment on prior, revised Rule 1.5(f).

Current California law does not prohibit non-refundable fees and existing prohibitions against unreasonable and unconscionable fees currently protect clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Rather than bringing current California standards into the Rule, Paragraph (e) creates ambiguities and uncertainties in the Rules in part by grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements (even including the specific form fee agreements that have been endorsed and distributed by the State Bar for years and are still available on its website[17]). The current standards, custom, and

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[17] The existing "fixed fee clause" distributed in the form fee agreements by the State Bar (and likely included in hundreds of fee agreements across the spectrum of specialties in State Bar sample fee agreements) explicitly provides that:

> "unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under the agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed." "The State Bar of California Sample Written Fee Agreement Forms" at pp. 30-31 (available at http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf).

In her latest column of the California Bar Journal, legal ethics expert Diana Karpman describes these "sanctified" State Bar fee forms as the "gold standard" and urges California lawyers to use them. She states:

> "Lawyers are urged to use the State Bar fee forms [. . . ]. These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues

practice (endorsed by the State Bar which provides that the fixed fee will be earned in full and no portion of it will be refunded once any material services have been provided) are entirely irreconcilable with Paragraph (e). Paragraphs (e)(2)(iv) and (v) would permit a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, demand a refund and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. It appears the Commission has never addressed this significant inconsistency.

## E. Failure to Effectively Advise the Bar of the Amendment

When the Commission attempted to prohibit non-refundable fees in 2008, it was done in a manner that was not designed to notify a meaningful cross section of the California Bar of the amendment.[18] With the latest proposal, the Commission totally redrafted and expanded Rule 1.5(e) and presented it along with 34 other rules to the Board of Governors for conditional approval in November of 2009, without informing the membership of the State Bar and the known stakeholders who opposed the 2008 proposal. It is unlikely that any meaningful number of members of the California bar, other than a lawyer who is on the Commission or a member of the Board of Governors, actually knew about the latest Proposal (draft Rule 1.5(e)) and the Commission's attempt to present it to the Board of Governors for approval. There was no time or opportunity to learn about, scrutinize, or comment on draft Rule 1.5(e). Obviously, since no notice that the meeting agenda involving a proposed draft of Rule 1.5(e) that in fact dealt with a ban on non-refundable retainers was

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involving an agreement, it's a stronger case if it's the sanctified State Bar fee agreement. . ." Diane Karpman, "Time for tuning up those fee agreements," California Bar Journal (February 2010).

[18] With the 2008 proposed revision to abolish non-refundable fees, aside from the posting of the 209-page Discussion Draft of 13 proposed amendments to the rules of professional conduct (including the prior proposed Rule 1.5(f) banning non-refundable retainers) on the state bar website, it was not publicized (as far as we know) in any effective manner. See, for example, a short article in the May 2008 California Bar Journal that made no mention of non-refundable retainers. Most California lawyers were completely unaware that these significant changes to Rule 4-200 had been proposed.

distributed to the members of the Bar, no one could appear before the Regulations and Admissions Oversight Committee ("RAC") or the Board of Governors on November 12 through 14, 2009 to raise the host of problems with this novel, wide-ranging version of Rule 1.5(e). The public comment letters sent in the spring of 2008 before it was abandoned in August 2008 could not have addressed the significant changes to Rule 1.5 submitted to the Board of Governors in November of 2009.

Considering the significance of this Proposal to lawyers and their clients throughout California, the controversy surrounding the Commission's prior efforts to abolish the non-refundable retainer, and the fact that public commenters in 2008 complained vigorously about the lack of publicity surrounding the 2008 proposed Rule 1.5(f), I am especially concerned that the Commission sought and received the Board of Governor's endorsement for Paragraph (e) without (1) publicizing, disseminating, or explaining, in a manner that actually informs a cross-section of the bar of its existence and (2) did not permit the membership to respond or object before the Board of Governors' tentative approval of revised proposed Rule 1.5(e).

Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar of California to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required:

> "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal."

Sending this Proposal out for public comment, along with approximately 65 other rules, after it was approved by the Commission and tentatively approved by the Board of Governors subject to after-the-fact public comments does not satisfy the Rule of the State Bar 1.10(A) or solve the process and notice problems.

**LAW OFFICES OF MARK BORDEN**
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March 25, 2010

State Bar of California
180 Howard Street
San Francisco, CA 94105

**RE: PROPOSED NEW BAR RULE 1.5(e)**

To Whom It May Concern:

This letter is being sent regarding the proposed new rule change regarding non-refundable retainers. This has been a staple of criminal law practitioners as long as I have been practicing, which is at least 30 years. My non-refundable fee allows my contacts to contact me 24 hours a day, 7 days, a week anywhere in the world. I have done this on my travels out of the country; including trips to India, Hong Kong, and Singapore and my clients have always been able to contact me anytime they need to. By proposing this rule, I am going to delete that service to my clients. The fact of the matter is that when the police are banging on their door at 2:00 am, they won't be able to get a hold of their lawyer. By eliminating the non-refundable fee, you are affecting the client's Sixth Amendment Right to counsel, as far as contacting his lawyer at anytime.

This proposed new rule is being done by people who are on large salaries, people from large law firms, and by people who work for the State Bar who have never had to practice in the private sector to and earn fees from clients. This is another case of too many bureaucrats with too much time on their hands.

I ask that this proposed rule change be postponed, since I will oppose it if I am elected from District 2 to the State Bar Board of Governors.

Very truly yours,

Mark Borden

MB/cc
Cc: file

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April 5, 2010

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

Howard B. Miller
President, The State Bar of California
At Girardi and Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017

**RE: PROPOSED NEW BAR RULE 1.5(e)**

To Whom It May Concern:

In reiterate my previous objection to Rule 1.5(e).

Non-refundable retainers have been a staple of criminal law practitioners as long as I have been practicing, which is at least 30 years. My non-refundable fee allows my contacts to contact me 24 hours a day, 7 days, a week anywhere in the world. I have done this on my travels out of the country; including trips to India, Hong Kong, and Singapore and my clients have always been able to contact me anytime they need to. By proposing this rule, I am going to delete that service to my clients. The fact of the matter is that when the police are banging on their door at 2:00 am, they won't be able to get a hold of their lawyer. By eliminating the non-refundable fee, you are affecting the client's Sixth Amendment Right to counsel, as far as contacting his lawyer at anytime.

This proposed new rule is being done by people who are on large salaries, people from large law firms, and by people who work for the State Bar who have never had to practice in the private

sector to and earn fees from clients. This is another case of too many bureaucrats with too much time on their hands.

I ask that this proposed rule change be postponed, since I will oppose it if I am elected from District 2 to the State Bar Board of Governors.

Additionally, I object to the proposed rule change on the argument of Tarlow & Berk, PC as set forth below:

If adopted, Paragraph (e) to abolish non-refundable retainers (Ex. 2) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

(1) The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.lO(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009 proposal cannot be reasonably interpreted as interpreted as a "non-substantive" "modification" of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem. See discussion Ex. 1, p. 12.

(2) Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of Californian lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(I) and (2)).

(3) There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem.

(4) The proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee

arrangement. The Board approved the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments... . to Rules of Professional Conduct." It also ignores the fact that it was the Committee on Professional Responsibility and Conduct ("COPRAC") that first suggested (see May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id*

(5) Paragraph (e)(l) involving a "true retainer" and Comment [8] prohibit the long-established practice of charging a nonrefundable retainer as a minimum fee to ensure availability when the client will also be credited for future work done either on an hourly basis or for the amount of the retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a "true retainer" earned when received if he does any legal work.

(6) Paragraph (e)(2) and Comment [5] would often require the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.

(7) Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue in fee forfeiture or restraining order situations is not what the fee is called but who owns the funds.

(8) Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (*see* proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.

(9) Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risks by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., the F.T.C. or is the potential target of a civil or

criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims. Since nonrefundable retainers have protected legal fees for several decades, there is no reason to experiment with this novel concept that will no doubt generatc costly litigation and, in all likelihood will fail to prevent fee forfeiture.

(10) Because Paragraph1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients s of their ability to retain counsel.

(11) Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.

(12) This Proposal is confusing and internally inconsistent and will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes for honorable lawyers acting in I good faith.

(13) Paragraph 1.5(e) (2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and thc complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.

(14) The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly never be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant rcsult that is not outcome-determinative in a outgoing case, the Rule encourages client to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would not be "the lawyer's property" or property to which the lawyer is entitled.

Very truly yours,

Mark Borden

MB/cc
Cc: file

# STROOCK

April 2, 2010

Michael F. Perlis
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Rex Heinke (District 7, #2)
Vice-President
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Re: Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers

Dear Rex:

I wanted to take this opportunity to register my concern regarding the adoption of Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200) (Fees for Legal Services, Abolishing Non-refundable Retainers).

In my view, the Rule benefits neither clients nor attorneys; but only those who would seek to deprive individuals potentially in the need of legal representation from the ability to obtain it. As a former Assistant Director of Enforcement at the Securities & Exchange Commission, and prosecutor, I fully understand the propensity of the government to seek asset freezes (often times ex parte) and oppose efforts to secure funds for legal representation by those accused either civilly or criminally for violations of law.

The Rule proposing the abolition of nonrefundable retainers would only serve further to deprive the people of the ability to secure legal representation and/or compel attorneys who are already involved on behalf of those individuals to become involuntary pro bono advocates. Neither alternative is an appropriate avenue.

In practice, the nonrefundable retainer as it currently operates, does not do a disservice to the client. Attorney overreaching is readily remedied and most attorneys would clearly be prepared to return unused portions of retainers where it would be inappropriate to retain them.

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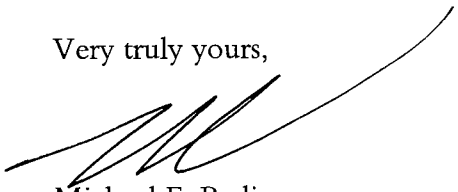
Proposed Rule 1.5(e)(2) does not solve the problem. It requires attorneys and clients to make binding estimates of what may be complex legal proceedings, leaves open the possibility that government agencies could require termination of counsel and return of unused retainers, and could potentially lead to attorney/client conflict relative to an evaluation of what portion of a retainer need be returned relative to non-completed legal services.

In sum, I would urge that we follow the old maxim, "if it isn't broken, don't fix it."

Very truly yours,



Michael F. Perlis

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KENNETH G. GORDON *
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ANTHONY E. GLASS

April 8, 2010

Mr. Howard B. Miller
Girardi & Keese
1126 Wilshire Blvd.
Los Angeles, Ca. 90017

Re: Proposed Rule 1.5(e)

Dear Mr. Miller:

This letter is written to you in your capacity as President of the State Bar and in connection with the proposed change to Rule 1.5(e) of the Rules of Professional Conduct.

My firm specializes in tax planning and tax controversy matters, both civil and criminal. The major part of our work pertains to the tax controversy area. The firm was started in 1983 and I have been admitted to the New York Br in 1971 and the California Bar in 1977. From June, 1972 through 1979 I was a senior trial attorney with the Internal Revenue Service. Since January, 1980 I have been in private practice and have extensive experience in dealing with various government taxing agencies.

My principal concern with the proposed change to Rule 1.5(e) has to do with the language of (e)(2) pertaining to flat fees. Assuming the attorney and client agree in writing, a flat fee is the lawyer's property on receipt. As such, the attorney should properly deposit this fee into his operating account and take it into income. In a tax sense, the attorney has dominion and control over the fee and should treat it as income. In the event that it is not the lawyer's property or is subject to a substantial risk of forfeiture, then the tax treatment would be otherwise. The language of proposed Rule 1.5(e)(2)(v) provides that the written fee agreement shall include a provision that the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been performed. This language appears to introduce a substantial condition into the equation of the lawyer's dominion and control of the fee.

I believe that there are sufficient remedies against abuses, such as the non-performance or incompetent performance of legal services, without the broad brush approach embodied in the proposed Rule that not only alters property rights, but puts the interests of both the lawyer and client at risk in certain fact situations. The following factual example will suffice:

> Client was a substantial Schedule business, the receipts of which were mostly in cash. The business is completely legal. Client and counsel enter into a flat fee arrangement to provide for legal representation before the Internal Revenue Service during the course of a civil tax examination. In the event that the client and the IRS could not come to an agreement as to civil tax liability, it was understood that a trial would be necessary in the U.S. Tax Court. Fees arrangements for such a trial were left open, inasmuch as the dimensions of the case could not be fully evaluated until the completion of the tax examination.

In the course of the tax examination, the assigned Revenue Agent became concerned over the large amounts of cash flowing through the business and the possibility that there was unreported income. Upon the agent's recommendation, a jeopardy assessment was made by the Internal Revenue Service. Once this procedure is instituted, levies are immediately served and assets seized. Essentially, the IRS seizes property of the taxpayer and then talks. The judicial remedy to contest the propriety of the jeopardy assessment and amount of jeopardy assessment is in the Federal District Court. The amount of a tax deficiency can be contested in a subsequent action in the U.S. Tax Court.

A trial on the jeopardy assessment resulted in the complete reversal of the assessment, in the approximate amount of $10 million. This, in turn, set the stage for the similar disposition of the underlying tax case. A trial in Tax Court was thereby rendered moot.

My interpretation of proposed Rule (e)(2) leaves open the possibility that, since the defense of a jeopardy assessment was not contemplated in the fee arrangement, the client might have been entitled to a refund of fees. There is no question that the client was quite satisfied with the result and that additional legal fees associated with a full trial in Tax Court were avoided. Logically, if the client would be entitled to a refund, then the client had a property right that was subject to seizure under the jeopardy assessment. The consequences that flow from this scenario could be:

1. The IRS, upon making the jeopardy assessment, could demand that the lawyer turn over all monies which would be subject to a refund claim by the client. Inasmuch as the initial retention of counsel did not contemplate a jeopardy assessment administrative and judicial defense, all fees attributable to this work could be subject to seizure (as well as all other assets of the client).

2. If the IRS seizes the fees from the lawyer, then the client is left without resources to contest the jeopardy assessment and any other process. This leaves the client with potential choices of defaulting on a jeopardy assessment process, since the client doesn't have the necessary resources to retain counsel, or bringing an action against the attorney for damages attributable to the turn-over of funds. As the attorney would be complying with a lawful seizure process, it is doubtful the client could prevail on this basis. However, the net result is that the client could be without representation in an action that was proved to be fatally flawed and that resulted in no additional tax liability. Even if an action for damages against counsel was ultimately successful, the client's business and net worth have been destroyed.

3. Counsel, upon a seizure of fees, is left with representing the client without immediate compensation, in the expectation that the client will prevail and recover their assets once the jeopardy assessment is abated. In the event that the jeopardy assessment is upheld, there is a subsequent tax representation in Tax Court for which the client lacks fees to be represented. In the event that the attorney, upon seizure under a jeopardy assessment, withdraws from further representation, the client could have a claim for abandonment by the professional.

4. The IRS, by having an ability to seize the amount of fees subject to a refund claim, in a purely civil matter, has been given the ability to interfere in the attorney-client relationship and decimate the client's ability to defend itself in a jeopardy case. Essentially, the logic of proposed rule 1.5(e)(2) provides the mechanism for the IRS to seize and retain funds that were necessary to mount a successful defense. The net result is that the client is out of business and bankrupt and the IRS gets to keep funds to which it is not entitled.

5. The language of proposed rule 1.5(e)(2)(v) is an invitation for the IRS to question and litigate the provisions of a fee engagement and get between the lawyer and his client. In the above scenario, both the lawyer and client would take the position that the services required in contesting the jeopardy assessment were contemplated to be within the parameters of engagement. The IRS, however, could take the position that an interpretation of the engagement letter, in the context of this proposed rule, provides a refund remedy to the client, which is subject to seizure. Unfortunately, by the time the extent of this property interest is litigated, the jeopardy assessment case has moved forward and the client is out of business for lack of funds. Instead of protecting the interests of the client, the proposed rule has the opposite effect.

The core issue under the proposed rule is one of property or interest in property. It appears that the proposed rule is confusing and inherently contradictory. If the flat fee is the lawyer's property upon receipt, then there should not be a basis for seizure. However, if the client has a right to a refund of fees attributable to services not completed, then the client has a property interest that can be seized by a taxing agency.

My comments have addressed the proposed rule change within a very narrow range of my tax practice and focused on a particular civil tax issue. There are many other factual situations, including those within the criminal law context, that raise issues of legal exposure for both the attorney and client which have not been addressed in this letter. Hopefully, the Special Committee considering this rule change will reconsider its position regarding this proposed rule. Existing legal remedies and professional restraints on attorneys are, in my opinion, sufficient to protect clients. The obfuscation of property rights pertaining to flat fees appears counter-productive to the interests of clients.

Very truly yours,

Kenneth G. Gordon

cc: Mr. Rex Heinke
Mr. Michael D. Marcus
Mr. Patrick M . Kelly
Mr. James H. Aguirre

# PIER 5 LAW OFFICES

A COMMUNITY OF SOLE PRACTITIONERS

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PENELOPE ROSE
STEPHANIE BROWN
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April 15, 2010

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

Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers

Dear Ms. Hollins:

I've been practicing criminal defense, and have been a member of the California State Bar, for over 30 years. I have utilized non-refundable retainers at various times in my practice. The rules that exist now adequately protect clients from excessive fees or failure of lawyers to refund fees upon withdrawal from representation. The new proposed rule deprives a client of the ability to formally retain an attorney in the circumstance in which, because of the nature or the scope of the proposed representation, it is necessary to secure the attorneys services.

Sincerely,

RANDOLPH E. DAAR

jw

JOE INGBER, ESQ.
Attorney at Law
P.O. Box 641879
Los Angeles, CA 90064-1879

April 16, 2010

Rex Heinke
2029 Century Park East, Suite 2400
Los Angeles, CA 90067

Re: Rule of Professional Conduct 1.5(e)

Dear Mr. Heinke:

I am an active member of the State Bar (# 31734), and have been so for about 50 years.

To modify/abolish rule 1.5(e) re: non-refundable retainer agreements, would create chaos an unnecessary manner.

Please vote against this abolition.

Very truly yours,

Joe Ingber

JOE INGBER

JI/

LAW OFFICES

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MARK T. ROOHK
OF COUNSEL

April 22, 2010

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

**Re: Opposition to Proposed New Rule of Professional Conduct 1.5(e) (4-200) Fees for Legal Services Abolishing Non-refundable Retainers**

Dear Ms. Heller

Let me join the throngs of other criminal law attorneys in opposing the proposed ban on non-refundable retainers. I have been practicing criminal defense for 25 years of my 42 years as an attorney licensed to practice law in California. Previously I was a prosecutor in the District Attorneys office of Los Angeles for 17 years.

It is my firm belief that if adopted, Paragraph (e) to abolish non-refundable retainers will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

(1) The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009 proposal cannot be reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008

reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem.

(2) Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of Californian lawyers have used some form of the non-refundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)).

(3) There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem.

(4) The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of approved endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments... to Rules of Professional Conduct." It also ignores the fact that it was the Committee on Professional Responsibility and Conduct ("COPRAC") that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*

(5) Paragraph (e)( 1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work.

(6) Paragraph (e)(2) and Comment [5] would often require that the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.

(7) Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue is not what the fee is called but who owns the funds.

(8) Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (*see* proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.

(9) Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.

(10) Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many civil clients of their ability to retain counsel.

(11) Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.

(12) The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause.

(13) Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat

fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.

(14) The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in a ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.

The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits non-refundable fees for performing legal services. In doing so, it abolishes and/or redefines a widely accepted historical fee arrangement, and in reality will provide that most payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as "the lawyer's property upon receipt."

Thank you for your attention to my concerns. Hopefully, you shall do whatever necessary to defeat the abolishment of non-refundable retainers.

Very truly yours,

Richard A. Moss, Esq.

RAM/yp

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April 29, 2010

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Special Commission for the Rules of Professional Conduct
c/o Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

**Re: Opposition to Proposed New Rule of Professional Conduct. Rule 1.5(e) (Fees for Legal Services). Abolishing Non-refundable Retainers**

The Criminal Defense Lawyers Club [CDLC] of San Diego has voted to oppose proposed Rule 1.5(e) of the Rules of Professional Conduct. CDLC provides education, training and support to lawyers representing citizens accused of crime while advocating fair and effective criminal justice in the courts, the legislature, and wherever justice demands.

Our purposes include insuring by rule of law those individual rights guaranteed by the United States and California Constitutions in criminal cases, and to resist efforts to curtail the rights guaranteed to citizens. As part of our educational mission, we provide the constant exchange of information among members on all matters pertaining to the defense of criminal cases, educational programs, membership meetings, special committees, publications, articles and otherwise. This includes educating members on proposed changes in legislation and relevant rules pertaining to the defense of criminal cases and practice of law.

We understand that the Board of Governors will be evaluating the proposal to add Rule 1.5(e) along with a number of other changes to the Rules of Professional Conduct to determine which rules are to be sent to the Supreme Court for proposed adoption.

We are opposed to proposed Rule 1.5(e) for a number of reasons. Many of our members are sole practitioners who regularly charge flat fees for routine criminal

matters. This rule unnecessarily puts in place a condition that essentially makes the fee "flat" only upon the client's wish as the case proceeds. If the work for the attorney is substantial, the client will be content with the flat fee arrangement. But if the attorney seems to be on the way to a result that will end the case on a favorable note for the client, the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund.

Specifically, paragraph (e) of Rule 1.5 prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). Yet, the latter rule, while first stating the fee is the attorney's on delivery, then says the client may be entitled to a refund prior to the "completion" of services. This paragraph adds uncertainty (which will certainly promote fee disputes) and promotes the problem identified in the preceding paragraph.

We believe this rule change is a remedy to a non-existent problem. Any and all fee disputes with clients are resolvable with the existing rules on a case-by-case basis, under the overriding rule prohibiting unconscionable fees.

We urge this rule not be adopted. It is unneeded and would overturn a history of flat fee contracts that have served clients and lawyers for years.

Yours truly,

REBECCA P. JONES
President
Criminal Defense Lawyers Club

cc: Wells Lyman, Esq. P O Box 2085 La Mesa, CA 91943

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April 29, 2010

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Re: Opposition to Proposed Rule 1.5(e)(1)-(2) Abolishing Nonrefundable Retainers

Dear Rex:

Enclosed for your review is my Opposition to Proposed Rule 1.5(e)(1)-(2). Considering the volume of material you have received and will receive about the approximately 55 new rules, I thought it would be helpful if I sent you this detailed factual and legal analysis of what the Commission has labeled "a very controversial" (the highest level used by the commission) if not the most controversial Rule change. However, in reality there is no controversy among the Bar membership. As demonstrated beginning in 1991 when the prior related proposals were rejected, the at large membership of the Bar overwhelmingly opposes abolishing nonrefundable retainers. These proposals were the subject of intense criticism by the membership in 1991, 1997 and 2008. In an attempt to give you sufficient time to analyze this comprehensive opposition, I have submitted it well in advance of the end of the June 15, 2010 public comment period.

There are a number of policy reasons why this change should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints and civil litigation, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees, the need to preserve the availability of civil and criminal legal services to the people of California including consumers of low, fixed fee services, and to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice and the right of civil litigants to be represented by any lawyer.

Rule 1.5(e), essentially prohibiting non-refundable retainers for almost all legal services, will drastically impact the economics of practicing law in California as well as the ability of people in need of representation to obtain legal services. Considering the significance of the 2009 revisions to Rule 1.5(e)(1)-(2) (abolishing nonrefundable retainers) I am especially concerned that in apparent violation of State Bar Rule 1.10 (A) this novel version of Rule 1.5 (e)(1)-(2) prepared by the Commission for the Revision of the Rules of Professional Conduct ("Commission") was neither publicized nor disseminated, in any manner prior to its November 2009 approval by the Board of Governors[1]. Therefore the membership of the Bar was

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1 §1.10 (A) requires proposals for the Rules of the State Bar of California to be circulated for public comment "before adoption" by the Board of Governors. Rule 1.5(e)(1)-(2) certainly does not meet the exceptions in Rule 1.10 B (1) for "clerical errors, [to] clarify grammar or improve organization..." or in Rule 1.10 (B) (2) that applies to "non-substantive modifications." In addition, the minutes of the November 14,

unaware[2] of this new rule or that it would be considered at the November 14, 2009 Board of Governors meeting and were unable to meaningfully respond or object and be heard at the RAC and Board of Governors' November meetings. See enclosed opposition pp. 7-12.

What is also troubling is that the Commission has not published any comprehensive or detailed factual and legal analysis for enacting these extensive changes or demonstrated that a need exists to do so. Rule 1.5(e)(1)-(2) also clearly violates the "Commission Charter." The Commission has asserted that a principle reason for this rule "is client protection." However, since 1991, I have asked the proponents of attempts to abolish non-refundable retainers for evidence supporting the claim that in California there is a pattern of unethical lawyers cheating clients by using nonrefundable retainers. None has been forthcoming.

It is also significant that this prohibition appears nowhere in the ABA Model Rules. Since the 19th Century nonrefundable retainers have been used in California and are currently permitted in many states. In fact, in 1992 the Board of Governors of the California Bar endorsed the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" so long as the written fee agreement explicitly spelled out the arrangement and that the fee was "earned when paid."[3] Their decision was widely publicized. As far as I can determine, the Commission has never provided a written analysis of this persuasive authority, advised the current Board of Governors of its existence and certainly has not demonstrated why it should be ignored by those who now sit on the Board of Governors.

In essence, the proposal abolishes and/or redefines a widely accepted historical fee arrangement and prevents fully informed clients from entering into a fee agreement, the nonrefundable retainer, that far more often than not reduces and limits the cost of legal representation. These changes will impact lawyers who practice in many areas, including immigration, entertainment law, matrimonial/divorce, civil litigation, appellate, securities, bankruptcy, tax, real estate and criminal law and their clients.

One of the most troubling aspects of the proposed Rule is that prohibiting nonrefundable retainers, see 1.5(e)(2), will make these fee payments the property of the client until the work is performed. This is so regardless of the inaccurate representation set out in Rule 1.5(e)(2) requiring a written agreement by the

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2009 meeting # 132, p. 6, reflect that the "Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment . . . (along with 65 other Rules)." This after-the-fact theoretical public comment does not satisfy the Rule 1.10(A) requirements of public comment "before adoption" or solve the notice and process problem.

2 It is indeed odd that the November 14, 2009 minutes of the Board of Governors # 132, p. 6 that "adopts" Rule 1.5(e) along with 34 other rules states "following publication for comment and consideration of comment received" "the Board of Governors adopts" 35 Rules that included Rule 1.5(e)(1)-(2). There was no "publication for comment" of Rule 1.5(e )(1)-(2).

3 See, "Request That the Supreme Court of California Approve Amendments . . . to the Rules of Professional Conduct," October 1992, page 9.

> "Although the proposed amendments would avoid use of the terms 'fixed fee,' 'flat fee' or 'non-refundable fee,' such types of retainer fee agreements would be permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid."

lawyer and client asserting that the "flat fee is the lawyer's property on receipt." The critical issue in fee forfeiture and restraining order situations is not what the fee is called but who owns the funds. See opposition pp. 31-35.

Almost certainly, in spite of the legally and factually unsupported claim by the Commission that these changes have eliminated fee restraint and/or fee forfeiture problems, in reality the changes have aggravated this serious problem, see Opposition pp. 29-35. Abolishing the nonrefundable retainer, that for years has protected clients and lawyers from fee restraints, fee forfeiture and jeopardy assessments, will expose lawyers performing many types of legal work to great financial risk. It will facilitate the restraint or seizure of fees if the client has a potential problem involving, for example, securities law, bankruptcy, criminal law, tax law and even some creditors' claims. The enclosed opposition analyzes these significant problems and poses the question of: why enact this novel and untested fee arrangement that will result in years of collateral litigation, when for more than 40 years the nonrefundable retainer has proved to be the best available fee agreement to protect the client and lawyer from fee restraint and/or fee forfeiture?

The proposed Rule changes and Comments are also confusing and internally inconsistent. Rule 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee agreements presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It will also certainly cause clients to fire their lawyer without cause and demand a refund of fees that until now have been considered and were in fact earned when received. The result will be the filing of arbitration demands, bar complaints, and civil suits. Of course, if a lawyer has seriously underestimated the work involved in a complicated "flat fee" case, which often occurs, ordinarily he will never be discharged without cause.

As I understand the ongoing developments, a number of bar associations will join in opposing these radical changes. I sincerely hope you have the opportunity to review this submission that incorporates in one document the arguments advanced by the opposition, factually and legally analyzes why a nonrefundable retainer is a necessary and appropriate fee arrangement, responds to the arguments advanced by the proponents on the Commission and demonstrates the substantial problems that will result from the enactment of Rule 1.5(e)(1)-(2).

Thank you for your consideration.

Sincerely,

TARLOW & BERK PC

Barry Tarlow

BT/sew

Enclosure

cc: Audrey Hollins

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April 29, 2010

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Re: Opposition to Proposed New Rule of Professional Conduct 1.5(e) (4-200) (Fees for Legal Services) Abolishing Nonrefundable Retainers

Dear Rex:

I am a lawyer who has represented individuals and businesses accused of crimes in state and federal courts throughout the country for over forty years. Attached as Exhibit A is my biography so that you can consider my background and experience in evaluating my qualifications to present the analysis set out in this Submission. I am seriously concerned as are many other California lawyers about the problems raised by the Commission for the Revision of the Rules of Professional Conduct's ("Commission") proposed new Rule 1.5(e) and conforming amendments to Rule 4 200 of the Rules of Professional Conduct of the State Bar of California ("Proposal"). Paragraph (e) essentially prohibiting nonrefundable retainers for legal services will drastically and detrimentally impact the economics of practicing law in California, as well as the ability of people in need of representation to obtain legal services. I am requesting a meaningful opportunity to be heard, on behalf of the members of the bar who overwhelmingly oppose these radical and unnecessary revisions of custom, practice, and the law, (1) if this matter is heard by RAC and (2) at the time it is heard by the Board of Governors.

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## INTRODUCTION

In 1992, the Board of Governors approved the continuing use of the nonrefundable retainer "earned when paid," as a perfectly appropriate fee arrangement. It endorsed the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement provided that such fees paid in advance of legal services are "earned when paid."[1] This information was widely publicized. In 1991, the Committee on Professional Responsibility and Conduct (COPRAC) first suggested that any change to the rules should explicitly add "nonrefundable retainers" as part of the definition of "true" retainers earned upon receipt. *See* May 20, 1991 COPRAC memorandum. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly nonrefundable retainer in appropriate circumstances. *Id.*

The Bar has soundly and repeatedly rejected attempts to ban the nonrefundable retainer: (1) in 1991 by the Commission, (2) in 1997 by COPRAC, and (3) in 2008 by the Commission. Now again, without notice, process, or opportunity to be heard, the Commission submitted a proposal to the Board of Governors to abolish nonrefundable retainers primarily on the grounds of consumer protection. Since 1991, we have been requesting that the Commission demonstrate any pattern of misconduct that would justify such a ban. It has been unable to do so simply because none exist.

This Proposal to ban nonrefundable retainers is a solution in search of a problem. Although the Commission's four-person subcommittee (which includes a law professor consultant, Kevin Mohr, who actually drafted the proposed rule) is no doubt knowledgeable in the ethics field, they appear to lack practical experience with how such a fee actually works in private practice. One significant example of this problem is the unsupported, undocumented and erroneous assertions that the abandonment of the 2008 proposed Rule 1.5(f) and the creation of 1.5(e)(2) has eliminated the previous problems involving fee forfeiture, restraint of legal fees or asset restraint that would deprive clients of their lawyer of choice in civil and criminal matters. See pp. 29-35, *infra*.

It has always been recognized by members of the Bar practicing in many fields, including immigration, family law, criminal law, tax law, civil trial practice, and SEC law, as well as appellate, entertainment and real estate law, that there is nothing about a nonrefundable retainer that permits a lawyer to charge an unconscionable or a clearly excessive fee. That is, the nonrefundable retainer, as with any other traditional fee

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[1] *See* October 1992 State Bar Memorandum and attachments (prepared by the Office of Professional Competence, Planning and Development in connection with a "Request that the Supreme Court of California Approve Amendments . . . to Rules of Professional Conduct"). To this point we have been unable to find a record demonstrating this document was in fact filed with the Supreme Court.

arrangement, has always been subject to well-established professional rules that apply to the unscrupulous lawyer who extracts an unconscionable fee as a "nonrefundable retainer" from a naïve client, does little or no work, and keeps the client's money. These rules include: (1) the case-by-case Rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding Rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). Common sense, fairness, and the existing protections against unconscionable fees dictate that under a nonrefundable retainer fee arrangement, if a lawyer does very little or no work, the client is entitled to a full refund.

Similarly, members of the Bar have almost universally recognized that when a client signs an agreement and pays a nonrefundable retainer, as with many contracts, there are unanticipated events that can result in a total or partial refund. For instance, a client would be entitled to a full refund if his/her lawyer is sick and unable to work on the case. Likewise, an honest lawyer would refund a $10,000 nonrefundable retainer if, shortly after receiving it, the client changes her mind and fires him/her without cause, and the lawyer has not done any meaningful work. In these and many other unanticipated circumstances, a nonrefundable retainer would be "unconscionable" under Rule 1.5(a) and an honest lawyer would refund all of the unearned portion of the fee.

If adopted, Paragraph (e), designed to essentially abolish nonrefundable retainers, will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, expose lawyers acting in good faith to disciplinary charges, arbitration, and civil lawsuits, seriously undermine the attorney-client relationship, prevent many clients from obtaining representation, and deprive clients of their lawyer of choice by facilitating the restraint or forfeiture of legal fees. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

(1) The Board of Governors adopted this Proposal without any input from the membership. Considering the significance of Paragraph (e)(1)-(2) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' adoption of the Rule. Although the minutes of the November 14, 2009 meeting ¶ 132, p. 6, reflect that the "Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment . . . (along with 65 other Rules)," such after-the-fact theoretical public comment does not satisfy the Rule 1.10(A) requirements of public comment "before adoption" or solve the notice and process problem.

(2) Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a nonrefundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of Californian lawyers have used

some form of the nonrefundable retainer (that falls outside of the limited exceptions to Paragraph (e)'s ban on nonrefundable retainers in (e)(1)-(2)).

(3) There is no identifiable abuse or pattern of wrongdoing by California lawyers resulting from the current rules that mandate the abolition of the nonrefundable retainer or that would be remedied by this sweeping change.

(4) The Proposal ignores the fact that in 1992 the Board of Governors approved the continued use of the nonrefundable retainer "earned when paid" as an appropriate fee arrangement. The Board of Governors approved the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."[2]

(5) Paragraph (e)(1) (a true retainer) and Comments [8] and [10] prohibit using a nonrefundable retainer as a minimum fee to ensure availability when the client will also be credited for future work done either on an hourly basis or for the amount of the retainer. Rule 1.5(e)(1) deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from charging a nonrefundable retainer earned when received if he does any legal work while waiting for a case to be filed or rejected.

(6) Paragraph (e)(2) and Comment [5] would often require the theoretically "nonrefundable" "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" should cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.

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[2] *See* "Request That the Supreme Court of California Approve Amendments . . . to the Rules of Professional Conduct," October 1992, page 9.

> "Although the proposed amendments would avoid use of the terms 'fixed fee,' 'flat fee' or 'nonrefundable fee,' such types of retainer fee agreements would be permissible under the proposed amendments. However, such fees would be required to be placed in the member's client trust account unless the member's written attorney-client fee agreement expressly provides that such fees, paid in advance of the provision of legal services, are earned when paid."

(7) Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the fee by representing that the fee "is the lawyer's property on receipt." However, the critical issue is not what the fee is called but who owns or has any interest in the funds.

(8) Rather than protecting the client's entitlement to a refund of the "nonrefundable" flat fee (*see* proposed Rule 1.5(e)(2)(v)), Paragraph 1.5(e)(2) actually will deprive the client from receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessment, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.

(9) Paragraph (e)(2), contrary to the Commission's claims, exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraint and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.

(10) Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee restraint/forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional right to retain the lawyer of their choice and many civil clients of their ability to obtain any legal representation.

(11) Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.

(12) The Proposal is confusing and internally inconsistent. It will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes for honorable lawyers acting in good faith.

(13) Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (specifically the "fixed fee" clause) that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.[3]

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[3] In her article in the *California Bar Journal*, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

(14) The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to an advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determinative in an ongoing case, the Rule encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.

The Commission also appears to have ignored a significant problem. If these changes are adopted and approved by the California Supreme Court, what will happen to the hundreds if not thousands of partially completed nonrefundable fee agreements? Is the simple answer that they should be honored since the Proposal would not apply retroactively? Putting aside for the moment any Constitutional prohibitions, what can possibly be done about these partially performed contracts, some of which may require legal services for two or three years into the future, for example, an agreement for representation in federal Habeas Corpus proceedings? Will the lawyer be compelled to alter partially performed contracts? What will happen if the client does not agree to the alteration or the lawyer would not have initially entered into the agreement in its altered form? How will the structure of the new contracts be determined? The permutations and combinations of potential problems are mind numbing. This is simply yet another example where the actual practice of law has been ignored in pursuit of unnecessary theoretical reforms.

The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits nonrefundable fees for performing legal services. In doing so, it abolishes and/or

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> "Lawyers are urged to use the State Bar fee forms [. . . ]. These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar fee agreement. . ." Diane Karpman, "Time for tuning up those fee agreements," *California Bar Journal* (February 2010)

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used "fixed fee clause" at pp. 30-31 of "The State Bar of California Sample Written Fee Agreement Forms" available at:
http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

redefines a widely accepted historical fee arrangement, and in reality will provide that most payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as "the lawyer's property upon receipt." At the same time, in violation of the theoretical rationale for abolishing nonrefundable retainers, it leaves in place in Rule 1.5(e)(1) a nonrefundable fee that is a "true retainer."

## I. PROCEDURAL PROBLEMS CONCERNING THE MANNER IN WHICH THE COMMISSION OBTAINED THE BOARD OF GOVERNOR'S ENDORSEMENT OF THE 2009 PROPOSAL

Many lawyers in California share my concern about the process or lack thereof that resulted in the Board of Governors' passage of Rule 1.5(e)(1) and (2). The concern focuses on the lack of any prior opportunity to comment on the version of Rule 1.5(e) that was approved by the Board of Governors on November 14, 2009. Prior to the rule being sent out for final comment with the 65 other rules and the endorsement of the Board of Governors, the membership of the Bar and interested local Bar associations should have been given the opportunity to: (1) submit public comments before the rule was approved and (2) appear before the board to present their opposition to this controversial, novel, and literally unprecedented change to the Rules.

### A. Lack of Notice/Process Surrounding Commission's Abandoned 2008 Proposal To Prohibit Nonrefundable Fees

The Commission attempted to prohibit nonrefundable fees in 2008 without effectively informing the Bar membership of its attempt to do so. Although they posted a 209-page Discussion Draft of 13 proposed amendments to the rules of professional conduct (including the prior proposed Rule 1.5(f) banning nonrefundable retainers) on the State Bar website, the Commission's 2008 proposal to ban nonrefundable retainers was not meaningfully publicized. As discussed below, for example, posting a short article in the May 2008 California Bar Journal related to the Commission's proposed revisions to 13 Rules of Professional Conduct that did not mention this radical change.

I only discovered this specific provision after reading the May 2008 edition of the *California Bar Journal* about the Commission's proposed revisions to 13 Rules of Professional Conduct, and learned that the deadline for public comment was June 6, 2008. I was interested in a totally different Rule and it was only by chance in early May 2008, after printing and reviewing 209 pages of information from the website regarding all 13 Rules, that I first noticed the provision prohibiting nonrefundable retainers. I do not recall at the time seeing anything on the Bar's home page about existing Rule 4-200 to be revised as Rule 1.5(f) that would abolish nonrefundable retainers.

This short *California Bar Journal* article did not describe, discuss, or mention the proposed revision to abolish nonrefundable retainer fees. This provision may have possibly been mentioned somewhere. However, I certainly never read about it and no lawyer had previously discussed it with me. I have not yet spoken to any lawyer, other than perhaps someone who was a member of the state or local bar association ethics committee, who in early May 2008 was aware that this specific Proposal existed, even though I have attempted to find members of the Bar who were aware of this drastic change. Most California lawyers were completely unaware that these significant changes to Rule 4-200, referred to as new Rule 1.5(f), had been proposed.

When I learned of the 2008 proposal in May of 2008, I was able to advise a relatively small number of members of the California Bar and several bar associations about these proposed radical changes.[4] At that time, the public comment window expired on June 6, 2008.

The Commission received a number of comments complaining about the lack of notice and process. In response to the complaints that the former 2008 proposal had not been publicized in a manner that permitted members to respond, the Commission later stated:

> "The proposal was issued for a 90-day public comment period posted on the State Bar website and was also the subject of a public hearing in Sacramento that was noticed by several methods, including: a posting at the State Bar website; public notices in the *Daily Journal*, the *Daily Recorder*, and the *Sacramento Bee*; e-mail notifications to approximately 14,000 interested persons; and a press release to the media." *See* Public Comment Chart, Exh. 1 to the Executive Summary.

As far as I knew, not one publication mentioned by the Commission actually discussed the proposal to ban nonrefundable retainers. On March 17, 2010, I received via email from Randall Difuntorum requested copies of what appear to be all of the publications, including several different emails, that the Commission maintains provided adequate notice of the 2008 proposal to ban nonrefundable retainers. A review of these materials reveals that nowhere in the emails or anywhere else did the Commission ever explicitly publicize or state that it was going to take up the issue of nonrefundable retainers, let

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[4] With the 2008 Proposal, the Commission also did not publish any rationale for enacting this comprehensive change or demonstrate that a need exists to do so. It failed to publish a comprehensive legal and factual analysis of this revision anywhere in its 209-page March 2008 Discussion Draft of the 13 proposed amendments or anywhere on the State Bar website.

alone seek to prohibit them altogether. Indeed, no version or parts of the words "nonrefundable retainer" appear even once in any of these materials.[5]

Moreover, even if the materials had provided some sort of information about their efforts to abolish nonrefundable retainers, many, if not most, of those materials would not have afforded concerned members of the Bar adequate time to act within the 90-day comment period scheduled to end on June 6, 2008. The brief notices for a public hearing on "Proposed Amended Attorney Rules of Professional Conduct" that appeared in the *Los Angeles Daily Journal*, the *Recorder*, and the *Sacramento Bee*, for example, were first published on May 15, just a week prior to the May 22 Sacramento hearing, which itself was only two weeks prior to the end of the 90-day comment period.

It is therefore hardly surprising that not a single well-respected and established Sacramento lawyer that I personally spoke with (approximately five to ten) knew, prior to conversing with me, of a public hearing in Sacramento that was noticed in the publications discussed above and that would deal with a proposal to ban nonrefundable retainers. The methods used to notice the 2008 proposal to ban nonrefundable retainers were also clearly ineffective in giving actual notice of this sparsely-attended public hearing.

### B. The Manner In Which The Commission Obtained Board of Governors Approval of The 2009 Proposal To Ban Nonrefundable Retainers

In August of 2008, the Commission's prior proposed approach that was Rule 1.5(f) was abandoned. This proposed rule consisted of one sentence.

In late 2009, the Commission totally redrafted Rule 1.5 and expanded it in a new paragraph (e) and five accompanying Comments [7]-[11] (which were not a part of the 2008 proposal). The Commission presented this new proposed rule, along with 34 other rules to the Board of Governors for approval in November of 2009, without informing the

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[5] For example, the notices of public comment published in the *California Bar Journal* merely noted that the Commission was considering proposed amendments to rules that governed a wide variety of issues including "fees for legal services," while the notices of public hearing published in the *Los Angeles Daily Journal*, the *Recorder*, and the *Sacramento Bee* provided no information whatsoever about any of the proposed rule changes. Assuming someone sorted through the public notices in these publications and discovered the Commission's notice, all they would have learned was that there was a Sacramento meeting about "proposed amended attorney rules of professional conduct." The emails sent out to theoretically interested parties similarly failed to mention anything about nonrefundable retainers, either providing no details about any of the proposed rule changes or listing a number of potential changes unrelated to nonrefundable retainers.

membership of the State Bar or even the known stakeholders who vigorously opposed the 1991, 1997 and 2008 proposals. It is unlikely that any meaningful number of members of the California Bar, other than for example a lawyer who is on the Commission or a member of the Board of Governors, or perhaps some member of a local Bar ethics section, actually knew about the latest Proposal (draft Rule 1.5(e)) and the Commission's attempt to present it to the Board of Governors for approval. There was no time or opportunity to learn about, scrutinize, or comment on draft Rule 1.5(e).

Obviously, since there was no notice that the meeting agenda involved a proposed draft of Rule 1.5(e) that in fact dealt with a ban on nonrefundable retainers was distributed to the members of the Bar, no one opposing the proposal could appear before the Regulations and Admissions Oversight Committee ("RAC") or the Board of Governors on November 12 through 14, 2009 to raise the host of problems with this new version of Rule 1.5(e).

However, the proponents of these radical changes did in fact have the opportunity to advance their agenda and did appear before RAC and approximately 17 members of the Board of Governors at the November 12, 2009 RAC meeting. Harry Sondheim, Chairperson of the Commission and the co-chair of the four person Subcommittee responsible for drafting Rule 1.5(e), and Professor Kevin Mohr, who drafted this new proposal, were present. Coincidentally Mr. Sondheim was Chair of the Commission in 1991 when, using a different approach and rationale, it was a major proponent of abolishing nonrefundable retainers.

So far as I know the fact the board would deal with the issue of nonrefundable retainers was not published and/or disseminated on any board agenda. The Board of Governors' meeting agenda for November 2009 only mentioned: "Rules of Professional Conduct, Proposed New and Amended, Batches 1, 2, and 3, Return from Public Comment." *See* BOG agenda for the November 2009 meeting available at: http://bog.calbar.org/pages/Agenda.aspx?id=10237&t=0&s=false. The public comment letters sent in the spring of 2008 could not have addressed Rule 1.5(e) submitted to the Board of Governors in November of 2009.

Despite the overwhelming opposition to this Rule, I do not believe any member of the Bar wrote to the Commission or the Board of Governors about (e)(1) and (2) and of course no member of the Bar appeared before the RAC or the Board of Governors to oppose this rule. All quite logical since how could any member of the Bar who opposed the rule appear at a meeting about which they were unaware? In fact, I have not heard that the merits of the proposed ban on nonrefundable retainers was even discussed at the Board of Governors meeting. The minutes of the Board of Governors' November meeting do not reflect any such discussion. Although Rule 1.5(e) was designated as one of the most controversial changes, the unofficial recording of the November 12 RAC

meeting reflects that there was no discussion of Rule 1.5(e) and the approximately 17 members of the Board of Governors who attended that meeting heard only a brief discussion of Rule 1.5 about whether the words unconscionable or unreasonable should appear in 1.5(a). It appears from the recording that the word nonrefundable was never mentioned. The minutes of the November RAC meeting do not reflect anything different. However, at the November meeting, Rule 1.5(e) was approved by the Board of Governors along with approximately 33 other Rules.

In December 2009, the California Bar Journal published a small article announcing that 35 revisions of the professional conduct rules won approval by the Board of Governors. This after-the-fact announcement (after the Board of Governors had already endorsed the Proposal) was the only publicity I am aware of given to the new proposed draft Rule 1.5(e) which had already been endorsed by the Board of Governors and the article made no mention of the newly drafted and renumbered paragraph (e) prohibiting nonrefundable retainers. Rather, it only stated:

> "at its November meeting, the Board of Governors approved [35] rule revisions that . . . retain current standard prohibiting, for disciplinary purposes, an 'unconscionable fee.' The commission had been considering adopting ABA's standard that prohibits an 'unreasonable fee.' (Rule 1.5)."

Like the 10-page October 23, 2009 "Executive Summary" submitted to the Board prior to the November meeting, this article did not mention one word about the proposed Rule to change the way fees are structured in California by, among other revisions, the abolishment of nonrefundable retainers.

On November 16, 2009, the State Bar issued a press release that the "Board of Governors has approved 35 revisions of the California Rules of Professional Conduct." Approximately one week later, I learned of the decision about Rule 1.5 made by the Board of Governors. Since that time, I have discussed this matter with a cross-section of the Bar membership from throughout California and have not found lawyers who were aware that a decision about whether to approve Rule 1.5(e)(1) would be made by the Board of Governors at its November 2009 meeting.

### C. The Commission Violated Rules Of The State Bar 1.10 By Failing To Circulate The Proposal For Public Comment Before Adoption

Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar of California to be "circulated for public comment before adoption, amendment, or repeal by the Board of Governors." Section 1.10(B)(1) states that Public Comment is not required:

> "(1) to correct clerical errors, clarify grammar [or] improve organization" or

"(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal."

The 2009 Proposal cannot be reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008 proposed Rule 1.5(f). The 2008 proposal consisted of one sentence of 47 words from which the Commission later removed 32 words. The 2009 Proposal adds approximately 557 new words to Rule 1.5 and the "Comments" and creates an entirely new structure concerning "flat fee" arrangements. Any comments received by the Commission in the spring of 2008 about the proposed Rule 1.5(f) that was abandoned by the Commission in August of 2008 could not have been directed at the 2009 Proposal adopted by the Board of Governors in November of 2009. Rule 1.5(e)(1)-(2) did not even exist on June 6, 2008 when the comment period ended for the abandoned proposal.

The Board of Governors adopted this 2009 Proposal without any input from the membership.[6] Considering the significance of Paragraph (e)(1)-(2) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' adoption. *See* Rule of the State Bar 1.10(A) ("Public Comment") requiring Proposals for the Rules of the State Bar to be "circulated for public comment before adoption, amendment, or repeal by the Board of Governors."

Finally, the minutes of the November 14, 2009 meeting #132, p. 6, note that the "Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment . . . (along with 65 other Rules)." Such after-the-fact theoretical public comment does not satisfy the Rule 1.10(A) requirements of public comment "before adoption" or solve the notice and process problems.

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[6] It is indeed odd that the November 14, 2009 minutes of the Board of Governors # 132, p. 6 that "adopts" Rule 1.5(e) along with 34 other rules states: "following publication for comment and consideration of comment received that the Board of Governors . . . adopts" the 35 Rules that include Rule 1.5e(1)-(2). There is no doubt there was no "publication for comment" of Rule 1.5e(1)-(2). In spite of the number of members of the Board of Governors and their staff who were present at (1) the RAC and (2) the Board of Governors' meeting, it appears due to the enormous volume of material that no one recognized that Rule 1.5(e)(1)-(2) had never been circulated for public comment.

## II. ANALYSIS OF THE SUBSTANTIVE PROBLEMS WITH PROPOSED RULE 1.5(e)

### A. Description of the Proposal:

In November of 2009, the California State Bar's Board of Governors adopted the new proposed Rule 1.5(e) (referred to as "The Proposal"). The Proposal states:

> (e) A lawyer shall not make an agreement for, charge, or collect a nonrefundable fee, except:
>
> (1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.
>
> (2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

The Proposal also includes several comments (numbered [7] through [11]), in addition to the already existing Comment [5], that state:

> [5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to

bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.

[7] Every fee agreed to, charged, or collected, including a fee that is a lawyer's property on receipt under paragraph (e)(1) or (e)(2), is subject to Rule 1.5(a) and may not be unconscionable.

[8] Paragraph (e)(1) describes a true retainer, which is sometimes known as a "general retainer," or "classic retainer." A true retainer secures availability alone, that is, it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services, is not a true retainer under paragraph (e)(1). The written true retainer agreement should specify the time period or purpose of the lawyer's availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer's property immediately on receipt.

[9] Paragraph (e)(2) describes a fee structure that is known as a "flat fee". A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort the lawyer expends to perform or complete the specified services. If the requirements of paragraph (e)(2) are not met, a flat fee received in advance must be treated as an advance for fees. See Rule 1.15.

## B. The Proposal is the latest effort by the Commission to prohibit nonrefundable retainers[7] in California.

### 1. Past efforts to abolish the nonrefundable retainer

The Proposal is the latest effort by the Commission to amend Rule 1.5 (4-200) to abolish nonrefundable retainers. Similar though somewhat different proposals were made by the Commission in 1991[8] and 2008[9] and by the Committee on Professional

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[7] "Nonrefundable retainer" refers to nonrefundable retainers, true retainers, advance fees earned when received, and minimum fees.

[8] *See* proposed and rejected amendments to State Bar Rule 4-100 (Preserving Identity of Funds and Property of a Client) and Rule 3-700 of the Rules of Professional Conduct (Termination of Employment) (1991). The vast majority of the public comment was in opposition to the proposed 1991 amendments, which were ultimately withdrawn.

[9] A 209-page Discussion Draft for 13 proposed Rules of Professional Conduct, including proposed Rule 1.5(f), is posted on the State Bar website. Proposed Rule 1.5(f) stated:

Responsibility and Conduct ("COPRAC") in 1997.[10] They were soundly rejected based on the overwhelming number of negative responses from a wide cross-section of California lawyers.

In fact, in 1992, the Board of Governors concluded that a nonrefundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." *See* October 1992 State Bar Memorandum (prepared by the Office of Professional Competence, Planning and Development). Indeed, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "nonrefundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly nonrefundable retainer in appropriate circumstances. *Id.*

In August 2008, the Commission scrapped the pending proposed revision to Rule 1.5(f) and instead decided to redraft Rule 1.5 to incorporate the following concepts: (1) that nonrefundable fees for the performance of future services would be prohibited; (2)

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> "A lawyer shall not make an agreement for, charge, or collect a nonrefundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter."

Aside from the posting of this 209-page Discussion of 13 proposed Rules on the state bar website, the proposed revision to abolish nonrefundable fees, as far as we know, was not publicized other than a short article in the May 2008 California Bar Journal that made no mention of nonrefundable retainers. Most California lawyers were completely unaware that these significant changes to Rule 4-200 had been proposed. For a more detailed discussion of the failure to give meaningful notice of this 2008 proposal to the vast majority of the Bar membership, *see* pp. 7-9, *supra.*

[10] *See* proposed and rejected State Bar Rule 4-110 (Advance Payment of Fees for Legal Services) and amendments to Rules 3-700 (Termination of Employment) and 4-100 Preserving Identity of Fund and Property of A Client) (1997). The public comment information on the proposed 1997 amendments is unavailable for purchase or review on the State Bar website.

that a "true retainer" fee would be permitted; and, (3) that a fixed or flat fee would be permitted subject to compliance with stated requirements such as the requirements used in Washington's proposed Rule 1.5(f)(2). Commission Meeting Notes of August 29-30, 2008 meeting.[11] The Proposal is the result of this drafting decision.

### 2. Drafters' Clear Intent Is To Abolish The Nonrefundable Retainer

The Proposal begins with the statement that a lawyer "cannot make an agreement for, charge, or collect a nonrefundable fee, except . . ." This language demonstrates the Commission's[12] clear intent to abolish, nonrefundable retainers, advance fees earned when received, and minimum fees subject to the limited exceptions in (e) (discussed below). The Commission's intent is also apparent from the comments made by the Commission members and drafters during the drafting of the Proposal and demonstrates a myopic focus on linguistics and a profound misunderstanding of firmly established custom and legal principles. They state, for example:

- ". . . The concept of nonrefundable fee does not fly, except to the extent it is a true retainer which means it genuinely is earned upon receipt in return for the lawyer making himself or herself available to provide legal services for a period of time. . ." (August 15, 2008 email drafted by Commission consultant Mohr);

- ". . . I suggest tweaking 1.5(f) to clarify our intent, namely, prohibiting the designation of a fee to a client as nonrefundable when in fact it may be refundable." (August 16, 2008 email drafted by Commission Chair Sondheim);

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[11] The August 2008 drafting decision also included "restrictions (in the rule or in the comments) on what lawyers can or cannot say to their clients to avoid misleading clients about the refundable nature of a fee (e.g., proposed Washington Rule 1.5(g))." Commission Meeting Notes of August 29-30, 2008 meeting. These restrictions were abandoned by the Commission after they failed to pass in Washington.

[12] "The Commission" refers to the Special Commission for the Revision of Rules of Professional Conduct, chaired by Harry Sondheim. Mr. Sondheim was also the Chair of the 1991 Commission that proposed amendments to State Bar Rule 4-100 (Preserving Identity of Funds and Property of a Client) and Rule 3-700 of the Rules of Professional Conduct (Termination of Employment). This proposal would have eliminated fees for future services, including nonrefundable retainers, fees earned when received, and minimum fees. The vast majority of the public comment was in opposition to the proposed 1991 amendments, which were ultimately withdrawn.

- "I suggest we . . . have a comment which indicates that a fee described as a 'flat fee' (as well as any other type of fee that the Commission wishes to set forth) is not deemed by the use of that phrase to be describing a fee that is not refundable. . ." (August 16, 2008 email drafted by Commission Chair Sondheim);

- ". . . it seems to me that, even in the situation of a naming retainer, we should not describe the retainer as nonrefundable. . . I think there is no such thing as a nonrefundable retainer. . ." (August 22, 2008 email drafted by Sapiro); and,

- ". . . [Commissioner Sapiro's] statement that "there is no such thing as a nonrefundable retainer" is, of course, absolutely correct. I agree wholeheartedly." (August 22, 2008 email drafted by Julien).

As explained below, these comments (and the Proposal itself) demonstrate that the members of the drafting subcommittee and certainly the professor who was the primary drafter have little understanding of how nonrefundable retainers actually function in private practice. It is doubtful they have any meaningful experience or substantial involvement in negotiating and drafting nonrefundable fee agreements for paying clients and collecting or refunding these fees, for example, in criminal, immigration and SEC cases. If they in fact had practical experience in drafting nonrefundable fee agreements while actually practicing criminal law, they would understand what young criminal lawyers have been taught for generations or have learned through personal and sometimes painful experience. That is that such fee arrangements for nonrefundable retainers are essential to the economic viability of an active criminal practice. It is quite frankly indisputable that many individuals charged with crimes either because of their character or economic misfortune simply do not pay their legal fees.

## C. The Narrow Exceptions of Section (e) Do Not Permit Traditional, Nonrefundable Fee Arrangements That Benefit Clients.

### 1. Exception (e)(1) – "True Retainer"

The authors of "The Truth about True Retainers" in the April 2010 issue of *California Lawyer* described this type of nonrefundable retainer as "very very rare" and a "vestige of days gone by." Paragraph (e)(1) may well prohibit, for example, the long-established practice of charging a minimum earned when received fee to ensure availability of a specific lawyer who often has exceptional qualifications if the client will also be credited for future work done either on an hourly basis or for the amount of the

true retainer. This arrangement benefits the client because the client may not need to pay additional fees until: (1) the true retainer is used up under an hourly or date related calculation, if it is and/or (2) until some conditional event occurs (i.e. filing of criminal charges or a civil suit), even though the lawyer will remain available and do all necessary work, under the initial minimum earned when received fee, for agreed upon services (including attempting to prevent the filing of a case). Paragraph (e)(1), however, appears to not permit this arrangement because if any portion of the original true retainer is used to pay for the attorney's work in the potential case, then the entire fee is automatically converted into an advance, unearned fee. *See* Comment [8].[13] Paragraph (e)(1), therefore, deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received.

If this arrangement is characterized as a "true retainer" and this requirement that the lawyer be additionally compensated for any actual work conforms with existing law, there is currently a far better solution. The Commission fails to discuss or analyze the relatively common use of hybrid fees. There is no reason a nonrefundable retainer or minimum fee cannot serve as payment for precharging representation to cover: (1) availability, and/or specialized knowledge and experience as well as, for example, (2) serve as a minimum advance fee earned when received for active representation until the time a decision is made as to whether criminal charges or a civil suit will be filed with (3) the full payment also credited as discussed above for necessary legal work performed prior to the filing of a civil suit or criminal charges. However, the fee for these services will be no less than the minimum fee. If the work exceeds the minimum fee, as computed hourly or an agreed upon future date passes, then the client can be billed as

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[13] Paragraph [8] describes a "true retainer." "It presumes the lawyer is to be additionally compensated for any actual work performed." The section goes on to say, "Therefore, a payment . . . "to secure a lawyer's availability, but that will be applied to the client's account as the lawyer renders services is not a true retainer under paragraph (e)(1)."

Under this proposal, if the lawyer chooses to be generous and reasonable in the negotiation of the availability retainer and decides to treat the payment as a minimum fee and give the client credit for any substantial work that will be performed until, for example, a decision is made about whether a case is filed, the entire balance of the availability retainer can no longer be considered as earned when received. Therefore, the hourly billing or additional fixed fee clock would begin running if the lawyer performs any substantive work. Under Comment [8] of the Proposal, this nonrefundable fee is no longer nonrefundable, but instead becomes a refundable, advance fee. As discussed above, this prohibition of charging nonrefundable retainers as a minimum fee with a credit against future services, if any, hardly serves the interest of the client or public.

agreed hourly or by an additional fixed fee for future work prior to the decision on whether the charges or a civil claim will be filed. If charges are filed so that in fact there is an actual case, the lawyer and the client can attempt to agree on a reasonable fee arrangement for further specified legal work or the entire case. This arrangement is obviously in the best interest of the client who has paid a nonrefundable retainer or true retainer or minimum fixed fee earned when received and who receives both availability and legal services for that payment.

In fact, just such a minimum fee agreement[14] was approved by the North Carolina State Bar in an October 24, 2008 ethics opinion. The Model Fee Provisions also state that ". . . The following paragraphs contain suggested or recommended language. Lawyers are not required to use these model fee provisions. This Model Fee Agreement does not mention the dreaded N word (nonrefundable) and disposes of the unpersuasive linguistic analysis applied by some members of the Commission.

### 2. Exception (e)(2) – "Flat Fee"

Paragraph (e)(2) (*see* Exh. 2) is the product of the Commission's attempts to "assuage" their critics by attempting to make their attempted abolition of the

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[14] "**Minimum Fee**

As a condition of the employment of Lawyer, Client agrees to pay $_____ to Lawyer. The money is a minimum fee for the reservation of Lawyer's services; to insure that Lawyer will not represent anyone else relative to Client's legal matter without Client's consent; and for legal work to be performed for Client.

**Client understands and specifically agrees that:**

- the minimum fee will be earned by Lawyer immediately upon payment and will be deposited in Lawyer's business account rather than a client trust account;

- Lawyer will provide legal services to Client on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement until the value of those services is equivalent to the minimum fee; thereafter, Client will be billed for the legal work performed by Lawyer and his/her staff on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement; and

- when Lawyer's representation ends, Client will not be entitled to a refund of any portion of the minimum fee, even if the representation ends before Lawyer has provided legal services equivalent in value to the minimum fee, unless it can be demonstrated that the minimum fee is clearly excessive fee under the circumstances."

nonrefundable retainer "more palatable" to their critics.[15] This novel and convoluted fee arrangement appears at first to allow for "nonrefundable" flat fee agreements "which constitute[] complete payment for those services" so long as there is a written fee agreement that states, "in a manner that can easily be understood by the client," a number of things including: "(v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed." The obvious problem with paragraph (e)(2) is that if any portion of a "nonrefundable" fee "may be" refundable, then the entire fee cannot be the lawyer's property.

The less obvious but equally troubling problem is that when read in context of the entire Rule and Comment [5], Paragraph (e)(2) would often require that the presumably "nonrefundable" flat fee cover fees for services spanning the entire length of the case, including trial.[16] Particularly in complex cases, since this flat fee is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. If the attorney was either fired without cause or withdrew from the case before trial or the case resolved before trial, the fees that would have covered the trial would have to be refunded (either on a pre-tax or post-tax basis)[17] because they are not earned.[18]

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[15] Following public comment in 2008, there was a series of email exchanges and memoranda between the drafting subcommittee members concerning the overwhelming criticism of the former proposed Rule 1.5(f) (prior attempt to abolish nonrefundable retainers). Among them is an August 13, 2008 Memorandum from Paul Vapnek to the members of the Commission where he asks whether there is anything the Commission could do to "make the bitter pill more palatable to our critics?"

[16] *See* detailed discussion at pp. 27-29, *infra*.

[17] Lawyers pay income taxes on nonrefundable fees. Under Paragraph (e), the lawyer may have to pay income tax on the "nonrefundable" flat fee paid when received from the client even though it may be refundable.

[18] One important purpose of a "flat fee" or "fixed fee" that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or based upon the time that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the "fixed fee" is often an educated but fair estimate, since there is no way to determine how or when, for example, a civil litigation or administrative matter or a criminal case will be resolved.

On closer examination, Paragraph (e)(2) does not actually permit truly "nonrefundable" "flat fees" as the Commission asserts that it does. The Commission's effort to dress up the ban on nonrefundable retainers in an attempt to make it more palatable to the critics fails and actually creates more problems for the lawyer and the client. *See* discussion in section [E] below concerning the many substantive problems with section (e)(2) of this Proposal.

## D. The Proposal is A Solution in Search of A Problem.

The Proposal suggested by the Commission is truly a solution in search of a problem. There simply has not been a pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the nonrefundable retainer or which would be remedied by this sweeping change. With the latest Proposal, the Commission offers a one-sentence rationale,[19] theoretically supported by two relatively ancient cases:

> "Paragraph (e) has no counterpart in the [ABA] Model Rule.[20] **The Commission recommends its adoption because charging a nonrefundable fee is inimical to California's strong policy of client**

[19] In support of the proposed Rule, the Commission relies solely on two off point, seventy-plus year old cases (dated 1931 and 1934), neither of which dealt with nonrefundable retainers; rather, they both dealt with the unconscionability standard. *See* Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Attachment 1, p. 64 (October 23, 2009); *Herrscher v. State Bar*, 4 Cal. 2d 399, 402 (1934) and *Goldstone v. State Bar*, 214 Cal. 490, 498 (1931). The rule announced in these cases was:

> "Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the attorney performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court."

[20] The ABA Model Rules contain no prohibition on "nonrefundable fees" and "earned upon receipt fees." *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt.[f] (2000) ("if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer" and need not be deposited in a client trust account).

**protection.** The prohibition stated in the introductory clause of paragraph (e) is subject to two traditional exceptions, as discussed below. Much of the language used in this paragraph is taken from Washington Rule 1.5(f)." (Commission's Explanation of Changes to the ABA Model Rule, Exh. 1 to Executive Summary[21] at p. 77)

The Commission, however, fails to demonstrate that clients need protection from a pattern of willful misconduct by the membership of the State Bar involving the nonrefundable retainer. No recent California reported cases have demonstrated any pattern of knowing abuse involving nonrefundable retainers. The Commission has failed to cite a single, recent reported California case to support the need for Paragraph (e) (despite our repeated requests since 1991).[22] It ignores the reality that thousands of Californian lawyers have been using some form of the nonrefundable retainer (that fall outside of the limited exceptions to Paragraph (e)'s ban on nonrefundable retainers in (e)(1) and (2)) since the 19th century without creating any identifiable pattern of willful abuse.[23]

The Commission ignores and fails to disclose that in 1992 the Board of Governors concluded that a nonrefundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "nonrefundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the

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[21] On October 23, 2009, Randall Difuntorum distributed his Executive Summary re: "Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2 and 3 – Return from Public Comment" to the Members of the Board of Governors and the Members of the Board Committee on Regulation and Admissions. Attached to the Executive Summary were over 2,000 pages of exhibits (Exh. 1 [includes Introduction and Dashboard for proposed Rule 1.5] – 922 pages, Exh. 2 – 1022 pages, and Exh. 3 – 252 pages, Exh. 4 – 125 pages).

[22] It similarly failed to explain previous proposed Rule 1.5(f) anywhere in its 209-page March 2008 Discussion Draft of the 13 proposed amended Rules of Professional Conduct or anywhere on the State Bar website.

[23] There are a myriad of examples of legal transactions other than criminal matters that have traditionally involved nonrefundable retainers, fees earned when received, and minimum fees that are not calculated based on the time devoted to the assignment. These legal transactions are in a variety of practice areas, including: (1) real estate, (2) criminal law, (3) securities, (4) family law, (5) tax, (6) entertainment, (7) bankruptcy, (8) immigration, (9) appellate law, and (10) SEC matters.

arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."[24] See, *supra*, p. 15.

Aside from the unsupportable position that in California this novel rule is justified by the need for client protection, most of the Commission's arguments are essentially sophistry. To justify creating Proposed Rule 1.5(e) a number of members of the Commission advanced the startling proposition that "there is no such thing as a nonrefundable retainer," *supra*, pp. 16-17 in spite of, for example, its specific approval by the Board of Governors in 1992. Indeed, in many jurisdictions the use of nonrefundable retainers has been recognized for decades as appropriate, if not essential, in both criminal and civil cases.[25] Although Paragraph (e) abolishes the well-recognized and long-utilized nonrefundable retainer (with the exception of the extremely limited categories discussed above), the Commission has not, and indeed cannot, demonstrate: (1) any need to completely alter the way law has been practiced in California or (2) how well this novel procedure will work in the actual practice of law.

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[24] Ironically, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "nonrefundable retainers" as part of the definition of "true retainers" earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly nonrefundable retainer in appropriate circumstances. *Id.*

[25] John M. Burkoff, Criminal Defense Ethics 2d: Law & Liability, § 10.1, at 455 (2009). *See also, e.g.,* John Wesley Hall, Jr., Professional Responsibility in Criminal Defense Practice (2d ed. 2005) at § 7:9, p. 184 (noting that "[m]ost ethics committees to have passed on the question permit this distinction in fee agreements that non-refundable retainers are permissible if properly handled") (emphasis deleted); *Bunker v. Meshbesher,* 147 F.3d 691 (8th Cir. 1998) (Minnesota); *Grievance Administrator v. Cooper*, SC135053 (December 12, 2008) (Michigan Supreme Court rules a nonrefundable minimum fee with credit against an hourly charge "incurred upon execution of the agreement, regardless of whether the representation was terminated by the client" is perfectly appropriate); *In re Connelly,* 203 Ariz. 413 (2002) (Arizona); *In re Kendall,* 804 N.E.2d 1152 (Ind. 2004 (Indiana); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of nonrefundable retainers); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Texas Op. 431 (1986) (affirming use of nonrefundable retainers); Maryland Op. 87-9 (a nonrefundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) ("When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid..."); Kentucky Op. 380 (1995) (affirming use of nonrefundable retainers).

The critical question here is not whether a rogue lawyer can gouge, exploit, and steal from his/her client using a nonrefundable retainer or whether nonrefundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves and memorialized in a written fee agreement that meets the requirements of Cal. Bus. & Prof. Code §6148(a) and Rule 1.5(a)).[26] Rather, the critical inquiry is whether the non-fraudulent or ethical use of nonrefundable retainers is nonetheless so corrosive as to require a per se prohibition. The answer to this question is a resounding no.

First, the membership of the Bar, though at times mistaken about the proper terminology used to describe a fee, has always recognized there is nothing about a nonrefundable retainer that permits a lawyer to charge an unconscionable or a clearly excessive fee.[27] That is, the nonrefundable retainer, as with any other traditional fee arrangement, has always been subject to well-established professional rules that provide a sufficient basis on which to discipline the unscrupulous lawyer who extracts a "nonrefundable retainer" from a naïve client, does little or no work, and then, after being fired, keeps the client's money. These rules include: (1) the case-by-case rule against charging excessive fees (Rule 4-200 of the Rules of Professional Conduct) and (2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule of Professional Conduct 1.16). Common sense fairness as well as the existing protections against unreasonable and unconscionable fees demand that under a nonrefundable retainer arrangement, if a lawyer does no work and is fired with or without cause, the client is entitled to a full refund.

Second, the Bar membership who have relied on these types of fee arrangements have also recognized that there are unanticipated events, as there are in any contractual

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[26] Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?

[27] A nonrefundable retainer is, and will be, evaluated for reasonableness. *See, e.g.,* Rule 4-200(A) of the Rules of Professional Conduct (prohibiting lawyers from gouging their clients by charging unconscionable fees); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Florida Rule 4-1.5 (explicitly acknowledging the propriety of nonrefundable retainers subject to review to ensure the fee was not "clearly excessive"); *In the Matter of Scapa*, 2 Cal. State Bar Ct. Rptr. 635, *24 (Rev. Dept., 1993) (finding lawyers attempted to charge "unconscionable fees" under Rule 4-200).

agreement, that result in the refunding of a nonrefundable retainer. The issue is not about semantics or the sophistry embraced by some Commission members who assert "there is no such thing as a nonrefundable retainer." For example, a client would be entitled to a full refund of the nonrefundable retainer if his/her lawyer gets sick and does no work. Similarly, an honorable and honest lawyer would refund the balance of a $10,000 nonrefundable retainer if, two weeks after receiving it, the client fires him/her without cause and the lawyer has performed little, if any, services. In these "unanticipated circumstances," a nonrefundable retainer would be "unconscionable" and almost all lawyers would refund the unearned portion of the fee. There is nothing about the way a nonrefundable retainer works in practice that permits a lawyer to charge and keep an unconscionable fee.[28] The sophisticated lawyers on the State Bar Board of Governors understood and considered these simple concepts in 1992, *see* October 1992 State Bar Memorandum and attachments Prepared by the Office of Professional Competence, Planning and Development discussed *supra*, when they concluded a nonrefundable fee earned when received was a perfectly appropriate fee agreement. *See* discussion at p. 15, *supra.*

Third, the Proposal is a source of overreaching and proves too much.[29] Though there are, no doubt, some lawyers who cheat and gouge their clients while theoretically

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[28] While the Proposal permits the concept of a nonrefundable true retainer (to mean a retainer for availability and does not permit the lawyer to do any work to be applied against the true retainer), *see* proposed Rule 1.5(e)(1) and Comment [8], the true retainer is subject to the same unanticipated circumstances. For example: (1) the lawyer may inadvertently become involved in representation that later creates a conflict and the lawyer only later recognizes a conflict with his or her representation of the client. Therefore, the lawyer could not represent the client in the future so he would have to refund a true retainer; or (2) the lawyer could get sick and not be able to represent the client if a civil or criminal case is filed. Therefore, once again, a refund would have to be made of the "true retainer."

The Commission's treatment of the true retainer from other forms of the nonrefundable retainer is neither consistent nor justifiable.

[29] According to the minority of the Commission who opposed the Proposal:

> ". . . proposed paragraphs (e) and (e)(2) as drafted would be a source of overreaching and confusion. The minority argues that there are many different fee arrangements involving flat or fixed fees. While a lawyer may require advance payment of a fixed or flat fee, the lawyer remains obligated under the rules in all jurisdictions, including Washington, to return any unearned portion. See Model Rule 1.16(d); current California Rule 3-

charging hourly rates (by padding their bills or charging unconscionable fees or having inexperienced lawyers spending endless hours on a simple legal matter, *see, e.g.,* Cal. Ethics Op. 1996-147 [billing clients for work performed on two or more matters at a time]), there is no effort by the Commission to impose a ban on hourly billing. Basic negotiation of fee contracts is still left to lawyers and their clients with some limited exceptions. Similarly, the fact that dishonest lawyers have had problems with trust accounts did not result in an effort to abolish trust accounts.

The unconscionable fee limitation in Rule 1.5(a) already protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Moreover, in the absence of demonstrable abuses that can be remedied by a ban, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers and not, for example, the generation of substantial increases in income for State Bar projects that depend on income from interest earned on lawyers' trust accounts.[30]

## E. Significant Problems Created by the Proposal for Many Members of the Bar and Their Clients

When presenting the Proposal to the Board of Governors for approval, the Commission stated:

> "During the public comment period, members of the California criminal defense bar and some of their representative organizations[31] disagreed with

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> 700(D)(2) and Washington Rule 1.5(f)(2). . ." Introduction (attached as Exh. 1 to the Executive Summary) at p. 69.

[30] The motivation for the original proposed changes that were rejected in 1991 was that certain groups within the State Bar wanted to require lawyers to move funds from their general accounts to their trust accounts to generate additional income for projects that receive the interest earned on lawyers' trust accounts. *See, e.g.,* April 28, 1997 Letter from Barry Tarlow to Katherine McMahon at p. 3, fn. 6. Although this rationale appeared nowhere in the similar and later rejected 1997 proposals, it seemed apparent at the time that those proposals were intended to serve the same purpose as the 1991 proposals. While funding of these programs is a vital and worthwhile function of the Bar, it cannot be an appropriate basis for a drastic reworking of the practice of law. There appears to be no way to determine from the bare record whether the current changes were motivated by some different reason or a simple misunderstanding of how nonrefundable retainers have worked in the actual practice of law in California since the 19th century.

[31] The Commission's effort to characterize the opponents of the Proposal as members of the criminal defense bar ignores the fact that the public commenters, opponents, and

> the Commission's proposed paragraph (f), which provided that a lawyer shall not charge, contract for or collect a nonrefundable fee, except for a true retainer. . . After public comment, the Commission revised paragraph (f) [now lettered "(e)"] to also permit nonrefundable *flat* fees, so long as the requirements set forth in paragraph (e)(2) are satisfied. . . The Commission believes the changes made should assuage the concerns raised by the criminal defense bar." Dashboard at p. 3.

A cynic might ask: if they were truly concerned, why did they divine this conclusion about the state of mind of the opponents rather than picking up the phone or sending an email and asking those dedicated lawyers who submitted public comments about the 2008 abandoned proposed Rule 1.5(f)?

As discussed below, the Proposal fails to assuage the concerns of either the criminal defense bar or other members of the Bar. Instead, it creates a number of significant problems for many members of the Bar (practicing in a variety of areas including entertainment law, matrimonial/divorce, immigration law, civil litigation, securities, tax, real estate, and appellate, to name a few) and their clients. There are also significant policy reasons why these changes should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints, arbitration proceedings and civil suits, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice. Several of these policy reasons are discussed below.

### 1. Section (e)(2) – "Nonrefundable" Flat Fee Constituting "Complete Payment" For "Specified Legal Services"

As discussed on pp. 19-21, *supra,* the Proposal appears to permit a "nonrefundable" flat fee if it constitutes "complete payment" for "specified legal services." Proposed Rule 1.5(e)(2). On closer examination and when read in context of the entire Rule (to ban nonrefundable retainers) and Comment [5], however, it is readily apparent that those "specified legal services" actually cover fees for all services that could be rendered during the entire duration of the case, including trial. This requirement

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stakeholders included the Los Angeles County Bar Association (the largest county bar association with 50,176 members).

poses many problems for the criminal defense lawyer (and applies equally to civil litigators handling complex civil matters).

First, under the Proposal, criminal lawyers (as well as any civil lawyer dealing with complex civil litigation or administrative matters) must at times speculate about what the fees will be before being retained, without any meaningful analysis of the case.[32] In practice, however, it is nearly impossible to accurately estimate the work that needs to be done in any reasonably complex case because, for example, no one really knows if the case will be tried or not.[33] Although in reality the lawyer often could not accurately predict and advise the client about whether there will or will not be a trial, how long it will last, and how much work will be involved, the Proposal would require the lawyer and the client blindly agree to a flat fee that includes the costs for a trial that may never happen. This is necessary so that the client will not have to "bargain for assistance in the midst of a proceeding." *See* Comment [5] and discussion at pp. 38-39, *infra* regarding exemption from this requirement if the "situation" is "adequately explained" to the client. If the client waives this requirement so that, for example, the trial fee or motion fee is not paid in advance, it creates a significant additional problem. A future restraint or forfeiture order as discussed below, *infra*, will prevent the client from paying the remainder of the fee that was not deposited in advance, when no restraining order existed.

Second, a problem that surprisingly is not always limited to criminal defense practitioners is that while a civil lawyer may often be able to withdraw if the client refuses to make additional agreed payments required under a fee agreement or pay hourly fees, in criminal cases the lawyer after doing a meaningful amount of work may not be able to withdraw (certainly in federal court and at times in state court). This is especially

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[32] In the criminal law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot demand discovery from the prosecution before being retained in order to assess the merits of the case and determine whether or not a lawyer wants to take on the case. In a state felony case, for instance, a lawyer may receive some discovery in advance of a preliminary hearing. For this reason, a widespread practice is for the lawyer to be retained simply for the preliminary hearing in state court and the parties later decide whether the lawyer will continue after the lawyer learns about the case.

[33] For this reason, practitioners in complex cases often use hybrid fees which might use a true retainer, a nonrefundable retainer earned when received with hourly credits that would cover the provision of legal services through the different steps (i.e. pre-filing, discovery, pre-trial, trial, post-trial) of a complicated case. In these situations, nonrefundable retainers are often used as a partial payment in combination with fixed fee payments or hourly credits on the retainer.

true if the fee agreement states that the flat fee covers the trial of the case. This is anything but an abstract, hypothetical fact pattern. In fact, in the Menendez brothers' case, after the first hung jury, the trial judge refused to let Leslie Abramson withdraw. Ms. Abramson had to retry the case without receiving any additional funds from her client for the retrial because her fee agreement stated that, for a flat fee, she would prepare and try the case. The fact she had already spent more than 2 years preparing the case and 6 months during the first trial did not change Judge Stanley Weisberg's ruling. If this type of drafting problem with serious financial consequences can happen to an experienced criminal defense lawyer, imagine what misfortunes will occur to the general practitioner who attempts to stumble through the morass of novel problems created by Rule 1.5(e).

Third, if the case does not result in trial (or the lawyer was allowed to withdraw from representation prior to trial or the lawyer is fired prior to trial), lawyers must determine what portion of the fee is refundable and whether this portion is paid with pre or post tax dollars.[34] These determinations are subject to dispute, fee arbitrations, and disciplinary proceedings.

Fourth, as explained in detail below, the Proposal exposes the purportedly "nonrefundable" flat fees to forfeiture.

### 2. Restraint, Fee Forfeiture, Seizure, Attachment

Restraint or attempts to forfeit attorneys' fees is an increasingly common occurrence in state and federal court. Numerous articles have appeared in the legal press on the impact of fee forfeiture on the ability of clients to exercise their constitutional right to retain lawyers of their choice to represent them in serious criminal cases. For almost three decades, Bar Associations throughout the country have vigorously opposed the concept of forfeiture or restraint of legal fees because it destroys an individual's Sixth Amendment right to counsel of choice. In light of the extraordinary effort by these concerned representatives of the organized Bar to safeguard the right to counsel in potential fee forfeiture situations, it is particularly disturbing that the California Bar would pass rules that will greatly facilitate restraints on legal fees and deprive the citizen accused of private counsel of choice.

Paragraph (e), if codified, will impact lawyers who practice in every area, including entertainment law, matrimonial/divorce, immigration law, civil litigation, securities, tax, real estate, appellate, and criminal law. In fact, prohibiting nonrefundable

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[34] Lawyers pay income taxes on nonrefundable fees. Under the Proposal, the lawyer would have to pay income tax on the flat fee paid when received from the client.

retainers will in essence make these fee payments the property of the client until the work is performed, regardless of the characterization of the intent of the lawyer or client set out in a written fee agreement. This will expose lawyers performing any type of legal work to great financial risk by facilitating the restraint or seizure of their fees if the client has a potential problem involving securities law, criminal law and jeopardy tax assessments, and even certain types of creditor claims.

The Commission has repeatedly asserted, both directly and indirectly, that Rule 1.5(e) will solve the restraining order/forfeiture problems that in 2008 generated extensive negative public comments directed at Rule 1.5(f). *See, e.g.*, Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Combined Attachment 1, p. 69 (October 23, 2009)(claiming that the changes to Rule 1.5(e) "should assuage the concerns raised by the criminal defense bar"). In fact, in explaining the proposed addition of Rule 1.5(e)(2) to the Board of Governors, the Commission asserted that subparagraph (2) was specifically drafted so as to avoid the restraining order/fee forfeiture problems.[35]

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[35] According to the Commission:

> "Subparagraph (1) [sic] was added following public comment to address concerns raised by members of the California criminal defense bar that prohibiting such earned-on-receipt flat fees and requiring all such fees paid to criminal defense lawyers to be advance fees, could result in the government impounding the fee advance, thereby preventing a criminal defendant from retaining the defendant's counsel of choice. The Commission believes the conditions marked by romanettes in the subparagraph will operate to prevent abuses of the flat fee exception and avoid the problems envisioned by the defense bar." See Agenda Item re: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2, and 3 – Return from Public Comment, Combined Attachment 1, p. 77-78 (October 23, 2009).

The Commission made similar assertions in its summary of the 2008 public comments regarding Rule 1.5(f). In this summary, the Commission responded to nearly every comment critical of the Rule 1.5(f) prohibition on nonrefundable retainers, including all of the comments focused on the restraining order/fee forfeiture issues, with an assertion that subparagraph (2) alleviates any and all expressed concerns. In the Commission's words: "To address the commenter's concerns . . . the Commission revised the approach to advance fee payments in paragraph (e) of the Rule" by adding subparagraph (2). *Id.* at 94-130.

Restraining orders, fee forfeitures, and jeopardy assessments depriving clients of the constitutional right to counsel of choice involve extremely complex areas of the law. There are few lawyers in the state of California who have extensive experience in these highly specialized areas. This is yet another important example of the lack of practical experience by the drafters. Certainly the Commission Subcommittee and Professor Mohr who actually drafted the Rule, and most likely (as far as I can determine) the Commission who no doubt are experienced in ethics issues, have no significant hands on experience and the background to hold themselves out as being experienced and knowledgeable about the relevant substantive issues of (1) federal restraint or forfeiture of funds necessary to pay attorney's fees in civil or criminal matters, (2) bogus jeopardy assessments,[36] often used by the IRS and Franchise Tax Board, that prevent the owner of the funds from retaining counsel, (3) seizure or restraint of attorney fees after counsel is retained by agencies ranging from the SEC, FBI and DEA to the Federal Trade Commission.

While erroneously asserting that Rule 1.5(e) has eliminated the significant problems relating to fee forfeiture or potential restraint or seizure of legal fees that existed under the now abandoned 2008 proposed Rule 1.5(f), so far as I can recall and have to this point discovered, the Commission has never prepared and/or circulated a legal and/or factual analysis purporting to support its claims that Rule 1.5(e) has solved the fee restraint/forfeiture problems. I believe the public comments the Board of Governors will receive conclusively demonstrate (1) the Commission's lack of understanding and their erroneous unsupported conclusion about this significant problem and (2) the fact that the restraining order/forfeiture problems raised by the previous Proposed Rule 1.5(f) have not now been resolved by the Commission as it claims.

Proposed Rule 1.5(e)(2)(v) does not protect the client's entitlement to a refund of the "nonrefundable" flat fee. Instead, the convoluted theoretically "nonrefundable" flat fee structure created by the Commission in proposed Rule 1.5(e)(2) requiring lawyers and clients to inaccurately describe that the fee is "the lawyer's property on receipt" actually will prevent the client from receiving a refund if these funds are the subject of any

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[36] These jeopardy assessments should actually reflect the income before expenses, net income, and the amount of tax due. There has been a pattern of misconduct extending back at least to the 1960's directed at people suspected of criminal conduct in the alleged computation of the taxes theoretically owed. For example, on January 2 of a tax year, officers would seize $200,000 in cash during an arrest. In order to seize the funds a Franchise Tax Board agent would make the following computation. At a 10% tax rate the owner of the fund must have earned 2 million dollars in profit to owe $200,000 in state taxes. Therefore, they would base the jeopardy assessment for the two days of the tax year on a theoretical profit of 2 million dollars and then seize the $200,000 recovered by the police as the state or federal tax due. *See* detailed discussion at fn. 40, *infra*.

seizure, restraining order or potential forfeiture arising out of any: (a) criminal case, state or federal, (b) SEC civil restraining order, or (c) a jeopardy assessment[37] by the IRS or the Franchise Tax Board. In fact, to make the situation even more egregious, if money to be paid to the lawyer is contingent on an event that never occurs (i.e. trial), in the face of either (a), (b), or (c) above, the lawyer cannot return these funds to the client. The attorney may not return any funds subject to restraint to the client even when she is fired by the client and even if they are necessary to retain a new lawyer.[38] Lawyers have been accused of and charged with obstruction of justice and/or contempt as well as being subject to discipline by the court which issued the restraining order if the money is returned to the client. The Commission appears to have not even focused on, let alone resolved, this aspect of the significant problem.

Federal and state statutes[39] and decisions control what the lawyer must do, not a provision in Section (e)(2) (requiring lawyers and clients to inaccurately describe that the

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[37] Jeopardy assessments present a clear example of the problem the Proposal would create. In hundreds of California cases, clients have transferred funds that have been seized by an investigative agency to a lawyer to pay for representation in the criminal case. The irrevocable assignments that have been used to pay legal fees transfer all of the client's rights, title and interest in the funds. Depending on timeliness issues, this often gives the lawyer priority over the IRS or the Franchise Tax Board jeopardy assessments. If the client maintains any contingent or actual interest, the funds would be subject to seizure with a jeopardy assessment. These jeopardy assessments have often been used and abused in state and federal criminal related matters.

[38] Why would a client go through a fee arbitration to receive a refund of a fee or portion of a fee after firing a lawyer without cause when that fee cannot be returned to the client? In addition, there is no reported case that we are aware of where a lawyer who received a nonrefundable retainer and was discharged without cause could transfer the money to a new lawyer selected by the client.

[39] Under federal law, attorneys' fees may be subject to restraint or forfeiture under a number of statutes, including 21 U.S.C. § 853, 18 U.S.C. §§ 981 and 982 or 18 U.S.C. § 1963 (RICO). If the government or the state of California seeks forfeiture of funds a defendant has used to pay his lawyer under 21 U.S.C. § 853, the lawyer's sole defense is that he or she is "a bona fide purchaser for value of the right, title or interest in the property and was at the time of the purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(B); *United States v. Saccoccia VI,* 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (lawyers often qualify as bona fide purchasers for value and without knowledge with regard to the fees received before conviction). The federal RICO statute provides the same language with regard to forfeiture under RICO. 18 U.S.C. § 1963(c). An attorney or other third party can defend

fee is "the lawyer's property on receipt") that is artificially attempting to change the character of funds that are actually not "earned when received." The critical issue in fee forfeiture or restraining order situations is not what the fee is called in a fee agreement, but who in reality owns the funds. The only way the client is guaranteed to obtain legal services and the lawyer is guaranteed to receive a fee when a client is potentially involved in a bankruptcy, SEC, criminal or jeopardy tax situation, or has potential creditors, is if there is a nonrefundable assignment or absolute transfer of the funds. This is the key principle of defense historically utilized to protect legal fees from seizure, restraint, and forfeiture.[40] When the client maintains the right to the funds before they are used, the state, the SEC, and IRS, or the bankruptcy lawyers or state and federal prosecuting agencies could and will make a persuasive argument that the fee is the client's property and therefore it can be seized and forfeited.

The Proposal enhances the risk of seizure, restraint, attachment, and/or forfeiture of legal fees. If a fee paid to a lawyer is earned when received, it is the property of the lawyer. The client's right to have representation in litigation is protected. The ban on nonrefundable retainers mandates that advance fees belong to the client. These funds

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a forfeiture proceeding under 18 U.S.C. §§ 981 and 982 to the extent that the lawyer can show an interest as an owner. 18 U.S.C. § 981(2).

California law provides for various forms of asset restraint and/or forfeiture in insurance and health fraud cases. *See, e.g.,* California Penal Code § 186.11(e)(2) (1996). It also provides for forfeiture for drug and so-called racketeering offenses. *See, e.g.,* California Health and Safety Code § 11470(f). As in the federal system, the legislature has provided that lawyers may challenge a fee forfeiture under this section by proving that the fee is "solely owned by a bona fide purchaser for value." Cal. Penal Code § 186.7(a).

[40] *See Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) (developed principles involving an "irrevocable assignment," the equivalent of a nonrefundable retainer, in a jeopardy assessment case, enabling the client to receive representation and the lawyer to maintain the fee); *People v. Vermouth, supra*, 42 Cal. App. 3d at 359.and *People v. Vermouth*, 42 Cal. App. 3d 353, 359 (1974) (reversing conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a nonrefundable retainer) of the seized funds that had priority over the IRS lien). This approach has been used by hundreds of California lawyers to protect their clients' constitutional right to representation by a lawyer of their choice while collecting their fee. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976).

may well be subject to seizure under the criminal or civil process.[41] Therefore, in many situations the attorney will lose a fee, the client will lose the ability to pay for an attorney of his choice, and in federal criminal prosecutions where nonpayment of fee after an appearance in court is often not grounds for withdrawal, the lawyer may be forced to complete all the remaining legal services without pay.

If the client does not deposit the trial fee or a motion fee in advance as usually required by Comment [5], see discussion, *supra*, it creates an additional significant problem. A subsequent restraining order or forfeiture will prevent the client from paying the necessary fee to the lawyer who unfortunately has become attorney of record.

A client's funds that are deposited in a trust or general account under this Proposal will always be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. The Proposal will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust, or who has deposited it in a general account even when it is owned by the client, to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by counsel of choice in many criminal or civil cases.[42]

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[41] Putting the funds in a general account with the permission of the client does not eliminate the problem. Under the Proposal, and the applicable forfeiture and property law concepts, the unexpended portion belongs to the client, not the lawyer. Therefore, it would be subject to seizure or restraint under applicable criminal law principles and also probably by the S.E.C under *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determination of whether the funds are subject to freeze on client's assets). *See also HBE Leasing Corp. v. Frank*, 61 F.3d 1054 (2d Cir. 1995) (attorneys compelled by creditors to disgorge $750,000 paid as legal fees as "fraudulent conveyances"); *United States v. Vincent*, unpublished. No. 93-10769 (9th Cir. 1995) (advance fee for post-conviction appeal ordered disgorged to pay criminal restitution as asset of client and not property of attorney).

[42] *See Caplin & Drysdale Chartered v. United States*, 109 S.Ct. 2646 (1989); *United States v. Monsanto*, 109 S.Ct 2657 (1989) (upholding the constitutionality of government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

Under the revised Proposal, the fee continues to belong to the client until earned, unless it fits in the very narrow definition of "true retainer" (which in real life experience and in the case law, is rarely, if ever, a substantial amount compared to what would be necessary for a civil or criminal trial). *See* Proposed new Rule 1.5(e)(1) and (2) and discussion on pp. 16-17, *supra* regarding the Proposal's ban on nonrefundable retainers. Although a narrow exception in Rule (e)(2) of the Proposal appears to permit a "nonrefundable" flat fee defined as the "complete payment" for "specified legal services" (meaning the entire representation in a case, including trial, *see* discussion at pp. 38-39, *infra*, about Comment [5]), such a fee is subject to seizure, forfeiture, restraint or attachment resulting from a civil, criminal, or an SEC process. This will occur because a significant portion of the Proposal's "nonrefundable" flat fee (that covers all services that are contingent upon the occurrence of future events, i.e. trial) is actually refundable because it is not in fact earned by the lawyer upon receipt and therefore is not the lawyer's property.[43] The controlling rationale is that the actual arrangement created is the controlling factor not language inserted in a fee agreement that does not actually describe the transaction and is inserted to prevent seizure or restraint of legal fees.

Even if the Board of Governors disagrees with my interpretation and the analysis in public comments from talented lawyers who have extensive experience in this sophisticated area of the law about the impact of this Proposal, it will still subject lawyers to an enormous risk, extensive extrinsic litigation, and the unpalatable option of hiring a separate attorney to represent the client and his lawyer of choice in a separate restraining order, fee forfeiture or jeopardy assessment case. There is quite simply no persuasive reason to depart from the proven protection provided to legal fees by nonrefundable retainers as a result of 40 years of litigation and gamble that after years of continuing litigation, the unsupported assertions of the Commission that 1.5(e) has resolved the fee restraint/forfeiture problems will eventually be embraced by the federal and state courts.

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The additional advantage of the nonrefundable retainer for the client is that by having the fee earned in advance, the lawyer can rest assured that, if the fee was legitimate when received, they will not risk generally forfeiting the fee if they "learn too much" about the client's source of income and, therefore, will not face any disincentive to thoroughly investigating the case. *See Caplin & Drysdale, supra,* 491 U.S. at 632 n.10.

[43] When considering all the applicable rules, this portion of the Proposal's nonrefundable" flat fee will likely have to be placed into a trust account.

### 3. Conflicts

The Proposal fails to account for the conflict situation in many civil and criminal litigation matters where accepting a particular client in a case precludes the lawyer from representing a number of other potential parties or defendants. The nonrefundable retainer is designed and intended to solve specific problems in a multi-defendant case. It is not unusual in these cases for there to be anywhere from six to twelve people charged in a complex fraud or controlled substance case. Often, if not most of the time, there are conflicts between and among the defendants. Accepting and agreeing to represent one person eliminates the lawyer from consideration in representing any other defendant or potential co-conspirator who may later be charged, or any person related to the case. Lawyers are quite often consulted by more than one person in a complex or well publicized case. By agreeing to represent a defendant the lawyer surrenders the possibility of representing any number of other people who may request to be represented by the law firm. This includes any potential witness or any person who may be investigated or indicted in the future in a related matter.

In addition, in the field of commercial transactional law, the lawyer or law firm accepting a client not only often forecloses representation of any other parties involved in the pending transactions, but may also be precluded in the future from representing other major clients in transactions that come to fruition years later. The Proposal also fails to account for the special knowledge, experience and ability an attorney may have already acquired on an issue or area of the law, which might otherwise have to be gathered at the expense of a client with a less experienced or knowledgeable lawyer. These are clearly legitimate bases for compensation and are a substantial part of the traditional factors justifying nonrefundable retainers.

Setting out in a fee agreement that "the fee agreement does not alter the client's right to terminate the client/lawyer relationship" (*see* Rule 1.5(e)(iv)) and also that the client "may be entitled to a refund" (*see* Rule 1.5(e)(v)), enables a client to retain a lawyer, have the lawyer work on the case for some time (say for one month), fire the lawyer without cause, demand a refund, and then prevent the lawyer from representing anyone else in the litigation or future related litigation. Although the client should be permitted to terminate the lawyer for cause, the lawyer and the client should also be free to ensure that a satisfactory fee arrangement has been negotiated to cover the contingency of a discharge without good cause. This problem is further complicated because under the Proposal's definition of the "true retainer," the lawyer must be separately compensated for "any services provided." *See* Comment [8]. The small fee charged for availability will most often never compensate the lawyer or law firm for being unable to represent anyone else related to the case.

Similarly, the Proposal fails to account for the civil or criminal lawyer who accepts one case that requires a substantial amount of work by the lawyer and perhaps other attorneys in the office, causing other cases necessarily to be turned down because the time is not available. A lawyer can handle very few complicated cases at the same time. Often when a lawyer agrees to handle a complex case and begins diligently working on that case, the lawyer adjusts his or her schedule and refuses to represent and participate in other complicated or uncomplicated matters in order to devote the time necessary to work on the client's case. The Commission's narrow definition of the "true retainer" (in Comment [8]), in the real world, often is not a sum which would significantly compensate the lawyer if after two months the client terminates the lawyer/client relationship without cause. The client has been guaranteed his lawyer, but the lawyer in order to keep the availability commitment has often turned down other desirable legal work. Eliminating nonrefundable retainers and permitting only true retainers or a flat fee subject to a refund does not permit the lawyer and the client to contract fairly. It turns representation into a one way street where the benefits only flow to the client and threatens the economic viability of small firms as well as financial planning of large firms.

### 4. The Proposal Is A Source Of Ambiguity And Confusion

Requiring California lawyers on the pain of discipline to include specific language (some of which is) set out in the rules (and some not) is both a trap for the unwary and a source of confusion. The point of fee agreements between a lawyer and the client has always been to write them so that a reasonably intelligent client can understand them. They should be written simply, made as short as possible, and in plain language, not legalese, covering the important points.[44] The more complex and lengthy a fee agreement is, the less likely it is going to be (a) read or (b) understood.[45]

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[44] Commissioner Voogd cautioned against proposing a rule that results in "a thirty page contract that is not read and in substance screws the client." In his January 6, 2009 email to drafters, he stated:

> "I find it difficult to make recommendations on particular language when I find the general structure of the rule unsatisfactory. I would adopt the existing ABA rule. However, a few comments may be appropriate. . .
>
> 2. If you are going to buy into the Washington approach, you might as well go whole hog, including form language and specified type size. My concern is that you end up with a thirty page contract that is not read and in substance screws the client. I am still of the view expressed long ago that the attorney should advise the client that the terms and conditions of the

Clients and lawyers, for that matter, prefer fee agreements that are relatively simple, the shorter the better and the less confusion the better. The Proposal's provisions and comments, however, are rife with ambiguity, inconsistency, and confusion.

**a. Comment [5]**

As set out above at p. 13, Comment [5] prohibits attorneys from entering into:

> "an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client."

It fails to provide any guidance on what it means to "adequately explain" the "situation." Paragraph (e) would force attorneys in any complicated case not only to speculate about what services "probably will be required," but somehow also to "adequately explain" this "situation" to the client, without any guidance before being retained and without any meaningful analysis of the case. It is unclear how a lawyer can "adequately explain" the "situation" to the client when the attorney himself often cannot determine, with any reasonable degree of certainty, whether and what "more extensive services probably will be required" and how much work will be necessary to complete these potential services prior to meaningfully evaluating the case. Perhaps this can lead to more work that the client must pay for: "a consultation fee" to cover the preparation necessary to "adequately explain" the case before receiving any discovery.

In practice, it is often difficult for any experienced litigator to precisely estimate the work that needs to be done in any reasonably complex case since, for example, often no one really knows which cases will go to trial and which will be dismissed. In civil cases and in the criminal law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot obtain discovery to assess the merits of the case (and also to determine whether or not a lawyer wants to take on the case) before being retained. Even if retained, it is unusual in a criminal or civil case for a lawyer to obtain any discovery before a complaint is filed. For this reason, practitioners in complex civil or criminal cases often use hybrid fees that are a combination of a true retainer, a

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> agreement are negotiable and he may wish to seek the assistance of other counsel in determining whether it is fair and reasonable.

[45] Most people rarely read complex and lengthy contracts such as: (1) warranties for expensive purchases, (2) title policies for the purchase of a home, (3) bank notes (other than the sum due and the interest rate), and (4) insurance policies.

minimum fee that is a nonrefundable retainer earned when received and either fixed payments or an hourly calculation that would cover the provision of legal services through the different steps (i.e., including in a criminal case, pre-filing, administrative hearings, discovery, pre-trial, trial, post-trial, and sentencing). In these situations, nonrefundable retainers are often used as a partial payment in combination with fixed fee payments or often hourly credits against the retainer.

This kind of unworkable language together with the unnecessary "Rube Goldberg" creation of section (e) will only encourage proceedings involving fee arbitrations, bar complaints and civil disputes, for a problem which is not endemic or widespread or ongoing or in need of any reform under the current practices. Heaven help the young non-specialist practitioners drafting a fee agreement in their first "big" case.

**b. Paragraph (e)(2)**

Paragraph (e)(2) compels lawyers, on the pain of discipline, to include the enumerated language (e)(2)(i)-(v) in their fee agreements. It also states that the client "may be entitled to a refund of a portion of the fee, if the agreed upon legal service has not been completed." The section, however, provides no guidance in situations (two of which are outlined below) that practicing attorneys are routinely confronted with:

(a) Where a lawyer may get a good result but not a complete result: What happens when the client fires the lawyer after the lawyer gets a good result but not a complete result that is outcome determinative? For example, in a criminal case, a lawyer succeeds in winning a motion to suppress but the retainer is for the entire trial. The motion did not end the case but shortened the case substantially. Is the client entitled to a refund of a substantial portion of the fee after firing the lawyer without cause? If so, how much?

(b) Where the case is concluded but the agreed upon legal services have not been performed: For example, the fee agreement was to cover an entire criminal case, including a potential six week jury trial, and the lawyer wins the case in two months after a preliminary hearing has occurred, by filing a demurrer. The case is then completed but the lawyer has not performed the agreed upon legal services. Is the client entitled to a refund and if so, how is this refund computed?

Paragraph (e)(2) also requires the lawyer and client to inaccurately describe the actual nature of the fee by asserting that the fee "is the lawyer's property on receipt." *See* discussion at pp. 19-20; 29-35, *supra.* The problem is not what the fee is called but who

owns the funds. The fee is not in reality the lawyer's property on receipt as it is erroneously asserted to be in paragraph (e)(2).[46]

Moreover, by restricting the definition of the traditional retainer and actually changing the existing requirements as to what can or must be deposited in a client trust account and what cannot (*see* discussion at pp. 17-19, *supra; see also* Comments [8], [9], [11]), the Proposal creates a trap for even experienced members of the Bar acting in good faith but unfamiliar with these niceties of the compelled language expressly or inferentially required by section (e)(2) and the Comments.

### 5. The Proposal and The Economic Viability of Firms: "Get it in Front or You Will Get it in the End"

Lawyers using nonrefundable agreements often underestimate how many hours are expended on a case. Experience has demonstrated that generally hourly billing is far more lucrative. Therefore, the criminal defense bar and other lawyers will find themselves in a troubling position. If the lawyer agrees to an advance nonrefundable fixed fee that is earned when received and substantially underestimates the work, he will certainly not be terminated by the client. However, if the lawyer through skill and ability has prevailed in an important part of the case that is not outcome-determinative, the client can then terminate the representation without cause and obtain a refund of a substantial portion of the fixed fee that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled.

The Proposal fails to: (1) recognize that an exceptional attorney may be able to obtain a superior result despite spending only a small amount of time on the matter than a less capable, less accomplished attorney would achieve after spending numerous hours of unnecessary litigation, (2) help firms guard against being hired only briefly by a client before the client changes to another lawyer and conflicting the rest of the firm out of representing other potential clients involved in the case, and (3) young criminal defense lawyers learn early on that a nonrefundable retainer is quite simply essential to the economic viability of an active criminal practice. Failure to arrange for an advance fee that is truly earned when received is an invitation to financial ruin. This principle has been characterized as "Get it in front or you will get it in the end." *See* Tarlow, *Five Important Words on Fee Forfeiture: Getting It Up Front & Getting It in the End*, The

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[46] If the client demands the refund under the proposed provisions at a time after the lawyer has paid taxes on the money, what does the lawyer put in the trust account? The fee paid by the client or the fee less the taxes? What if the lawyer is from a small firm and does not have excess funds to deposit?

Champion (May 2004); Tarlow, *Fee Forfeiture: Getting It Up Front May Not Mean You Get It in the End*, The Champion (May 2002).

**6. Discipline cases and complaints to the Bar:**

On August 26, 2008, the Office of the Chief Trial Counsel of the State Bar ("OCTC") recognized that the impact of a ban on nonrefundable retainers is that "it will make members subject to discipline for charging or collecting a nonrefundable retainer," when currently, any disputes related to the charging or retention of a nonrefundable fee are "typically handled as either a fee arbitration matter or, in egregious cases . . . as a failure to return unearned fees in violation of current rule 3-700(D)(2)." OCTC's 8/26/08 comment on prior, revised Rule 1.5(f).

California law does not now prohibit nonrefundable fees and existing protections against unreasonable and unconscionable fees currently protect clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Rather than bringing current California standards into the Rule, Paragraph (e) creates ambiguities and uncertainties in the Rules, in part, by grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements (even including the specific form fee agreements that have been endorsed and distributed by the State Bar for years and are still available on its website, *see* pp. 44-45, *infra*). The current standards, custom, and practice (endorsed by the State Bar which provides that the fixed fee will be earned in full and no portion of it will be refunded once any material services have been provided, *see* the existing "fixed fee clause" at pp. 30-31 of "The State Bar of California Sample Written Fee Agreement Forms") are entirely irreconcilable with Paragraph (e), which in paragraphs (e)(2)(iv) and (v) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. It appears the Commission has never addressed this significant inconsistency.

It is bad policy to force lawyers to adhere to vague and complicated language in disciplinary rules when they do not address complex factual and legal situations that practicing lawyers will often face. Not only are these principles complex, but there will be a large number of people of good will who are attempting to be fair with their clients who either will not understand the complicated legal or factual principles, will not strictly adhere to or follow the language set out in (e)(2), or may well be unaware that (e)(2) even applies to the wide variety of fee arrangements that exist. These lawyers will be exposed to Bar discipline arbitration and potential civil liability. The resources of the Bar discipline office should be far more appropriately spent on lawyers who are demonstrably acting unethically or in a dishonorable manner.

## F. The Proposal Is Unsupported By the ABA Model Rule, Any Consensus in the States, or the Washington Rule.

The Proposal lacks support from either the ABA Model Rules or any consensus in the states. Nonrefundable retainers are permitted under the ABA Model Rules and many states (if not most) permit the use of nonrefundable retainers.[47] By "substantially reject[ing] the ABA Model Rule," *see* Dashboard attached as Exh. 1 to the Executive Summary, the Proposal fails to "eliminate and avoid unnecessary differences between California and other states." *See* Commission Charter. Rather than looking to the ABA Model Rule, the Commission claims that the Proposal relies on and is supported by the Washington Rule.[48] *See* Table of Commission's Explanation of Changes to the ABA Model Rule (attached as Exh. 1 to the Executive Summary) at p. 7. This reliance is misplaced.

The Commission's claim that the Proposal relies on and is supported by the Washington Rule (Rule 1.5(f) of Washington's Rules of Professional Conduct), *see* Dashboard and Introduction to proposed Rule 1.5(e)), is simply incorrect. First, nonrefundable fees, advance fees, and fees earned when received are not prohibited under the Washington Rule. This fact is supported by: (a) the plain language of the Washington Rule, (b) the Washington Supreme Court's rejection of the proposal to ban the use of the terms "nonrefundable," "earned upon receipt," and "minimum," (c) the fact that the Washington Rule does not even mention the word "nonrefundable," and (d) the fact that Washington previously had no rule requiring written fee agreements. Second, the Washington Rule has little, if any, application to the stated purpose of the Commission's Proposal. Rather than preventing lawyers from "charging or collecting a nonrefundable fee" as the Proposal seeks to do, the Washington Rule instead was intended to (a) change the rule that required lawyers to place a fee for future services in their trust accounts and (b) impose standards requiring lawyers to inform the client about the nature of the fee arrangements since Washington (unlike California) did not have a statute requiring lawyers to set out and explain the fee arrangement in a written fee agreement.[49] *See*

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[47] *See* fn. 25, *supra*.

[48] In August of 2008 when the Commission decided to model the Proposal after the Washington Rule, the so-called Washington rule had not even been enacted. *See* Commission Meeting Notes of August 29-30, 2008 meeting. The Washington Rule took effect on November 18, 2008.

[49] At the time that the Washington Rule was approved, Washington's Rules of Professional Conduct did not require written fee agreements except: (1) in the case of contingency fee agreements (Rule 1.5(c)(1) or (2) upon the request of the client. Rule 1.5(b). Even under the new Washington Rule, a signed written fee agreement is only

July 10, 2007 Memo from the drafters of the Washington Rule to the Washington Bar Board of Governors.

## G. The Proposal Grossly Departs From Longstanding California Custom, Standards, Practice, and Principles.

The Commission makes erroneous and unsupported claims that: (a) ". . . current California law, [] does make fixed and flat fees refundable" (*see* Commission's October 2009 Introduction to proposed Rule 1.5, p. 69) and (b) "stating the requirements for a nonrefundable flat fee in the Rule itself explicitly brings current California standards into the Rule." *Id.* Current California law does not prohibit nonrefundable fees. Rather than bringing current California standards into the Rule, as explained in greater detail below, the Proposal creates ambiguities and uncertainties in the Rules by:

(1) grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements;

(2) grossly departing from and contradicting the form fee agreements (and the long-standing custom, standards, practice, and principles incorporated in those agreements) that are (and have been for years) endorsed and circulated by the State Bar (and which are still available on its website);

(3) failing to address the criticism of the flat fee agreements raised by the California Commission on the Fair Administration of Justice; and,

(4) taking a position that is inconsistent with the position of two Justices of the California Supreme Court in *People v. Doolin*, 45 Cal. 4th 390, 460 (2009).

First, the Proposal is a gross departure from "current California standards." There are no current California standards that prevent the charging of nonrefundable retainers, flat fees earned when received, and minimum fees. The Proposal contradicts the express conclusion of the Board of Governors on this very issue. The December 1991 proposal, endorsed by the State Bar and the Board of Governors in 1992, recommended minor, reasonable changes to the rules permitting the continued use of "fixed fees", "flat fees" and "nonrefundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services

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required for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer's property on receipt). *See, e.g.,* Washington Rule, Comments [11] and [16].

are "earned when paid." This determination was widely publicized. Since that time, my law firm and others have often included this specific concept "earned when received" in nonrefundable retainer fee agreements even though this change was never codified. Without justification, the Commission has now abandoned these important principles, heading in the exact opposite direction by improperly eliminating the concept of a legal fee for services that is fully earned when paid.

Moreover, the limitations on the use of a "true retainer" prohibiting the use of the funds to do legal work (and if the lawyer does do any work, seemingly requiring a true retainer for availability to then be deposited in a trust account), *see* Comments [8] and [10], ignore the financial interests and needs of the client. The Commission fails to consider the use of a hybrid fee that reflects the reality of the actual practice of law, *see* pp. 17-19, *supra*. While the Commission's asserted intent is consumer protection, in practice (and as discussed on pp. 17-19, *supra*), the Proposal disadvantages the consumer by prohibiting the lawyer from giving the client any credit, hourly or fixed fee, for money paid as a true retainer when the lawyer (as will happen in literally every case) is required to do the work. Therefore, the client is forced to pay additional legal fees even though she has already paid the true retainer.

Second, the written advisement set out in proposed Rule 1.5(e)(2)(v) that the client "may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been completed" is a radical departure not only from existing California practice, but from the fee agreements and flat fee principles and form agreements that are (and have been for years) endorsed and circulated by the State Bar (and which are still available on its website, *see* California State Bar's sample written fee agreement "fixed fee clause" form[50]). The existing "fixed fee clause" distributed in the form fee agreements by the State Bar (and then likely included in hundreds of fee agreements across the spectrum of specialties) explicitly provides that:

> "unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under the agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed."

The current standards, custom, and practice (endorsed by the State Bar) for a "fixed fee clause" are entirely inconsistent with the Proposal, which in paragraphs (e)(2)(iv) and (v) permits a client to terminate representation without cause, before all of

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[50] This form was approved by the Board of Governors in 1987, last amended on June 23, 2005, and available on the California Bar website at: http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

the work has been completed and after the lawyer has performed a substantial amount of work, and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. Indeed, the overwhelming majority of public commenters to the Commission's 2008 effort to abolish the nonrefundable retainer opposed the prior proposed Rule 1.5(f) in order to preserve the current standards.

## H. The Proposal Fails to Address The Concerns of the California Commission on the Fair Administration of Justice and The Position of Two Justices of The California Supreme Court in *People v. Doolin,* 45 Cal. 4th 390, 460 (2009).

The Proposal fails to address the criticism of the flat fee agreements raised by the California Commission on the Fair Administration of Justice[51] and is inconsistent with the position of two Justices of the California Supreme Court in *People v. Doolin*, 45 Cal. 4th 390, 460 (2009), who, relying on the California Commission on Fair Administration of Justice, stated the Court should exercise its supervisory powers to "prospectively declare fee agreements of this type [flat fee agreements] invalid." Proposed Rule 1.5(e)(1)-(2) does not preclude and in fact encourages flat fee agreements that could include all potential legal services as well as case costs. Neither the position of the California Commission on Fair Administration of Justice nor the two dissenting Justices in *People v. Doolin,* 45 Cal. 4th 390, 460 at fn. 1 (2009) were discussed in the Proposal, its comments, or by the Commission.[52] We are also unable to find any evidence that any of these materials were brought to the Board of Governors' attention.

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[51] The California Commission on the Fair Administration of Justice is "a group that was chaired by former Attorney General John Van de Kamp, and whose members included the current Attorney General; the District Attorneys of Santa Clara, San Mateo, and Ventura Counties; several law enforcement officers; and members of the criminal defense bar." *People v. Doolin,* 45 Cal. 4th 390, 460 at fn. 1 (2009). Its 2008 report criticized "Flat Fee Contracting" and recommended that:

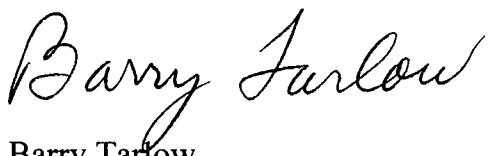
> ". . . legislation be enacted to provide that when Counties contract for indigent defense services in criminal cases, the contract shall provide separate funding for ... investigators and expert witnesses." *Id.* at 13.

[52] The two dissenting Justices in *People v. Doolin* would unquestionably find the Proposal to be problematic. In the face of their comments alone the Proposal should be rejected. It is a brazen decision to reject the views of the two Justices who reached the "supervisory power issue" question.

## CONCLUSION

For all the reasons discussed in this opposition, the Proposal fails to advance the goals or meet the criteria set out in the Commission's Charter. It is unnecessary, not in the public interest, and should be rejected as were the related proposals in 1991, 1997 and 2008.

Very truly yours,



Barry Tarlow

A

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# BIOGRAPHY

Barry Tarlow is a nationally prominent Los Angeles criminal defense lawyer who was profiled in *The National Law Journal* as one of "Ten of the Best Winning Trial Lawyers" in America. In 1992, he was selected for the Robert Heeney Memorial Award for lifetime achievement by the National Association of Criminal Defense Lawyers. In 1993, Mr. Tarlow received a "Special Award" from the Los Angeles Criminal Courts Bar Association recognizing: "His Prominence as a Brilliant Advocate and as a Zealous Defender of Constitutional Rights." In 1994, he was profiled in *The New York Times Magazine* as one of six attorneys in "L.A.'s Exclusive Club of Celebrity Lawyers," and in 1998, he was selected as a Fellow of the International Academy of Trial Lawyers.

A recent article described how "a specialty of Mr. Tarlow's is heading off indictments before big names hit headlines." He is recognized as one of the country's leading authorities in the defense of RICO prosecutions. Barry Tarlow, who practices criminal law exclusively, was certified as a specialist in criminal law by the California Board of Legal Specialization in 1975, and has been recertified in 1980, 1985, 1990, 1995, 2001 and 2005. In 1992, he received the "Criminal Defense Lawyer of the Year" Award from the Century City Bar Association. Mr. Tarlow has been selected as one of the finest criminal lawyers in the country by publications ranging from *The National Law Journal's* "Directory of the Legal Profession," Martindale-Hubbell's "Bar Register of Preeminent Lawyers," each of the 16 bi-annual editions from 1983-2010, of Naifeh and Smith's "The Best Lawyers in America" (in the specialties of appellate law, criminal defense: non-white collar and criminal defense: white-collar), to *Town and Country Magazine*. In 1991, *The National Law Journal* selected Mr. Tarlow among the "Who's Who in Defense Among the Nation's Top White-Collar Experts." In 1989, he was profiled in *The Los Angeles Times* as one of the eight best criminal defense lawyers in Los Angeles, and was named in a survey by the *California Lawyer* among "California's Most Respected Lawyers." He was described as "one of the country's leading criminal-defense lawyers" in a *Washington Legal Times* article entitled "The Lawyer Who Hates Snitches." In a 1998 "List of the Most Powerful Lawyers in Town," published by *Los Angeles Magazine*, Mr. Tarlow was named the top "gunslinger" among the 40,000 lawyers in Los Angeles County. In 2005-2010 he was selected each year as one of California's "Super Lawyers" based on ballots sent to 65,000 lawyers.

In 1964, Barry Tarlow graduated first in his class from Boston University Law School where he was senior editor of the law review. In 1965, he served as a prosecutor for the Justice Department as an Assistant United States Attorney for the Central District of California, Criminal Division. During this period, he prosecuted cases ranging from kidnaping and bank robbery to complex white-collar crimes. Since 1966, he has defended individuals and corporations in cases ranging from tax and environmental violations to RICO, money laundering and homicide, in state and federal trial and appellate courts throughout the country. His law firm maintains an extensive federal and state appellate practice. He has represented defendants in numerous significant criminal appeals which have had widespread implications for attorneys engaged in the practice of criminal law. His firm has represented clients in complicated white-collar matters involving ITT, National Health Laboratories, SmithKlein Beecham, General Dynamics, Waste Management, Hyundai, Airgas, Inc., Avant!, and GTE. Recently, a substantial portion of Mr. Tarlow's practice has consisted of the defense of lawyers, health care providers, and other professionals under investigation by federal and state prosecutors. He has often represented celebrities accused of crimes and was named as one of eight of "L.A.'s Celebrity Defenders" in an article entitled "The Stars' Bar," published in an issue of *California Law Business*.

Mr. Tarlow has been an outspoken critic of overzealous prosecutorial tactics that have led to abuses of individual rights and liberties. He first coined the now widely accepted theme that: "The War on Crime Had Become a War on the Defense Bar." Since that time, he has written, spoken, and also litigated cases defining this attack on the right to counsel. A front page profile in *The National Law Journal* observed: "If the phrase weren't Barry Tarlow's by dint of originality, he's earned title to it." Adversaries and defense lawyers describe Mr. Tarlow as a "fighter

scholar," the "ultimate advocate," and "the tiger," and his approach to trials as "innovative," "confrontational," and "obsessive." A 1998 article in *Los Angeles Magazine* concluded his "reputation as a contentious advocate in the courtroom is unmatched."

Barry Tarlow has been selected as an expert witness by clients ranging from the State Bar of California to plaintiff or defense counsel in complex litigation matters including the Howard Weitzman-John DeLorean fee disputes. He has been retained as a RICO or forfeiture litigation consultant to the trial lawyers in numerous high-profile criminal cases including the Princeton Newport prosecution. Mr. Tarlow is often consulted by the country's major newspapers including *The New York Times*, *Washington Post*, and *The Los Angeles Times* for commentary about his own cases and developing legal affairs issues. He is regularly interviewed on these subjects by all the network news programs as well as *60 Minutes*, *Nightline, Crossfire*, *Larry King Live*, Court TV, and CNN.

Mr. Tarlow was lead counsel in the Chance/Powell case, in which two innocent men, framed by rogue police detectives, were freed after serving 18 years in prison for the murder of a Los Angeles Sheriff, and received "The Pro Bono Award" for this case when *The National Law Journal* announced its "Great Moments in the Law Awards" for 1992. In 1989, he was awarded a commendation from the State Bar of California Board of Governors, "In recognition of outstanding contributions to the delivery of pro bono legal services."

Barry Tarlow has lectured at law schools and seminars throughout the country (see Attachment A). The topics have included: "Defense of Federal Conspiracy Cases," "White Collar Criminal Prosecutions," "Defense of RICO Prosecutions," "Representation of Witnesses and Attorneys Before Grand Juries," "Defense of Federal Forfeiture Cases," "Cross-Examination," "Closing Argument," "The Aggressive Defense of a Criminal Case," and "Federal Rules of Evidence Developments." Mr. Tarlow has participated in educational programs sponsored by organizations such as: Continuing Education of the Bar, Practicing Law Institute, National College of Criminal Defense Lawyers, American Bar Association, California Attorneys for Criminal Justice, American Trial Lawyers Association, and the American Law Institute.

For the past 15 years, Barry Tarlow has served as editor of the *National Directory of Criminal Lawyers*. He is a prolific author who has written over 325 books and articles dealing with criminal practice and procedure issues (see Attachment B), including "RICO Revisited," 17 Ga. L. Rev. 291; "RICO: The New Darling of the Prosecutor's Nursery," 49 Fordham L. Rev. 165; "Defense of a Federal Conspiracy Prosecution," 4 National Journal of Criminal Defense 183; "Criminal Defendants and Abuse of Jeopardy Tax Procedures," 22 UCLA L. Rev. 1191; "Admissibility of Polygraph Evidence: An Aid in Determining Credibility in a Perjury-Plagued System," 26 Hastings L.J. 917. He is an author of *California Criminal Defense Practice*, Vols. 1-6 (Matthew Bender, 1980), as well as each of the annual supplements, and is a member of the National Editorial Board of *Forecite*, the criminal jury instruction publication. He was the Criminal Law Editor of the *RICO Litigation Reporter* and a Contributing Editor of *The Champion*, the publication of The National Association of Criminal Defense Lawyers, and since 1982 has authored "The RICO Report."

He has been extremely active in various local and national bar organizations. In 1978, Mr. Tarlow served as President of California Attorneys for Criminal Justice — the 3,000 member state criminal defense lawyers' bar association — and from 1981 through 1991, he was Chairman of the RICO Committee. Mr. Tarlow was the Vice-Chairperson of the American Bar Association, Criminal Justice Section, and Chairperson of the Criminal Law Subcommittee of the Prosecution and Defense of RICO Cases Committee. He was a member of the Board of Directors for the National Association of Criminal Defense Lawyers from 1979 through 1990, and from 1978 through 1990, he was Co-Chairman of the RICO Prosecutions Committee. From 1992-1995, Mr. Tarlow co-chaired the NACDL Committee to Free the Innocent Imprisoned. He was a member of the Board of Directors of the ACLU Foundation of Southern California from 1997-2005. From 2005 through 2008 he was a member of the Criminal Law Advisory Commission of the State Bar that reviews all Criminal Law Specialist applications for certification and recertification.

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May 5, 2010

By U.S. Mail

Cheryl L. Hicks
Representative Member, District 3
State Bar of California Board of Governors
1440 Broadway # 814
Oakland, CA 94612

**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5 (4-200)**

Dear Ms. Hicks:

We are partners at Arguedas, Cassman & Headley, LLP in Berkeley, California. Each of us is a past President of California Attorneys for Criminal Justice, the country's largest statewide organization of criminal defense lawyers and allied professionals, and we each have more than twenty-five years of experience practicing criminal defense in California's state and federal courts. We write to oppose the State Bar of California's Proposed Rule 1.5(e), which would amend California Rule of Professional Conduct 4-200 by prohibiting attorneys from collecting a "non-refundable fee" except in certain limited circumstances.

As an initial matter, we see no reason for any rule change in this area. We are unaware of any pattern of attorneys abusing non-refundable fees to bilk their clients. Such misconduct is barred by already-existing rules, such as current Rule 4-200, which prohibits attorneys from charging or collecting unconscionable fees.

Furthermore, the Proposed Rule is confusing and internally inconsistent, and would negatively impact the financial realities of practicing law in California and the ability of clients to obtain legal services. Exception (e)(1) to the Proposed Rule purports to permit a "true retainer" fee to "ensure the lawyer's availability to the client." But the Proposed Rule would prohibit an agreement under which the retainer would constitute a minimum fee that ensures the attorney's availability yet also serves as a credit against which the attorney charges her time until the fee is exhausted. Such arrangements are

common and benefit both the client and the attorney. The attorney can be comfortable that she will be compensated sufficiently to make her time available to the client, and the client benefits because he will not need to pay additional fees until the retainer fee is exhausted. A rule prohibiting such arrangements would hamper clients' ability to afford the services of quality counsel.

Similarly, Proposed Rule 1.5(e)(2) purports to permit "flat fee" agreements under which the fee becomes the property of the attorney upon receipt, but the Rule will in fact make such arrangements impossible. Subsection (e)(2) requires a written agreement that states, among other things, "that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal service have not been completed." This is a contradiction — the fee cannot be the lawyer's property upon receipt if it is also potentially refundable. More importantly, the potential for refund undermines the very purpose of flat fees. Such fees benefit each party to the agreement. The client benefits because he knows his costs will not exceed the amount of the fee, and the lawyer benefits because she knows that she will at least collect the amount of the fee. The parties both undertake a calculated risk: the client finds that the assurance of a maximum fee outweighs the risk that the case will require less work then the fee would seem to justify; the attorney finds that the assurance of payment outweighs the risk that the case will require more work than the fee would seem to justify. If the parties do not wish to take such risks, they can enter into a different type of fee agreement, such as one in which the lawyer charges an hourly rate. Flat fee agreements are important because they often permit a client to hire an attorney he could not otherwise afford. Yet the Proposed Rule would essentially bar flat fee agreements by placing all the risk on the attorney — under the Proposed Rule, if the case requires less work than anticipated at the time of the agreement, the attorney will be required to refund a portion of the fee, but if the case requires more work, the attorney will be stuck with the flat fee. Few attorneys will enter into such an arrangement.

Finally, it is a matter of concern that the Proposed Rule has proceeded this far toward approval without proper notification to the Bar's membership. Many attorneys and organizations opposed previous efforts to make similar amendments to the rules governing non-refundable fees, yet this Proposed Rule was conditionally approved by the Board of Governors without any meaningful opportunity for public comment. This procedure seems to violate the terms of Rule of the State Bar 1.10, and in any case is not advisable when, as here, the proposal at issue is likely to be the subject of significant controversy.

Best regards,

Cristina C. Arguedas
Partner
Arguedas, Cassman & Headley, LLP

Ted W. Cassman
Partner
Arguedas, Cassman & Headley, LLP

cc:

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 1.5 - Fees For Legal Services**
**[Existing CRPC Rule 4-200]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 1.5 and adopt ABA Model Rule 1.5a with the addition of those factors set forth in existing CRPC Rule 4-200 to determine reasonableness that are not in existing ABA Model Rule 1.5.

Rationale For Comment 1: In the interest of uniformity, guidance to attorneys, and fairness, reasonableness should be the standard and the client's informed consent should be a consideration in determining whether a fee is ethical. Mandatory fee arbitration has a history of successfully resolving these issues.

**LACBA**
**LOS ANGELES COUNTY BAR ASSOCIATION**

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May 10, 2010

Audrey Hollins,
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180 Howard Street
San Francisco, CA 94105

Re: Comment Regarding Proposed Rule 1.5(e) (Fees for Legal Services) & State Bar Rule 1.10

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee (PREC) of the Los Angeles County Bar Association (LACBA) has a number of comments on Proposed Rule of Professional Conduct 1.5(e)(2).

The current version of proposed California Rule of Professional Conduct 1.5(e) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

(1) a lawyer may charge a true retainer, which is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A true retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a true retainer is the lawyer's property on receipt.

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (I) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a

refund of a portion of the fee if the agreed-upon legal services have not been completed.

*See*:
http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRule154200DiscussionDraft.pdf.

PREC's concerns about rule 1.5(e)(2) include the following:

1. This proposal discourages lawyers from efficiently resolving matters given the potential it creates for a client to request a refund because "the agreed-upon legal services have not been completed." For example, if a lawyer settles a matter before trial, a fee agreement that provided that the fee would cover representation through trial could be construed to require a partial refund, even though the case was favorably resolved. This would be unfair, and is contrary to the longstanding treatment of what constitutes an earned fee.

2. Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to all types of retainer agreements. Including them in a sub-part that pertains only to flat fee agreements creates the misleading negative inference that these requirements may not apply to hourly or contingent fee agreements. If it is desirable to mandate that fee agreements contain additional provisions, this should be accomplished through the existing statutory framework in the Business and Professions Code. The Legislature could choose to amend sections 6147 and 6148 to specifically address flat fees, but attorneys who use flat fee arrangements should not be singled out for discipline for failing to have details in a fee agreement that are not required for other types of fee arrangements.

3. Sub-part (e)(2) provides that the fee is the "lawyer's property on receipt," but also requires the attorney to state that the client "may be entitled to a refund" under certain circumstances. This is confusing. Also, stating that a fee is the lawyer's property on receipt suggests the creation of substantive law. Isn't the intent simply to clarify that a flat fee need not be placed in the client trust account? To describe the fee as the "lawyer's property" increases the likelihood of future litigation over who owns the fee, especially when combined with the mandate that counsel state that the client may be entitled to a refund. Ambiguities in fee agreements are construed against the lawyer, and this draft rule mandates an ambiguity.

4. This proposed language in Sub-part (e)(2) is unnecessary in light of the prohibition on charging unconscionable fees, a traditional and well

established standard which sufficiently safeguards clients from unscrupulous lawyers who overcharge clients, and which provides a uniform standard regardless of the type of retainer agreement involved.

5. The language of (e)(2) may discourage the attorney from providing details in the fee agreement regarding the extent of the work for which a flat fee is being paid because of the potential it creates for a client to request a refund because "the agreed-upon legal services have not been completed." The proposed language will foment greater discord over fee arrangements, which is not in the interests of either clients or the legal profession.

6. This proposal likely will lead to litigation in the context of an injunction, jeopardy assessment or forfeiture. It may lead to substantial problems in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace. The reason for this is that persons or entities with a claim against a client will seek to seize and forfeit a client's potential interest in obtaining a refund based the client's possible right to "be entitled to a refund of a portion of the fee." How would a creditor of the client know whether the agreed upon services were or were not provided?

7. This proposal has no counterpart in the ABA Model Rules. Thus, it does not advance the intended goal of national uniformity that is among the purposes for revising California's existing rules of professional conduct.

For the above reasons, PREC believes that the Rule needs to be substantially revised, without the controversial provisions in the present draft of (e)(2).

In addition to the above concerns, PREC is aware that some practitioners have expressed concern that this provision was presented to the State Bar Board of Governors without the prior public comment that is required by State Bar Rule 1.10. If there has been a failure to comply with any procedural rule, PREC believes that the Rules Revision Commission should consider recommending necessary corrective action in order to ensure that all of California's new Rules of Professional Conduct are lawfully adopted.

Thank you for the opportunity to comment on this rule.

Sincerely yours,

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

Cc: via email: *see* attached list.

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May 11, 2010

Special Commission for the Rules of Professional Conduct
% Ms. Audrey Hollins, The State Bar of California
Office of Professional Competence, Planning and Development
180 Howard Street
San Francisco, California 94105

**Re:** Opposition to Proposed New Rule of Professional Conduct. Rule 1.5(e)

Dear Ms. Hollins,

I write to oppose the proposed new rule of Professional Conduct. Rule 1.5(e). The Rule would prohibit charging non-refundable fees except when: 1) it is a "true retainer" for the attorney's future availability, or 2) it is a flat fee for specified legal services which constitutes complete payment. However, subpart 2 then states the client may be entitled to a refund upon terminating the relationship prior to all services being delivered.

Subpart 2 adds uncertainty to the rules. While the rule states that the fee is the property of the attorney on receipt, this is contradicted by the addition of the clause stating the client, upon termination of the relationship, can demand a refund. A fee cannot be both an attorney's property if it is also subject to a client right of refund. This makes the fee status uncertain and has direct implications in matters of creditor rights and government forfeiture claims. As others have written to you about those issues in detail, I shall only mention them here as direct byproducts of the proposed rule's contradiction.

There appears to be no need shown for a change of the rules. I regularly read the various discipline reports and fail to see that flat fee contracts have been a problem. Perhaps this is because there are already in place a number of substantive protections for clients to insure they enter fee contracts knowing their terms and insuring their fairness.

First, fee contracts of any size ($1,000) must be in writing. (Bus. & Prof. Code § 6148.) This promotes clear understanding at the outset of the relationship between counsel and the client. It creates and describes the agreed upon basis for compensation and service. Such contracts should be honored so long as not unconscionable.

Second, attorneys are prohibited by law, rules and ethics from entering contracts with clients that breach fiduciary duties to the client or are in conflict with the client's

interests. (*See* Rule 3-300,[1] requiring full disclosure, fair terms, and client consent in writing after having consulted independent counsel. (Hawk v. State Bar (1988) 45 Cal.3d 589 [an attorney who takes a promissory note secured by a deed of trust in real property to secure payment of a fee must comply with rule 5-101, now Rule 3-300]); *see* Maxwell v. Superior Court (1982) 30 Cal.3d 606 (regarding rules when publication rights to a client's case are negotiated as a fee); In re Corona (1978) 80 Cal.App.3d 684, 720 ("[S]uch arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment....")

Third, in criminal cases, as a policy matter, contingent fee contracts are prohibited. (People v. Clancy (1985) 39 Cal.3d 740, 747: "'[T]he contingent fee is generally considered to be prohibited [in] the prosecution and defense of criminal cases....'")

Fourth, Rule 3-700(D)(2) states that upon discharge, the attorney must:

> Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

"True retainers," of course, are now very rare as few attorneys charge clients fees simply to retain available time in the future.

Finally, the existing rule on unconscionable fees protects the clients from overreaching attorneys. California Rules of Professional Conduct, Rule 4-200, which provides an eleven factor test to determine whether a fee is conscionable, is broad enough to protect clients and has done so over the years. Case law also has been quite sensitive to the issue over overcharging. In Bushman v. State Bar (1974) 11 Cal.3d 558, a lawyer was suspended from practice for one year because he charged $2,800.00 for services worth no more than $300.00. The situation was worsened by the attorney's insistence that the clients, who were on welfare, execute a $5,000 promissory note in his favor. In imposing discipline, the court recited the guiding law in the area:

> It is settled that gross overcharge of a fee by an attorney may warrant

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[1] Rule 3-300: "A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied: ¶ (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and ¶ (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and ¶ (C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

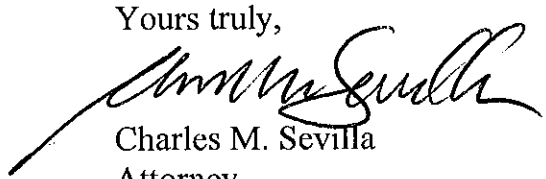
discipline. The test is whether the fee is "'so exorbitant and wholly disproportionate to the services performed as to shock the conscience.'" (Herrscher v. State Bar (1935) 4 Cal.2d 399, 401-402 [29 P2d 832], quoting from Goldstone v. State Bar (1931) 214 Cal. 490, 498 [6 P.2d 513, 80 A.L.R. 701].) In Herrscher this court stated that most cases warranting discipline on this ground involve an element of fraud or overreaching by the attorney, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds. (4 Cal.2d at 403). (Id. at 563 [113 Cal.Rptr. at 906].)

In Tarver v. State Bar (1984) 37 Cal.3d 122, the attorney was disbarred in part for charging his client more in fees than were recovered in the settlement of an age discrimination case. This was held to be an unconscionable fee. In Champion v. Superior Court (Boccardo) (1988) 201 Cal.App.3d 777, a junior partner left the firm. He had a contract with the partners which stated that if he left the firm and took his cases, he would only be entitled to remuneration from any awards in the case as determined by his partnership share. His share was 1.79%. He argued the contract produced an unconscionable fee, noting that if he won a case for $160,000, he would received $912 while his ex-partners would get $50,088. The court agreed and struck the contract as shocking to the conscience.

Many criminal defense lawyers are sole practitioners who regularly charge flat fees for routine criminal matters. This rule unnecessarily puts in place a condition that essentially makes the fee fixed (or "flat") only at client sufferance. If the work for the attorney is substantial, the client will be content with a fixed fee. But if the attorney seems to be on the way to a speedy result that will end the case on a favorable note for the client, the client can pull out of the "flat fee" contract, fire the attorney, and demand a substantial refund. There is no such thing as a "flat" fee when one party to the contract can void it at will.

This scenario is permitted by paragraph (e)(2) of the proposed rule. The proposal prohibits non-refundable retainers for legal services except under the circumstances outlined in subpart (1) and (2). While first stating the fee is the attorney's on delivery, it then says the client may be entitled to a refund prior to the "completion" of services. This paragraph adds uncertainty if not contradiction to the rules, and promotes the problem identified above. I urge this rule change not be adopted. It is unneeded, unfair and uncertain.

Yours truly,



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Attorney

cc: Wells Lyman, Esq. P O Box 2085 La Mesa, CA 91943

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May 12, 2010

Audrey Hollins
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The State Bar of California
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San Francisco, CA 94105

Dear Ms. Hollins:

It is the purpose of this letter to register my opposition to the proposed new Rule of Professional Conduct 1.5(e)(4-200). I wish to add my voice to those members of the bar who oppose the above-referenced proposed new Rule of Conduct.

In speaking from 40 years of experience in the practice of criminal defense, I believe that the "flat fee" can play an important role in maximizing the availability of legal services, especially to those who can least afford it. I know that you have received in-depth arguments from many lawyers and bar associations.

The point I want to emphasize is that many clients prefer to have a "flat fee" arrangement. Unless a client is extremely wealthy, a client is concerned about the cost of legal services and often does not want to enter into an agreement where the amount is indefinite. And while there may be attorneys who would take advantage of the "flat fee" opportunity, certainly there now exists sufficient safeguards to prevent "unconscionable" fees. But if "flat fee" contracts are not going to be enforced and therefore not entered, many potential clients will find themselves unable to avail themselves of legal services that they request and require.

Best regards,

Michael Pancer

MP:cr

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25 May 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 1.5(e) (Fees for Legal Services)

Dear Ms. Hollins:

The National Association of Criminal Defense Lawyers (NACDL) writes to oppose the adoption of Proposed Rule of Professional Conduct 1.5(e)(2).

NACDL is the nation's preeminent organization committed to advancing the criminal defense bar's mission to ensure justice and due process for persons accused of criminal wrongdoing. Founded in 1958, NACDL is comprised of over 11,000 direct members in 28 countries, and affiliated with more than 350,000 attorneys in 90 states, provincial, local, and international organizations. In California, NACDL has over 900 members. These members are public defenders, private criminal defense lawyers, military defense counsel, law professors, and judges dedicated to promoting a fair, rational, and humane criminal justice system.

NACDL is concerned that the present text of proposed rule 1.5(e)(2) undermines the Sixth Amendment right to counsel by impairing the ability of lawyers and clients to agree that a client will pay a flat fee for legal representation by counsel in a specified matter.[1] As drafted, the language of the proposed rule will substantially discourage, if not preclude, criminal defense lawyers from offering to represent clients on a flat fee basis. This is a common form of retention in criminal cases in California, and throughout

[1] As used in this letter, the term "flat fee" means a fee that is earned-in-full upon receipt, and paid pursuant to an agreement by which counsel commits to represent the client in a specified matter or through a specified stage of proceedings in a matter. Such fees are also commonly referred to as "non-refundable" fees.

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the country. The issue is of substantial concern to many California criminal defense lawyers and their clients. It also has national significance insofar as other jurisdictions may look to California for purposes of fashioning ethics rules.

Flat fees agreements have the benefit of allowing persons under investigation or accused of crimes, at the inception of a matter, to secure representation that is assured to continue throughout the duration of the matter unless the client chooses otherwise, or unforeseen circumstances arise, such as the death of a client or counsel or an unforeseen conflict of interest. The proposed rule discourages flat fees by making flat fees received by counsel vulnerable to third-party claims against clients and/or their property, forfeitures, jeopardy assessments, seizures, liens and attachments. These types of claims would be asserted *against counsel* because of the inchoate interest the proposed rule appears to give a client in fees which purportedly were the "lawyer's property on receipt." This additional potential risk and expense will cause many, if not most, criminal defense lawyers to decline to agree to represent clients on a flat fee basis.

Discouraging counsel from using flat fee agreements is a disservice to those clients who may desire such fee arrangements. Flat fee arrangements allow persons who are under investigation or accused of offenses to plan in advance and reduce the risks they face. If such persons were unable to secure representation in a matter for a flat fee, they would receive the services of counsel retained on an hourly basis only as long as they could continue to compensate counsel on an hourly basis. While wealthy clients could assume such a risk, most could not. Flat fees, therefore, provide clients the most affordable representation while also assuring that they will not be beggared by litigation and forced to rely upon forms of public assistance.

In contrast to a client who retains counsel for a flat fee, a client who retains counsel on an hourly basis may be forced to seek the appointment of counsel at public expense, or seek the services of a less expensive lawyer, if a matter progresses to a point where the client can no longer afford to pay existing counsel on an hourly basis. Because of the uncertain nature of criminal cases, estimating at the inception of a matter how long it will take to represent a client competently and effectively is inherently challenging. Flat fee agreements place the bulk of the risk upon lawyers, and enable risk-sharing between clients and defense counsel. A virtual ban on flat fees – as would result from adoption of the proposed rule – will shift the entire burden to clients and disproportionately burden less wealthy individuals.

If a flat fee agreement were agreed upon by a client and lawyer notwithstanding adoption of proposed rule 1.5(e)(2), counsel would be vulnerable to becoming embroiled in costly litigation over third-party claims asserted against counsel, forfeitures, jeopardy assessments, seizures, liens, and attachments based on the debts or other obligations of clients. This would interfere with attorney-client relationships by creating potential conflicts between lawyers and their clients. It also would unfairly penalize lawyers in practice areas in which flat fee agreements are commonplace, including criminal defense, among others.

Proposed Rule 1.5(e)(2) is unnecessary in light of the prohibition of unconscionable fees, a uniform standard applicable to all types of fee arrangements, including contingency, hourly and flat fees. This standard is sufficient to protect clients from being charged unreasonable fees, and

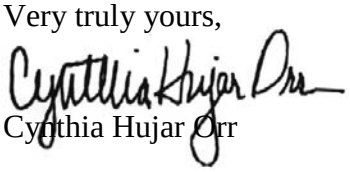
to safeguard clients from excessive charges where a client chooses to discharge counsel, or other unforeseen circumstances arise such as the death of a client or counsel prior to the conclusion of a matter.

NACDL believes that Proposed Rule 1.5(e)(2) is unsound on a number of additional grounds. First, it provides that a fee is the "lawyer's property on receipt," but a client also "may be entitled to a refund" under certain circumstances. This language is internally inconsistent and confusing. Clarity, rather than confusion, best serves clients and counsel with respect to retainer agreements. Second, it has no counterpart in the ABA Model Rules, and there is no national authority to provide guidance on how the provision may be interpreted by California disciplinary authorities or courts. Accordingly, it may create uncertainty and the potential for protracted and costly litigation, rather than certainty, which best serves the interests of both clients and counsel. Third, Sub-parts (e)(2)(i), (ii) and (iv) are equally applicable to *all* types of retainer agreements, but placing them in a sub-part that pertains only to flat fee agreements creates the inaccurate negative inference they may *not* apply to hourly or contingent fee agreements. Fourth, it could discourage detailed descriptions of the "agreed-upon legal services" in written retainer agreements because it encourages third parties to assert an interest on a previously paid fee on the grounds that "the agreed-upon legal services have not been completed." This would increase disputes between clients and counsel.

Finally, NACDL is concerned that Rule 1.5(e) is among a large number of new rules that were provisionally adopted in a manner that may have deprived the Board of Governors of the State Bar of California (the Board) of the insights of lawyers, and other members of the public, who have knowledge and experience with flat fee arrangements. NACDL understands that Rule 1.5(e) was among a number of provisions adopted by the Board without the prior public comment required by Rule 1.10 of the Rules of the State Bar of California. *See* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title1.pdf. NACDL believes that public comment in accordance with Rule 1.10 is critical to ensure fairness and the adoption of a sound and informed rule. Although the Board's adoption was subject to potential reconsideration following a period of public comment for all rules provisionally adopted, NACDL believes that this does not provide a sufficient opportunity for the public scrutiny that is essential for a rule that substantially impacts the Sixth Amendment right to counsel and disproportionately burdens clients of limited means.

NACDL appreciates the opportunity to comment on this rule.

Very truly yours,



Cynthia Hujar Orr

cc via email: Howard B. Miller, Esq.

# CACJ California Attorneys for Criminal Justice

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May 25, 2010

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

Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as *amicus curiae* on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

We are unclear why the Board is now considering a ban on non–refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (*e.g.*, trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may be feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified' State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.[1]

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

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[1] In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

> "Lawyers are urges to use the State Bar fee forms [. . .] . These represent the 'gold standard.'
> The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify
> Regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar
> Fee agreement . . ." Diane Karpman, *"Time for Tuning Up Those Fee Agreement"*, California Bar Journal (February 2010)

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used "fixed fee clause" at pp. 30-31 of *"The State Bar of California Sample Written Fee Agreement Forms"* available at http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of this letter.

Very truly yours,

ANN C. MOORMAN, President
CACJ Board of Governors

cc:

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May 28, 2010

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180 Howard Street
San Francisco, CA 94105

**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200)(Fees for Legal Services), Abolishing Nonrefundable Retainers**

Dear Ms. Hollins:

I am writing to respectfully express my opposition to proposed new rule of professional conduct, Rule 1.5(e)(4-200)(Fees for Legal Services). This provision expressly abolishes nonrefundable fees subject to two rather narrowly defined exceptions. Having practiced law in California for approximately forty years, I believe that the nonrefundable fee is a justifiable arrangement to accommodate the appropriate needs of attorneys and clients in a wide variety of settings. The propriety of such arrangements, arrived at by informed attorneys and prospective clients, has long been recognized by the State Bar. Since the 19th Century, thousands of California lawyers have used some form of nonrefundable retainer (falling outside the limited exceptions embodied in the present proposal), without any demonstrated pattern of abuse or misconduct.

Members of the Bar practicing in many fields, including bankruptcy, immigration, family law, criminal law, tax law and SEC law, as well as many lawyers practicing gin the fields of entertainment and real estate law, have long utilized nonrefundable fee agreements. Such arrangements are often beneficial to both attorney and client, and are less subject to abuse and over-charging than hourly fee arrangements. A flat fee arrangement under which the fee becomes immediately the property of the lawyer takes into account the legitimate needs of both parties to the agreement and promotes a measure of predictability to the client's fee expectations. Hourly fee arrangements, whether or not billed against substantial retainers, can expose the client to practically unlimited fees based on legal work that cannot be accurately anticipated when the agreement is entered into. Anyone who has seen billing statements by large law firms, embracing all tasks performed by members of the firm, associates, paralegals and clerical personnel, can attest to this fact. By entering into a flat, nonrefundable fee arrangement,

attorney and client agree upon a fee they deem appropriate at the inception of the litigation. They recognize that it may transpire that the work ultimately performed by the attorney would justify a much higher fee, or for that matter, a lower fee, if measured on an hourly basis. But they have reached an agreement that provides a measure of certainty to each party to the agreement. Given a choice between an hourly fee, and a carefully written flat or nonrefundable fee, many clients will choose the latter. In my experience, such an agreement has rarely if ever led to serious disagreements later on.

In crafting the proposed rule change, the Special Commission for the Rules of Professional Conduct has not given adequate consideration to the historic viability of nonrefundable fee arrangements, and has instead concluded that such arrangements should be prohibited, except under express conditions. This position was taken by the Commission without notifying the membership of the State Bar or the lawyers and Bar Associations who opposed the earlier 2008 version of this draft rule. It is regrettable that the Board of Governors adopted this 2009 proposal without input from those members or groups. All ethical lawyers would agree that unconscionable fees should be prohibited, and they are prohibited by a number of standing rules. Thus, lawyers are prohibited from charging excessive fees (Rule 1.5(a)) and are required to refund unearned fees upon withdrawal from representation (Rule 1.16). These prohibitions against unconscionable and excessive fees clearly apply to nonrefundable fees; they dictate that under a nonrefundable retainer agreement, if a lawyer does little or no work, the client is entitled to a refund.

With these recognized and effective protections in place, there is no reason to adopt a new rule essentially barring nonrefundable retainers. I am aware of no identifiable pattern of abuse by California lawyers resulting from the current rules, which mandates this sweeping change. Without supporting evidence the Commission, in recommending adoption of this rule, asserts that "charging a nonrefundable fee is inimical to California's strong policy of client protection . . ." the Commission fails utterly to demonstrate that clients need protection from a pattern of misconduct by State Bar members involving nonrefundable retainers. The proposed change constitutes an unwarranted interference with freedom of clients and lawyers to make informed decisions regarding the terms of legal representation.

The exceptions to the abolition of nonrefundable retainers embodied in Rule 1.5(e) do not adequately address the problems that would be created by such a prohibition. Sub-division (1) of Rule 1.5(e) provides that a lawyer may charge what is referred to as a "true retainer" paid by the client to insure the lawyer's availability during a specified period or on a specified matter. This subsection provides, however, that any such "true retainer" be "in addition to and apart from any compensation for legal services performed." This is highly problematic because it would, by its terms, prohibit lawyers and clients from agreeing that a retainer to secure the lawyer's availability may also be used, in whole or in part, to compensate the lawyer for work actually performed, There would appear to be nothing wrong with such an arrangement , but under sub-division (1), it would disqualify the client's payment as a "true retainer" meaning that the funds paid are not, after all, the lawyer's property on receipt.

Similarly, the second exception to the proposed outlawing of nonrefundable fees is rife with problems. At the outset, sub-division (2) appears to affirm that a lawyer may charge a "flat fee" for specified services and that, if the parties agree, the flat fee becomes the lawyer's property on receipt. This is a fair statement of a nonrefundable fee agreement, and the first four requirements, expressed in small Roman numerals, for such an agreement should not be controversial. However, requirement (v) completely undermines the validity of the agreement by providing that "the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been completed." It seems obvious that if any portion of a "nonrefundable" fee may be refundable, then the entire fee cannot be the lawyer's property. Lawyers pay income taxes on nonrefundable fees and, under this paragraph, they may have to do so even though the fee may be refundable.

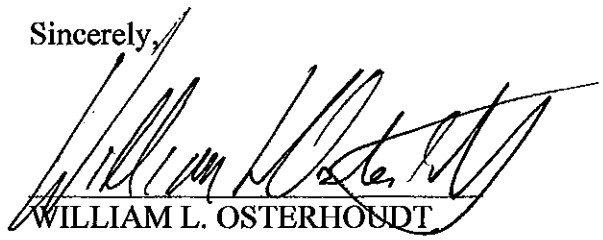
If the Commission is concerned about the unscrupulous lawyer who seeks to retain a substantial fee after doing little or no work, or after being discharged immediately, there are ample protections in place to discourage and prohibit such misconduct. It is neither fair nor logical to seek to address this hopefully rare "problem" by providing that nonrefundable fees may be refundable after all. This provision will invite needless disputes and even litigation about the circumstances under which a "nonrefundable" fee must be refunded in part. In this connection Comment [5] to the proposed rule change is particularly problematic because it provides that "a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services will be required, unless the situation is adequately explained to the client." The rule provides no guidance as to what this means. As a practical matter it is often impossible, in any complex civil or criminal case, for the practitioner to know what services "probably will be required" at the outset of the representation. In the criminal context the lawyer will normally not receive discovery from the prosecution until he or she has entered an appearance in the case and will thus not know, much less be in a position to "adequately explain" the services that will "probably" be required. Therefore the parties not infrequently agree on a nonrefundable retainer earned when received in conjunction with other provisions including but not limited to hourly fees to accommodate representation at possible future stages of the litigation.

The problem with the proposed rule, as augmented by comment (v), is that it would require the lawyer to anticipate all of these stages and arguably, to embrace them within his or her agreement. I believe that this provision could lead to Bar complaints and litigation that, in the absence of real problem, should be discouraged and avoided. The meaning of "foreseeable that more extensive services will be required" and "adequately explained to the client" in comment (v) are the stuff of which administrative complaints and civil litigation are made. In practice this provision, while appearing to preserve the parties right to enter into nonrefundable fee arrangements, completely undermines this right. In the end, the present system is not broken so as to require the fix embodied in the proposed rule change. I respectfully urge that the proposal be rejected,

or at a minimum, that it be withdrawn pending a full opportunity for members of the Bar and various affected Bar Associations to comment.

Thank you for your consideration in this matter.

Sincerely,



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June 3, 2010

Rex Heinke, Esq.
Akin Gump Strauss Hauer & Feld LLP
2029 Century Park E, #2400
Los Angeles, CA 90067

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear Mr. Heinke:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background, my areas of practice is criminal defense.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:
. . . .

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

*See*: http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRulesB1B6.pdf (at p. 10)

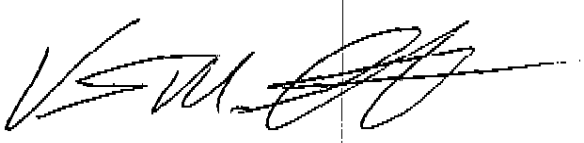
My concerns about this proposed new rule include the following:

1 It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);
2 It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);
3 It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;
4 It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";
5 It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;
6 It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and
7 It was submitted to the State Bar Board of Governors for preliminary approval without the ***prior*** public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.

Very truly yours,



Vince Imhoff
Managing Director

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June 3, 2010

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

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear Ms. Hollins:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background, my areas of practice is criminal defense.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

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My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);

2. It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);

3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;

4. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";

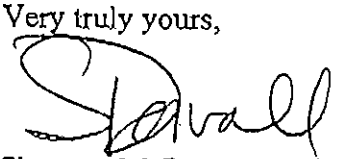
5. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;

6. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and

7. It was submitted to the State Bar Board of Governors for preliminary approval without the ***prior*** public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis. Thank you for considering my views.

Very truly yours,



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June 4, 2010

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Howard B. Miller
President, The State Bar of California
At Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017

Re: Opposition to Proposed Rule 1.5(e)(4-200)

Dear Mr. Carruth, Ms. Hollins, and Mr. Miller:

Our office opposes the proposed new rule of professional conduct, which would, for all practical purposes, abolish non-refundable retainers.

We are a small law firm consisting of five lawyers, all independent contractors. Our practice is limited almost exclusively to criminal defense and bankruptcy.[1]

I have personally practiced criminal law for nearly 40 years. Three other attorneys in the firm are also very experienced lawyers, and the fifth started in December 2009, immediately after passing the Bar exam. Our practice covers Monterey County and, to some extent, Santa Cruz, San Benito, and Southern Santa Clara Counties. This geographic area is almost entirely rural and "small town." We rarely have any big

[1] With regard to the bankruptcy portion of our practice, we must of course comply with the rules and regulations established by the United States District Court. Therefore, our fee arrangements in those cases are not relevant to this letter.

corporate clients. Our success is based on hard work and the personal service and attention we can devote to our client's cases.

Even after 40 years of practice, I still take calls in the middle of the night and on weekends. We receive desperate calls from bewildered parents whose children have been in a terrible accident where someone was killed, or who have been charged with the most serious crimes on the books. Spouses call to say that after decades of marriage and neither having been in any trouble in the past, a terrible charge has been levied against one or the other. Or, accused person calls directly from the jail or shortly after being released on bail, completely bewildered and having no idea what they should do to protect their constitutional rights.

When we receive those calls, every lawyer and member of the staff in our office swings into action. The number of tasks competing for *immediate* attention are innumerable—

--visiting the client to get him or her settled down and to make sure the client makes no further statements to law enforcement

--assure that there is no witness tampering or hiding evidence

--exercise of Fourth and Fifth Amendment privileges

--advice regarding cooperation when law enforcement appear with search warrants and arrest warrants

--immediate contact with investigators, psychologists, psychiatrists, accident reconstruction experts, and other professionals to collect and preserve evidence before it deteriorates or is lost

--preparation of good character letters and bail motions.

All of these activities cause the time and expenditures in criminal cases to be "frontloaded." Untold hours are often spent in the first few days after retainer, and yet to the untrained eye, it may appear that little has been accomplished. In the practice of criminal law, a "true retainer" to assure the availability of the lawyer to perform these kinds of tasks on an emergency basis is uniquely required.

But perhaps the most important reason that a "true retainer" should be allowed in criminal cases is that, often, the reputation of the law firm is critical to the outcome of the case. In addition to the tasks mentioned above, immediate contact with the law enforcement agency and District Attorney's office is essential. Negotiation with the District Attorney at an early stage is often critical. A demonstration of cooperation can lead to the filing of lesser charges and an opportunity for the client to make bail. Sometimes the best advice we can give the client is an early admission of guilt, which is given great weight by the courts in deciding on the ultimate disposition. And yet, the more effective our negotiations with the District Attorney at this early stage of the proceedings, the more likely it is that a good result will be accomplished without the expenditure of the kind of time that would be involved if the case is left to languish in the congested criminal justice system.

Thus, it is our reputation, knowing what to do, and hard work at the beginning of a case that often gets the client the best results. And that sometimes happens without the expenditure of enough hours to justify the retainer if the "reasonableness" of that retainer is always measured by the hours expended.

On the other hand, when cases become enmeshed in the criminal justice system, continued time after time after time, set and reset for trial, the initial retainer is frequently burned up before the case is resolved. We all know what happens in a criminal case if the lawyer tries to withdraw because the client ran out of money. "Denied, counsel." Rightfully so. Even if this were not a legal reality—even if the lawyer *could* find other valid grounds to withdraw—the reality in a small town atmosphere is that the lawyer simply cannot do that.

Thus, for a small practice to be financially viable, we must balance our caseload. Some cases resolve quickly, partly because of our excellent reputation. Others take forever no matter what we try to do. It is the cases that resolve quickly that give our firm the financial ability to represent clients who cannot manage the fees and costs involved when their cases drag on forever.

Very truly yours,

THOMAS S. WORTHINGTON

TSW/bc

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June 3, 2010

Audrey Hollins,
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The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear State Bar Leaders and Representatives:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background my practice is solely comprised of representing criminal defendants in Federal and State trial courts.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except: . . . .

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

*See*: http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRulesB1B6.pdf (at p. 10)

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);

2. It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);

3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;

4. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";

5. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;

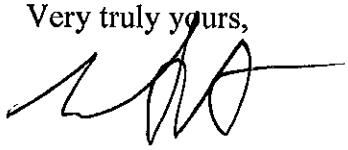
6. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and

7. It was submitted to the State Bar Board of Governors for preliminary approval without the ***prior*** public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.

Very truly yours,



Michael E. Hansen

LEROY DAVIES
Attorney at Law
State Bar No. 123556
341 "H" Street
Crescent City, CA 95531
**TEL. (707) 465-4745** Ldavies@ladslaw.com Fax (707) 465-6534

June 3, 2010

Audrey Hollins,
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105
audrey.hollins@calbar.ca.gov

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear State Bar Leaders and Representatives:

I am writing to voice my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). By way of background I have more than a decade in criminal defense, during my 25 years as a member of the bar. I also practice in the areas of guardianships, conservatorships, dissolution of marriage, child support and spousal support.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except:

. . . .

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled

to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);

2. It is internally inconsistent and confusing (the fee is the "lawyer's property on receipt," but the client is told s/he/it "may be entitled to a refund" under certain circumstances);

3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;

4. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";

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Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

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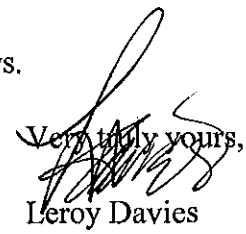


Leroy Davies

June 4, 2010

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

Bradley T. Paulsen
4945 Pinnacle St.
Riverside, CA 92509
(707) 673-6982

ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar**
**State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice**. Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone,** costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

**lawsuit. If they are not aware of the claim, how did their name end up in the filing?** Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***"Some of our clients' homeowners are being added to suits without even being aware of it,"*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. ***"I can't tell you the number of times I've seen a defect claim that says 'defective stucco', and the house doesn't even have stucco".***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner's Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

**(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**

**(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

**and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.**

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned. There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**
Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*
Litigation/Claims cause insurance to go up.
Litigation/Claims force builders to raise their prices.
Litigation/Claims burden the judicial system and expend judicial resources.
Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.
*As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.*

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.
*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

**Rule 1.1 Competence**

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

*The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved,* ***so it goes on.***

**Rule 1.4 Communication**

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

*As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.*

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.*

**Rule 1.5 Fees For Legal Services**

Rule 1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

*In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.*

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

**Rule 1.7 Conflict of Interest: Current Clients**
Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
*The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.*

Rule 1.7 (b) (4) Each affected client gives informed written consent.
*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

*the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.*

**Rule 1.8.6 Payments Not From Client**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

**Comment (noted in the proposed new or amended rules)**

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of $10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately $500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

Bradley T. Paulsen
Concerned Citizen

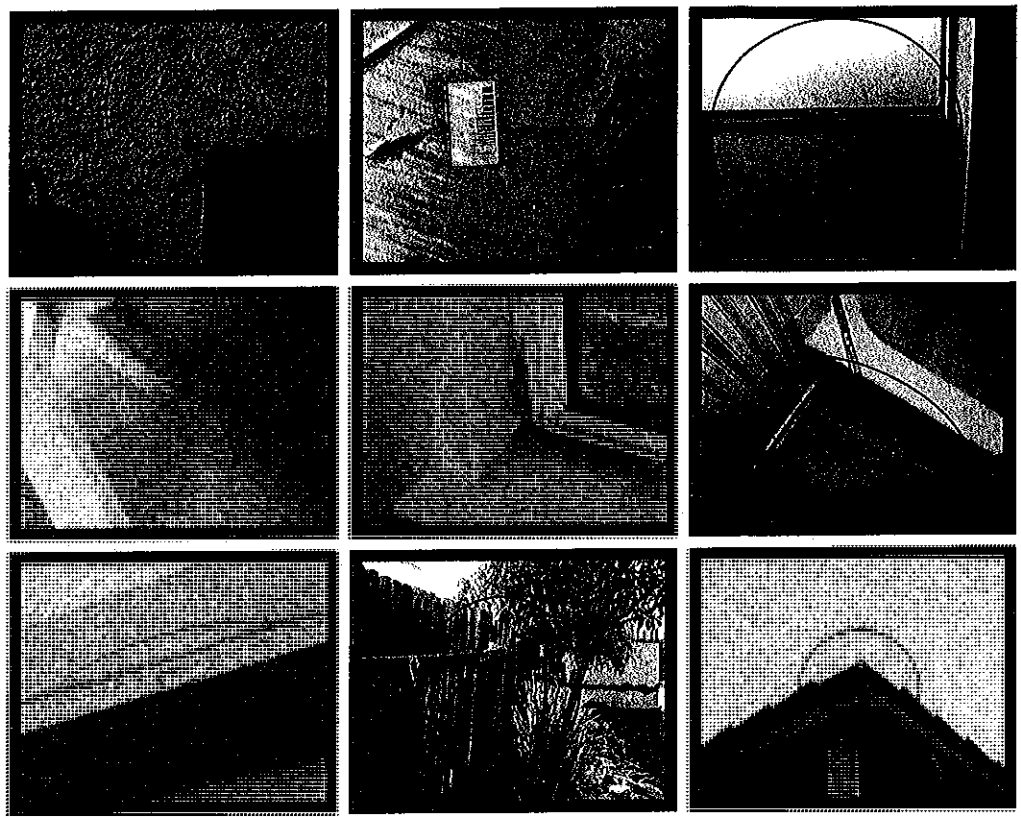
/encl

# MAK

www.maklawyers.com

MILSTEIN, ADELMAN & KREGER, LLP

# NEWSLETTER



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

## NUMEROUS [redacted] HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners. Original ownership is not required to participate. Each home will be inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:


**Anneke Stewart, Esq. extension 135 or**

**Lisa Appelbaum extension 146 or**

**2800 Donald Douglas Loop North Santa Monica, California 90405**

**Toll Free: (888) 835-8055**

**Fax: (310) 396-9635**

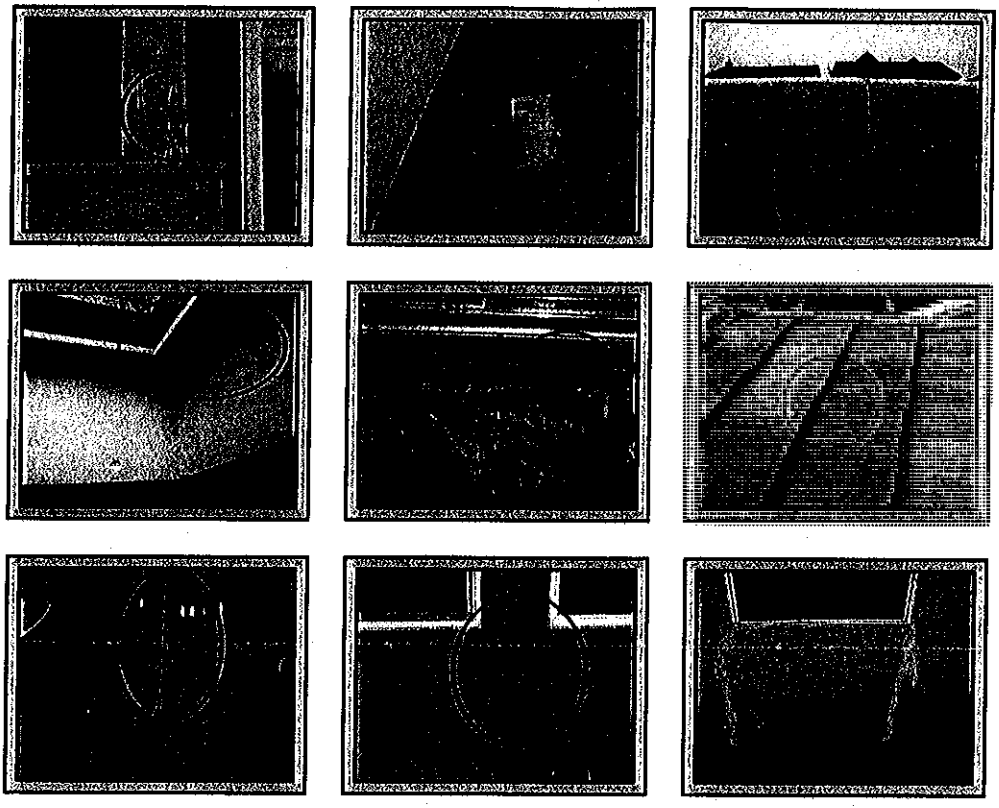

**Numerous [redacted] homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.**

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

# NEWSLETTER

MILSTEIN, ADELMAN & KREGER, LLP

January 2009



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

## HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

[redacted]

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either fax or in the postage-paid envelope we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:


David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop North

Santa Monica, California 90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635


[redacted]

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

*MILSTEIN, ADELMAN & KREGER, LLP*

[redacted]

## HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____ NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

[redacted]

[redacted]

Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sinkinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICIES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

[redacted]

June 27, 2008

**Re:** [redacted] **Construction Defects***
**Our File Reference # P 119-LMRO**

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within t[redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / RL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW
*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners. Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME [redacted] | CASE NUMBER |
|---|---|

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By:_____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

**FOR A&K USE ONLY**

GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0405

Anderson & Kriger
ATTORNEYS AT LAW

# Homeowner's Contingent Attorney Fee Agreement



*A Professional Law Corporation*

THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is: [redacted]

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

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In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***(Continued on reverse)***

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| [redacted] | |

Anderson & Kriger

*A Professional Law Corporation*
**Construction Defect & Community Association Law**
2155 Chicago Avenue, Suite 300
Riverside, CA 92507
**(951) 787-7146**
Fax: (951) 787-7168

# *FINAL NOTICE !*

**The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [redacted] Housing Development on behalf of many of your neighbors.** We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks** and/or **loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

**Anderson & Kriger** has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger
Rhonda Harrington
Rhonda Harrington

*This advertising communication is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

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REAL ESTATE • May. 26, 2010

# Searching For Cracks In Construction Law

**Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects**

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kreger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

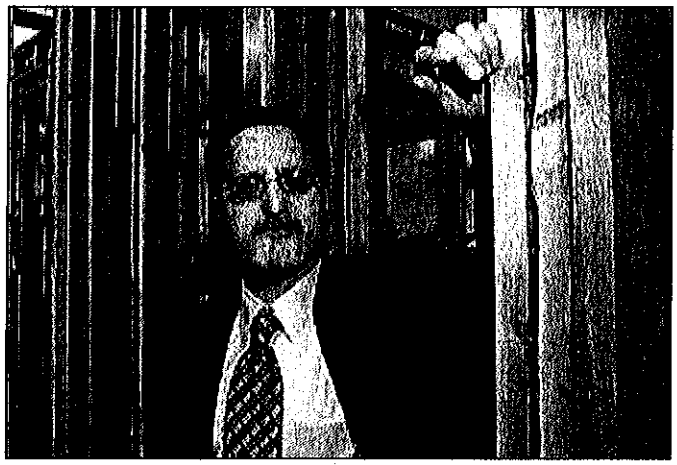
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow,* E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

jason_armstrong@dailyjournal.com



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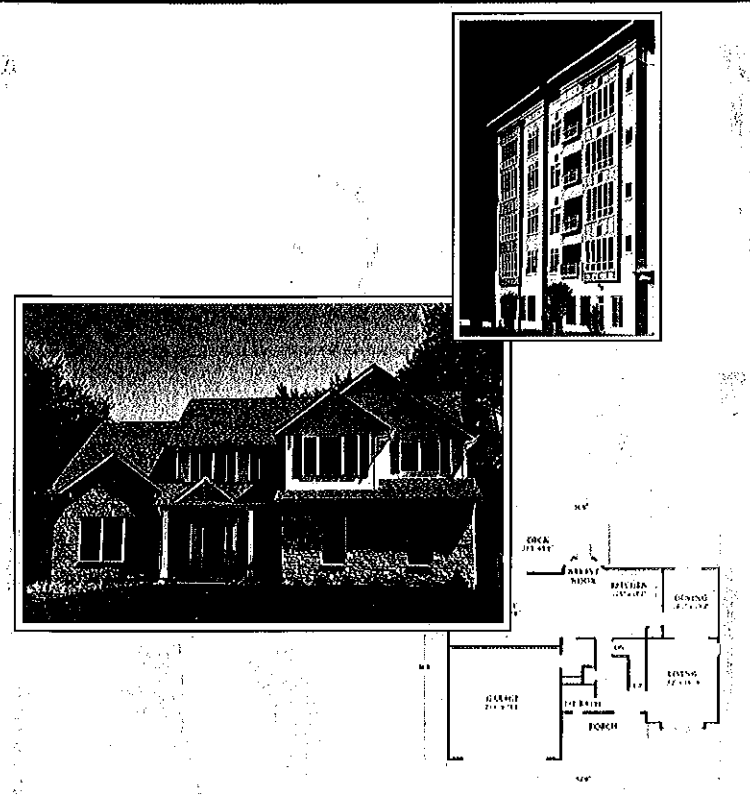
# Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association




BIA Orange County Chapter
17744 Sky Park Circle, Suite 170


Construction Quality and Sustainable Building Committee

## For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

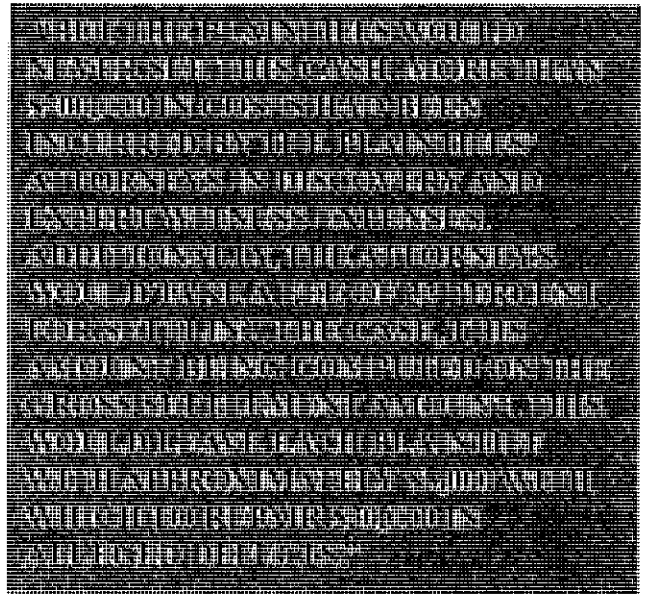
This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

## Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate $30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-fifth of the amount claimed. After attorneys' fees were deducted, the homeowners were left with only $5,000 to repair $30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.[1]



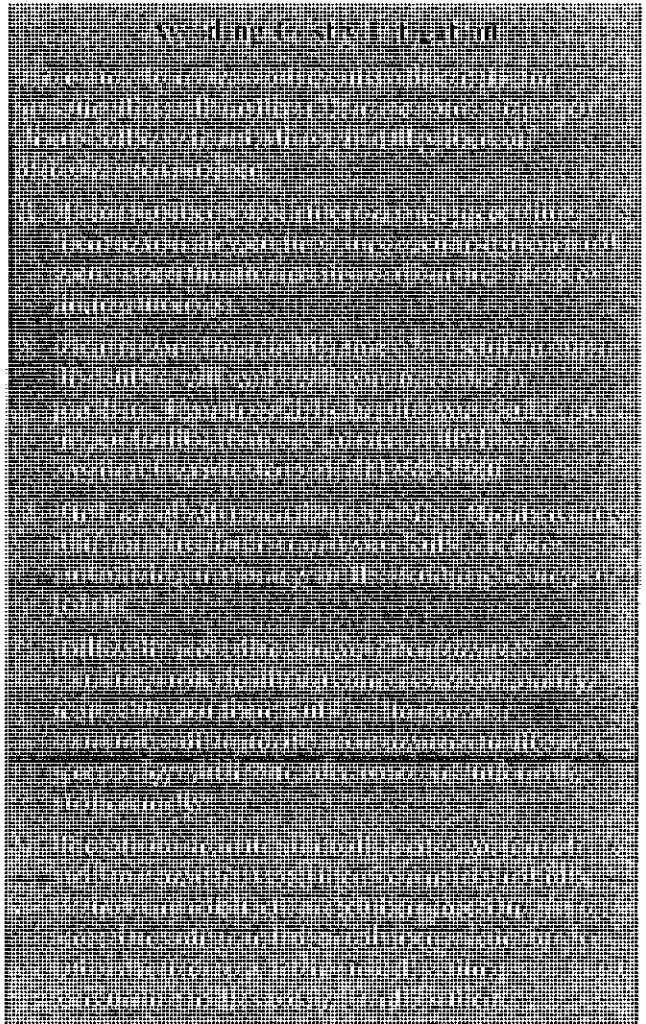
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.[2]

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

## Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.[3]

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



## Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

## When The Construction Defect Lawyers Call

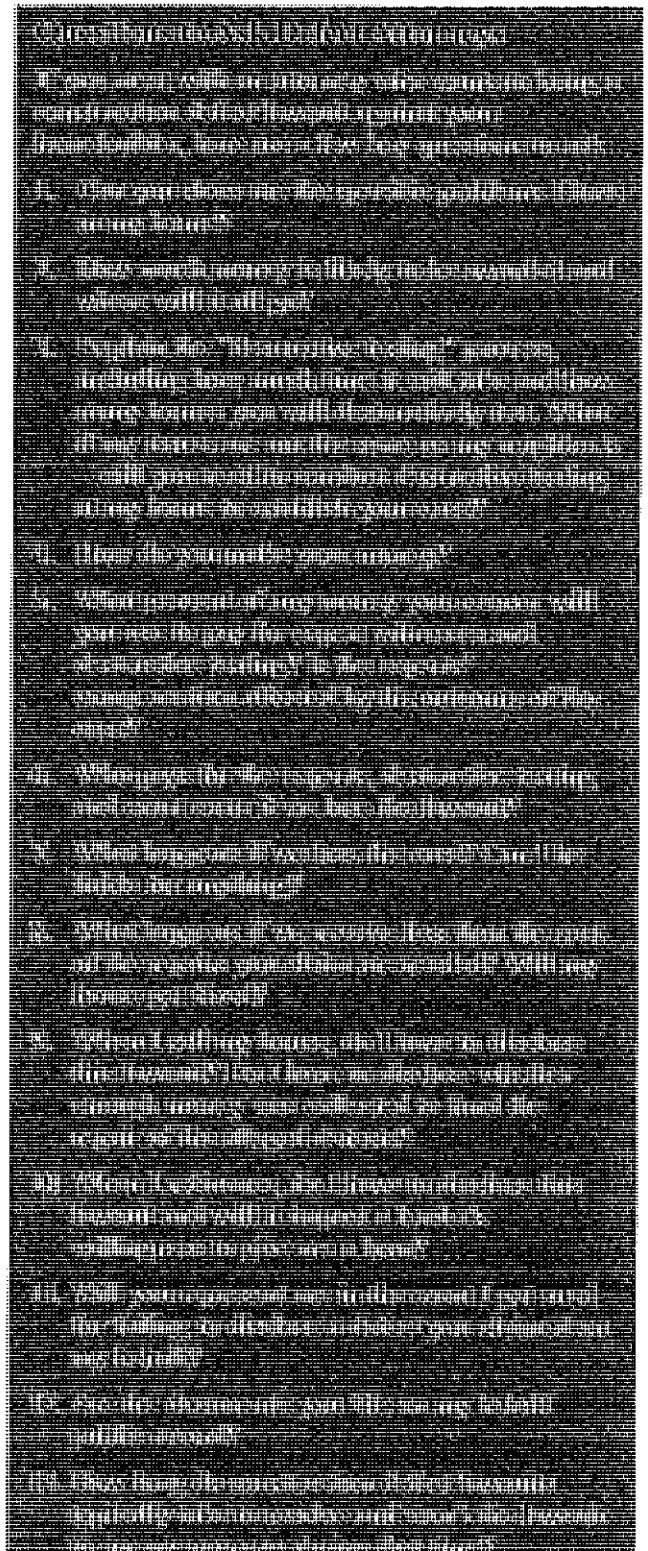
You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

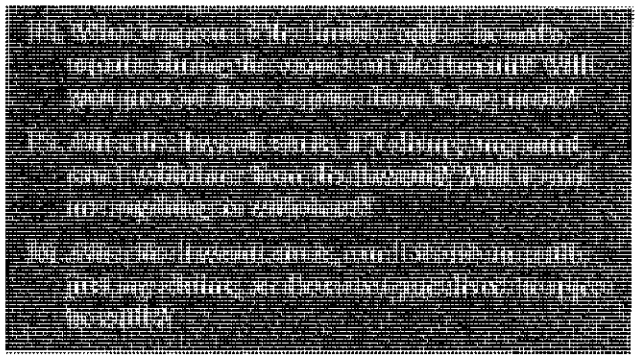
Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?





## Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.[4]

How would you feel about paying a contractor nearly $90 just to have your showerhead tightened? In one case, the trial attorneys sought $28,000 for showerhead repairs, or $90 per showerhead. The same case sought $12,000 for squeaky floors, $28,000 for bathtub repairs and $215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

## You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.[5]

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

## Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

## California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

## The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

## About Our Sponsors

**Citizens Against Lawsuit Abuse** (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

**The Trade Contractor Council of Southern California** (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

**The Associated General Contractors of California** (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

**The Building Industry Association of Southern California** (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

**The Construction Quality Committee** (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

## We'd Like To Hear From You!

Comments: _____

_____

_____

_____

Name: _____

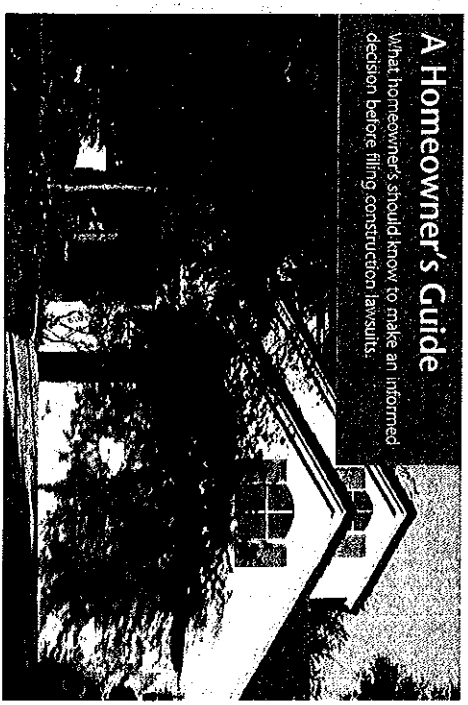
Address: _____

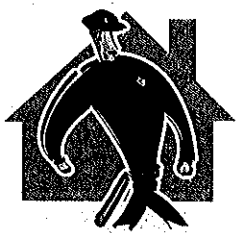
City/State/Zip: _____

Phone: _____ E-mail: _____

Your Builder/HOA/Property Mgmt. Co: _____

# Think Before You Litigate!





Neighbors Protecting

HOME VALUES

www.NeighborsProtectingHomeValues.com

# Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

# And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California, causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate -

***Neighbors Protecting Home Values***

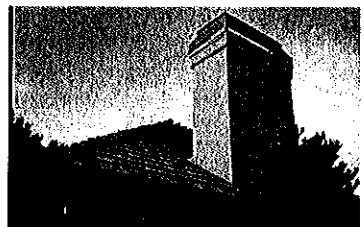
# Be an Informed Homeowner

Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

1. Contact your homebuilder first to solve your problem.
2. Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
3. Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



*Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.*

# *What Questions Should I Ask?*

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?

# Frequently Asked Questions:

### *Will a lawsuit harm my home's value or my neighborhood?*

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

*(The Business Journal / August 30, 1999)*

*Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.*

### When I sell my house, will these litigated "defects" require disclosure to potential buyers?

Under California law you are required to fill out a disclosure statement regarding your home, which includes everything regarding [illegible] and lawsuits relating to your home. The seller of the home must provide any potential buyer with a complete disclosure statement – listing all defects in the property known to the seller. The statement must be presented to the potential buyer prior to entering into any contract. Buyers usually waive the mandated cooling time for the property and discuss the potential selling price on the property. Here, the buyer may have discovered the defect first.

### Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage/home equity loan?

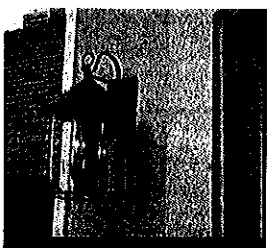
Title in California will disclose how your lender will be just as [illegible] as many lenders previously have not financed by anyone in your town due to the loss in home value as a result of the suit. [illegible] to an unnecessary lawsuit may also prevent homeowners from being able to sell or refinance a home, at least until and pending all of the applicable statutes have been met.

### How long does it take to settle a lawsuit?

[redacted]

### How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

[redacted]



*Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.*

### *Will the lawsuit affect my ability to obtain homeowners insurance?*

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

### *Shouldn't the City building codes and inspectors prevent construction defects from occurring?*

City's are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments and available for the homeowner's review. In order to protect future homebuyers city's often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.

*Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.*

### *What if I have a legitimate concern about my home?*

There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

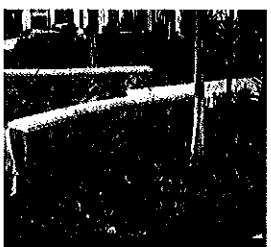
### *Will proper home maintenance prevent defects?*

Under California law homeowners are expected to maintain their homes – performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete – doing it properly the first time will save homeowners time and money in the long run.

*Withdrawal From A Lawsuit*

## *How do you withdraw from a lawsuit?*

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



*Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.*

# *THINK BEFORE YOU LITIGATE!*

Give your homebuilder a call – you will be pleasantly surprised!

For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at ***www.neighborsprotectinghomevalues.com***

*Think Before you Litigate!*

## Frequently Called Phone Numbers

My Homebuilder _____

Homebuilder's Customer Service _____

Licensed Maintenance Person _____

Gardener _____

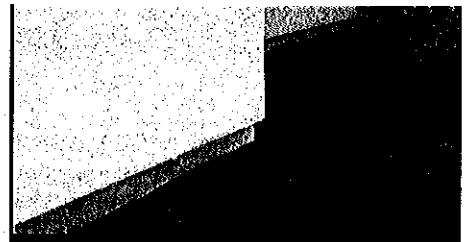
Pool Maintenance _____

City Services _____

Other _____

Other _____

Other _____



*Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.*

Neighbors Protecting
HOME VALUES

**Hollins, Audrey**

**From:** John duree [jduree@pacbell.net]
**Sent:** Thursday, June 10, 2010 2:52 PM
**To:** Hollins, Audrey
**Subject:** proposed change in fee agreements 1.5

Dear Ms. Hollins:

I am an AV rated, certified specialist in criminal law who has been in private practice for 29 years. I have used flat fee, non-refundable retainers in at least 85% of my cases. I have never had a fee dispute with a client in a flat fee case, because my contracts are simple, straightforward and fair. My clients appreciate agreements of such a nature because they know the total amount my representation will cost. They are beneficial to me because I do not have to concern myself with time keeping or collections and our decisions on how to proceed in the case are not cost-based; unlike civil cases, my cases are usually about liberty, not money, and assessing strategies on the basis of their cost is simply not done in my practice.

My initial agreements are for flat fee amounts through the preliminary examination. If the case goes beyond that point, I reach a new agreement or withdraw. My clients are clearly informed of this limitation at the outset, and I have never had a dispute on this issue. The reasons for this limitation are: First, most cases resolve at, before or immediately after the prelim--to charge a fee based on going through trial when less than 5% of my cases go that far would be unnecessarily expensive to the client. Second, case law does not require a motion to withdraw if the attorney wishes to do so between the prelim and the next appearance. It is a natural breaking point in the litigation. Third, I do not know how extensive a jury trial will be until I have done the review and investigation of the matter, which, in my practice is largely done prior to the prelim. Postponing the fee agreement for trial allows me to make a fair estimate of the extent of work trial would require and hence, to set a fair fee. The timing also gives my clients the opportunity to decide whether to continue with me or to seek other counsel after they know the total fee.

I have charged hourly fees in a number of cases, generally when my client is a corporation or quite wealthy. The reason I am willing to bill hourly in such cases is that the client is sufficiently financially strong that I am confident that my bills will be paid. I have found that my total fees are substantially higher when I bill hourly. Hourly billing would not be an effective method of paying for representation for me or for most of my clients.

I am not sure why the state bar is considering a change to rules governing fee agreements to get rid of a fair and workable method for attorneys and clients operating in the criminal justice system, but I hope, on full reflection, it will decide against such change.

Thank you for your consideration of this letter.

John Duree #65684

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** inactive member

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

*** Name** Jon Ash

*** City** Bend

*** State** Oregon

*** Email address** (You will receive a copy of your comment submission.) jonash61@msn.com

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

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

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

I have been a licensed attorney since 1972. My practice has been limited to criminal defense. For the past 38 years, I have been charging a flat fee service based on my experience in dealing with every type of criminal offense.
I have found, over the years, that my clients would much rather know, up front, what the handling of a case is going to cost. If my fees aren't acceptable to them, I can always refer them to an attorney that might charge less. If the handling of a case takes much less time than anticipated, I have the ability to refund fees if I wish. In all my years, I might have had one or two clients, out of hundreds, who have asked for any type of refund.
It's been my experience most criminal defense attorneys in California charge a flat fee. Not only does a client feel more assured knowing what the fees are going to be, I believe an all inclusive fee encourages more attorney-client contact. I tell my clients to call with any problem or question. This approach promotes better trust; the client knows I'm not encouraging contact so I can bill for an extra 15 minutes.

**ENTER COMMENTS HERE.**

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My primary practice is now in Oregon. I've been practicing in Bend since 1993. Alot of criminal defense attorneys in Oregon charge by the hour and I've heard many complaints from clients regarding that approach. Clients feel they are being "nickeled and dimed" to death and appreciate the flat fee approach. I constantly hear that their attorney is "dragging the case out" just to charge additional hourly fees. If an attorney is to expensive, clients won't hire them. Fee arbitration is always an option if a client is really taken advantage of. Clients are usually looking for results. If they get the result they want for a set amount of money, they are happy. Curtailing the flat fee would be a mistake!!

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Private sole practitioner - criminal law

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

*** Name** J. Robert Gericke

*** City** Victorville

*** State** California

*** Email address** (You will receive a copy of your comment submission.) BGericke@desertlaw.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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

I am opposed to the suggested new rule. In california we have a strong policy of protecting clients, as well we should. However, I think that in the field of criminal law there needs to some consideration to protecting the attorney. The non-refundable fee tends to do that while also offering the client clear notice of the cost of representation.

I would also note that fees in criminal cases tend to be pretty affordable compared to other areas of practrice. If the reader has ever been through a divorce this should be evident.

The rules for being relieved due to non-payment are different in criminal cases and this is another consideration. If non-refundable fees are banned should criminal attorneys charge by the hour? Can they be relieved more easily for non-payment? What impact will this have on court calendars?

I strongly urge that this proposed rule be scrapped. Criminal clients have many other protections. This rule is not needed.

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Private Attorney

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

*** Name** Howard M. Van Elgort

*** City** Soquel

*** State** California

*** Email address** (You will receive a copy of your comment submission.) howard@santa-cruz-criminal-lawyer.com

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- ○ AGREE ONLY IF MODIFIED

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I have been a member of the State Bar of California since 1/9/62, and have been in private practice for most of this time. I also served as a Judge for 6 years in San Bernardino County. I only handle criminal cases. Eliminating non-refundable and flat fee retainer agreements will only raise fees to clients resulting in heavier caseloads for public defender offices. I know, that if I where to charge for my time on an hourly basis, my fees would far exceed that of my non-refundable retainer fee and flat fee agrements for other services. Most of my client would not be able to hire private counsel. These proposed changes are a step backwards in the Bar's effort to expand the availability of legal services.

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation** CACJ

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

*** Name** Phil Johnson

*** City** Boulder Creek

*** State** California

***** Email address
(You will receive a copy of your comment submission.) lbj8060@sbcglobal.net

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Rule 1.5 Fees for Legal Services [4-200]

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- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

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"Wut... we have heeer..... is uh failyuh to 'umunicate".
"Cool Hand Luke", circa 1978

As a criminal lawyer who has served in the public defenders' realm in Louisiana and California for over 20 years and then in a solo or independent contractor capacity, I depend on simplicity and clarity in contracts with clients who need representation, but who do not have a lot of money. I protest this rule. But I will leave to others with more experience and insight the task of adequately explaining to the Commission why the substance of this new rule is abhorrent.

I write separately to protest the abysmal lack of notice to the members of the Bar this paid organization was created to assist and serve. I submit that if I similarly tried to foist upon a client - - without any prior notice - - a contract that allowed me to change my hourly rate under certain circumstances (i.e., DA suddenly amends information to include enhancements and priors, or refuses to cooperate in

**ENTER COMMENTS HERE.**

---

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I write separately to protest the abysmal lack of notice to the members of the Bar this paid organization was created to assist and serve. I submit that if I similarly tried to foist upon a client - - without any prior notice - - a contract that allowed me to change my hourly rate under certain circumstances (i.e., DA suddenly amends information to include enhancements and priors, or refuses to cooperate in providing discovery, judge issues stunning rulings requiring pretrial writs, etc.) because I cannot modify it any other way, the client-attorney relationship would be adversely impacted. It follows that his case would suffer along with the client's best interests, a complaint would inevitably follow and much energy and time would be lost in a lose-lose situation with absolutely no benefit to anyone. And of course, I would probably be hauled before the Bar Court as one of those villains who are out to gouge clients and otherwise cast aspersions on the legal profession.

That is how I view this failure to effectively notify the rank and file that this unsupported and unsupportable engraftment is coming down the pike one more time. Why is notice such a problem in these troubling areas?

In 35 years of practice, like the vast majority of others on this list, I have never been cited by any state bar for any malfeasance. Fortunately, I am semi-retired and so this concern has somewhat less impact on me than for my less aged brethren. For now, I just hope I can live out my days without looking over my shoulder for more trebuchet-launched boulders like this one, raining down from the sky. This may speed up my decision to do something else for a living with less downside. I also feel that it may lead others to do the same thing.

Thank you for listening. I hope this new Rule 1.5(e) idea gets a decent burial.

Phil Johnson

CBN 156738

# THE STATE BAR OF CALIFORNIA

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## PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Antonio Garcia

*** City** South El Monte

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) garcialaw08@yahoo.com

---

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## Your Information

**Professional Affiliation** Criminal Defense Attorney

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

*** Name** E. Michael Linscheid

*** City** San Francisco

*** State** California

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

---

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The proposed rule ignores the realities of the practice of criminal defense. Currently, the nonrefundable fee allows a client to pay a known amount which will cover the entirety of his criminal representation without additional fees. An attorney and client that enter into a contract for a nonrefundable retainer can feel secure that the retainer fee will cover the representation of the client through trial. Such a retainer allows a client to make decisions about a legal defense without taking into consideration the additional costs that may be incurred.

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## Your Information

**Professional Affiliation**

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

*** Name** Scott Ball

*** City** Santa Ana

*** State** California

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

---

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This is simply untenable and would have a profound negative effect on the practice of law in the area of criminal defense, as well as other areas of law as well. Flat fee, non-refundable retainers enable attorneys to take cases where it is impossible at the outset to know the amount of work that will be necessary. When we take a case, we agree that we will not ask for additional funds when the work necessary is greater than anticipated - and to be able to make that guarantee it has to work both ways.

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## Your Information

**Professional Affiliation** An individual

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

*** Name** Kenneth C. Gregory

*** City** Palm Springs

*** State** California

*** Email address** (You will receive a copy of your comment submission.) kgregory@socal-law.com

---

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Commission/Committee Members:

Your proposed rule is misplaced on so many levels. First, I share a concern that a significant level of deceit is involved in moving this proposed rule forward. The normal and typical process for introducing such a rule has been ignored; in favor of a secretive and deceitful move to push consideration of the rule without encountering known and legitimate opposition – THAT IS NO WAY FOR THE GOVERNMENT TO CONDUCT PROPER BUSINESS.

Second, the premise for the bill is seriously flawed and appears to be someone's personal vendetta rather than a legitimate need looking for an actual solution.
I recommend that you take the time to read and consider the attached letter from CACJ.

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation**

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

*** Name** James Webster

*** City** Sonora

*** State** California

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

---

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My CalBar # is 75342. I have been practicing since 1977 and my practice is devoted probably 85% to criminal defense. If this rule passes my ultimate fees to my clients will need to go way up.

I completely agree with the comments in the letter to you dated May 25, 2010, from:

ANN C. MOORMAN, President
CACJ Board of Governors

Thank you,

James Wm. Webster

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation** criminal defense sole practitioner

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

*** Name** Edward R. Rojas

*** City** Redwood City

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rojazz@pacbell.net

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For all the reasons Mr. Tarlow stated.

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## Your Information

**Professional Affiliation** Private Criminal Defense Attorney

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

*** Name** Aaron Hicks

*** City** San Diego

*** State** California

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

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If we are forced to do away with flat fee retainers, our clients will be billed much higher fees based on hourly work on their case. Most will not be able to afford private representation. Many will be forced to go with public defenders, crippling the private bar and bankrupting the state for the public defender representation. Please leave this alone.

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation** President of the Tuolumne County Bar Association

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

*** Name** Mark Borden

*** City** Sonora

*** State** California

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

---

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## Your Information

**Professional Affiliation** attorney, SBN#228119

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

*** Name** Gael G. Mueller

*** City** San Luis Obispo

*** State** California

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

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The only people who would even raise this issue are those who have never practiced criminal law. People who come to a criminal defense attorney can not afford hourly fees and most would not understand them. They would not pay the bill.
More importantly, the work required on a criminal case could not be done as monies received would be in the trust account. For instance, discovery on a criminal matter is charged to a private criminal defense attorney by the District Attorney's Office. This can run into hundreds of dollars depending on the complexity of the case and must be paid "up front". The amount of discovery is unknown to the attorney until it is received.
Additionally, the number of appearances, the number of phone calls, the number of hearings are all unknown quantities at the time that a client retains a criminal defense attorney. An hourly estimate is impossible and could run into hundreds of thousands of dollars for a case which now costs around 20-30 thousand.
We do not bill on hourlies for a very good reason- people need us to protect their constitutional rights-not just their money.

**ENTER COMMENTS HERE.**

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We do not bill on hourlies for a very good reason- people need us to protect their constitutional rights-not just their money.

This new "rule" would shut down my business. I will not charge people on an unreasonable basis.

Gael G. Mueller

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation**

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

*** Name** James Farragher Campbell

*** City** San Francisco

*** State** California

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

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Non-refundable fees, or flat fees, have been used in criminal cases in California for well over a hundred years. The average client is better served by a flat fee in a criminal case, particularly in a misdemeanor case, where to charge hourly would be prohibitive. The average client in a criminal case has no way of having the costs for criminal representaion perdicted with any real accuracy.It is very difficult for defense lawyers to collect an hourly fee in a criminal case after the work has been performed. The flat fee structure is a better way to deliver this type of legal representation. The client has a predetermined fee that they know they can pay or not pay. It is not open ended. This also encourges counsel to more efficently deliver the legal service without an eye on the clock. To my knowledge, I have not heard of any reports where clients have been harmed by non-refundable retainers in criminal cases. I know that my clients are very happy to know what it will cost to defend the case and that the fee will not exceed that non-refundable flat fee. I wish I had more room to tell you how stupid an idea this is. Where is the problem that you feel needs a solution?

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## Your Information

**Professional Affiliation**

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

*** Name** Paul Meltzer

*** City** Santa Cruz

*** State** California

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

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I join in the opposition to the Proposed Rule filed by the California Attorneys for criminal Justice (CACJ).

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**Professional Affiliation**

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

*** Name** James Cooper

*** City** Los Angeles

*** State** California

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

---

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With respect to privately criminal cases, the hourly rate scheme is impractical and unworkable. If attorneys could only ask for their compensation after the services have been provided, then clients would never pay us. There are rules in place to deal with excessive fees. This proposed rule would actually frustrate a client's effort to hire a lawyer.

OCBA

ORANGE COUNTY
BAR ASSOCIATION

PRESIDENT
LEI LEI WANG EKVALL
PRESIDENT-ELECT
JOHN C. HUESTON
TREASURER
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OC ASIAN AMERICAN BAR
OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

Date: May 26, 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 1.5 – Fees for Legal Services**

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

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

We are aware that a number of other persons have raised the concern that the Board of Governors adopted this proposed rule in the first instance without conforming to public comment procedures established in State Bar Rule 1.10. The OCBA believes that the State Bar should be concerned with the potential implications if the rule is adopted without complying with its own procedural rules.

Substantively, the OCBA is opposed to the present formulation of Rule 1.5, and especially the provisions of paragraph (e)(2) and the comments related to that section.

There already is an existing statutory scheme for written fee agreements in B&P Code sections 6146 through 6148. Several of the terms in proposed paragraph (e)(2) are already contained in these statutory requirements. If there is concern that flat fee arrangements contain peculiar risks for clients, those should be addressed within the existing statutory framework. Lawyers are not subject to discipline for failing to comply with B&P Code sections 6147 and 6148. It would be inappropriate to impose disciplinary consequences only upon those lawyers who charge flat fees, and not those who enter into other fee arrangements.

Paragraph (e)(2) mandates five contract terms that "shall" be set forth in the flat fee agreement. The OCBA believes that requiring inclusion of all of these provisions actually will lead to greater uncertainty and confusion. For instance, it is internally inconsistent to state that the flat fee is the lawyer's property immediately upon receipt, while at the same time mandating that the fee is refundable. Lawyers may believe and claim the fee has been fully earned because the rule declares it is their property. It should not be an ethical requirement that the lawyer state in writing that a fee which is the lawyer's property might have to be given back. This will create ambiguity, resulting in more disputes over whether or not the fee is refundable.

It would be very simple to state expressly in the rule that flat fees for specified legal services contractually agreed to between attorney and client need not be placed in the client trust account,

without also stating that the flat fee is the attorney's property. That solves the issue of whether or not the fees may be placed in the general account.

Whether or not such fees are refundable to a client when the representation ends should depend upon the parties' agreement, as well as whether the lawyer has substantially completed the tasks for which he or she was retained. Substantial completion of the task is difficult to define. There are many factors including the possibility that an early settlement or resolution is one way to complete a task, even if the consequence is to avoid trial or other proceedings that might have been contemplated.

The question of whether or not the client would be entitled to a partial refund should be left to the parties' agreement, subject only to the traditional, well-defined rules that prohibit unconscionable fees (Rule 1.15(a)), and mandate the return of an unearned fee (Rule 1.16). A lawyer should *not be subject to discipline* for retaining a flat fee *unless* that lawyer violates those rules. The question of whether the flat fee lawyer has earned the fee may be resolved just like all other fee disputes. It should not be a separate basis for lawyer discipline unless the overall fee arrangement or the fee charged was unconscionable, or was not appropriately earned by the performance of a proper degree of services. By seeking to resolve the widespread concern over "nonrefundable" fees, the proposed language is simply overbroad.

There is also a risk that the disclosures mandated by paragraph (e)(2) could discourage early resolution of matters by providing incentives for flat fee lawyers to delay resolution of matters so as not to be accused of receiving an excessive fee. This could be an unintended consequence of the rule, contrary to public policy favoring early resolution of disputes. Just because a lawyer has been able to negotiate a favorable early resolution does not mean that the fee is unearned. Better guidance is needed in the comments if the intent is to provide a means of determining when a fee has or has not been earned.

In Comment [9], there is a typographical mistake which erroneously refers to paragraph (f)(2), a provision that does not exist. We believe that is intended to refer to paragraph (e)(2).

With regard to the substance of Comment [9], the lawyer's failure to include the required contract language would essentially convert the payment received from a flat fee to an advance fee deposit – a refundable deposit against which a reasonable fee should be charged. Yet, because the parties were contracting for a flat fee, they did not set a rate or method of calculating a different fee. Thus, this provision will necessitate a *quantum meruit* determination in every instance where the paragraph (e)(2) language is missing, leading to more fee disputes.

In summary, the OCBA is strongly opposed to the provisions of paragraph (e)(2) as presently drafted, and would discourage the Commission from imposing special contractual terms that are appropriately left to the parties or better governed by existing statutory provisions.

PAUL L. GABBERT
LAWYER
MAIN STREET LAW BUILDING
2115 MAIN STREET
SANTA MONICA, CALIFORNIA 90405
(310) 399-3259

June 3, 2010

Howard B. Miller, President
State Bar of California
Girardi & Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017

Re: Opposition to Proposed New Rule of Professional Conduct
Rule 1.5(e)(4-200) (Fees for Legal Services) [Abolishing Non-Refundable Retainers]

Dear Mr. Miller:

I am a criminal defense attorney admitted to the State Bar of California on June 28, 1977. I practice state and federal trial and appellate criminal defense with an emphasis in asset seizure and forfeiture defense. I also represent clients in state and federal jeopardy and termination tax assessment proceedings.

In addition to being admitted to practice in California, I am admitted to the Bars of the United States Supreme Court, the United States Court of Appeals for the Ninth and Federal Circuits, the United States District Courts for the Northern, Southern, Central and Eastern Districts of California, as well as the Districts of Arizona and Hawaii, and the United States Tax Court. I have a national practice and have represented federal forfeiture claimants in California, Hawaii, Oregon, Arizona, Nebraska, New York, Illinois, Pennsylvania, South Carolina, and state forfeiture claimants in California, Hawaii, Michigan, Arizona and Kansas.

In the area of asset seizure and forfeiture defense, my cases have generated nineteen published opinions in the United States District Courts, Ninth Circuit Court of Appeals, and the United States Supreme Court.[1]

Perhaps unlike some Members of the Special Commission for the Rules of Professional Conduct ("Commission") who drafted the proposed rule, I have first hand experience in the importance of non-refundable retainers and their significance to the attorney-client relationship in general and in fee forfeitures and Internal Revenue Service ("IRS") and California Franchise Tax Board ("FTB") jeopardy and termination assessment, seizure and levying contexts in particular. On at least three occasions, in which I was representing clients who had their assets seized for federal or state forfeiture, and my compensation was contingent upon obtaining the return of the seized currency, all of the money was seized pursuant to IRS and FTB assessments. This, in turn, required substantial collateral litigation to obtain the return of the funds and payment of my fees.[2]

I am familiar with the myriad ways federal and state prosecutors use to separate attorneys from their earned fees. Currently I have a motion for an award of attorney's fees under the Civil Asset Forfeiture Reform Act ("CAFRA") (28 U.S.C. §2465, *et seq.*) pending before the Ninth Circuit in United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, (9th Cir. 2010) in which the government is contending that the statutory fee award belongs to the client, not the attorney who earned the fee, so that the government can then seize the entire fee award under the Treasury Offset Program to repay the government for any debts allegedly owed by the client. In short, while the price of liberty, like safety at sea, is eternal vigilance, it frequently seems to the practitioners in the trenches that the price of getting paid for defending persons accused of crimes is eternal litigation.[3] True retainers and other fixed fees are the only way for practitioners to avoid these pitfalls.

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[1]/Attachment 1.

[2]/U.S. v. $127,360.71 U.S. Currency, CV 95-8743-WJR; Guerra v. United States, 645 F.Supp. 775 (C.D.Cal. 1986) (Pfaelzer, J.); and People v. $74,722 in U.S. Currency, BS 04395958

[3]/In one FTB seizure in which I represented the client, from the date of the seizure of his funds, through the FTB and State Board of Equalization ("SBE") appeals including the suit for refund and trial in the superior court, approximately ten years were consumed by the litigation.

Initially, it is my understanding that the proposed new rule was adopted by the Board of Governors without appropriate notice and public comment as required by Rule of the State Bar 1.10(A). I certainly had never heard of it until very recently. Nor may the proposed new rule be excused from the requirement of this rule under section 1.10(B)(2) because it is clearly substantive and not a mere modification of the abandoned 2008 proposal, Rule 1.5(f). The present provision for post-hoc public comment neither solves nor resolves the Special Commission's and the Board of Governors' apparent failures to follow their own rules. Indeed, this situation is analogous to a judge issuing a tentative ruling without briefing and then inviting a party to try to change the Court's mind.

Although the purported purpose of the new rule is to protect clients, it appears to work to the detriment of clients and attorneys as well as ignoring the reality of more than a century of practice by California attorneys who have used various varieties of the non-refundable retainer fee. It is also my understanding that the Board of Governors has previously endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" earned upon receipt. Nor am I aware of any course of conduct or pattern of wrongdoing by California attorneys that would warrant modifying the existing rules as well as implicitly questioning the case law upholding them that are not already adequately provided for in the existing body of rules prohibiting the obvious: charging unconscionable fees and stealing money from clients for services not performed.

The primary reason that the non-refundable retainer or other fixed, fee earned upon receipt is essential to criminal defense practitioners and to their clients is to avoid fee forfeiture, seizure by tax assessments, orders to withhold, levies, restraining orders, preliminary injunctions, and years of uncompensated collateral litigation that distracts the lawyer from the purpose for which he was hired. The proposed new rule with its multiple qualifiers and conditions muddies rather than clarifies the existing law. State and federal prosecutors, agents and taxing authorities will have a field day with the proposed rule. It opens the door to seemingly endless "investigations" regarding the nature of the legal work performed by the lawyer and whether or not the fees belong to him or to the client. By definition, any monies deposited into the client's trust account belong to the client and are fair game for seizure, levy, and forfeiture.

In criminal securities litigation involving federal prosecutors and the Securities and Exchange Commission ("SEC") payment of attorney's fees and the relationship of that payment to restraining orders and preliminary injunctions can not only distract the attorney from the case she was hired to defend, it can eclipse the underlying case and result in the attorney having to defend herself in contempt proceedings based on how her

fee was paid. Even when the attorney prevails in the litigation, this can result in the functional equivalent of a fee forfeiture because the cost of successfully defending the civil contempt action can greatly reduce or eradicate the fee paid to defend the client in the underlying criminal action. Thus, non-refundable retainer fees are important in this context to insure that the fees belong to the attorney and that clients will be entitled to retain the counsel of their choice in the underlying case.

As an example of the creativity of federal prosecutors in the securities area, in one case counsel and his expert forensic accountant were paid by credit cards which are debt instruments. They were forced to retain counsel to defend their fees against the government's arguments that fees advanced from credit cards were assets, not debts, and fell within the scope of the order restraining the defendant's assets. After substantial collateral litigation at counsel's and the accountant's expense, the Court ruled that credit cards are debt instruments and were excluded from the order restraining the defendant's assets.

Thus, the proposed new Rule 1.5(e)(2) exposes members of the bar performing a variety of legal services to substantial financial risk and additional, uncompensated, extrinsic litigation by increasing the likelihood of the restraint and/or seizure of fees where the client has criminal, bankruptcy, state or federal tax or SEC investigations as well as being subject to a civil or criminal forfeiture or restraining orders.

Given the existing minefields in these multiple, overlapping areas of practice, Rule 1.5(e)(2) not only substantially increases the risk of attorney fee seizure and forfeiture, it will deprive many criminal defendants of their Sixth Amendment rights to the retained lawyer of their choice and prohibit many civil clients facing state and federal regulatory and civil penalty actions from retaining counsel.

Rule 1.5(e)(2) provides that "[i]f agreed to in advance in writing signed by the client, a flat fee is the lawyer's property upon receipt." Whether or not this is a true statement depends upon the applicable substantive law and a host of factually particular circumstances. Pursuant to its rule making authority, the State Bar cannot promulgate, overrule, alter, amend, or change existing substantive law. The cited portion of the proposed new rule in conjunction with its subsequent, multiple conditions and qualifications, is an unnecessary attempt to meld diverse areas of the law into a single rule that encompasses all potential future circumstances. Given the protean nature of human conduct, this is a factual impossibility, and greatly exceeds the Bar's rule making authority.

Cash flow is the economic life blood of all law firms. Under the proposed new Rule, and its multiple exceptions, when a skilled lawyer through knowledge, experience, reputation and carefully cultivated relationships obtains a significant benefit for the client within a short time, that does not resolve the entire case, the new Rule encourages clients to terminate representation without cause and obtain a refund of a substantial portion of the "flat fee" that would, under this proposal, no longer apparently belong to the attorney. As an example, in some federal drug cases, the principal concern of some clients is to get out of custody on bail. In a significant case, bail hearings can take many days and involve the presentation of multiple witnesses and the admission of numerous items of documentary evidence. Once the client is admitted to bail, and, in the case of a large multi-defendant federal drug conspiracy, the case can be set for trial six months to a year later. The proposed new rule provides an incentive for the client to fire the lawyer who successfully litigated the bail motion without cause, demand a significant refund of the "flat fee" fee paid, and to go shopping for less expensive counsel. Although it may seem counter intuitive, or even counter-empirical, to those who have not practiced in this area, there can be a surprising lack of gratitude and loyalty from clients even when counsel obtains significant results during the course of the litigation such as pre-trial release on bail, partial suppression of evidence, a severance of the defendant, the release of some assets, and the severance or dismissal of counts.

In short, there is no apparent historical, factual, legal or logical basis for the proposed new rule. It appears to unnecessarily and unreasonably create fertile new ground for fee disputes, including arbitration claims, bar complaints and lawsuits, as well as fee seizures, fee levies, fee forfeitures, and civil and criminal contempt proceedings against attorneys. Accordingly, the proposed new rule should be withdrawn.

Very truly yours,

PAUL L. GABBERT

PLG:ht
Encls.
cc: Rex Heinke
Michael Marcus
Richard A. Rubin
James H. Aguirre
Angela Joy Davis

Jeannine English
Patrick M. Kelly
Gwen Moore
William Gailey
George Davis
Laura N. Chick
Audrey Hollins
Jon Streeter

**ATTACHMENT 1**

1. United States v. $8,850, 461 U.S. 555 (1983) (on the brief)
2. United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, (9th Cir. 2010). Reversing the District Court (United States v. $186,416.00 in U.S. Currency, 527 F.Supp.2d 1103 (C.D.Cal. 2007) (Wilson, J.)
3. Carvajal v. United States, 521 F.3d 1242 (9th Cir. 2008)
4. United States v. $4,224,958.57, 392 F.3d 1002 (9th Cir. 2004) (on the brief)
5. United States v. Real Property Known as 22249 Dolorosa St., Etc., 190 F.3d 977 (9th Cir. 1999) (Dolorosa 2)
6. United States v. One 1997 Mercedes, E420; One 1992 Mercedes Benz 500SL; One 1997 Chevrolet Tahoe, 175 F.3d 1129 (9th Cir. 1999) (on the brief)
7. United States v. Real Property Known as 22249 Dolorosa St., Etc., 167 F.3d 509 (9th Cir. 1999) (Dolorosa 1)
8. United States v. Real Property Located at 874 Gartel Drive, 79 F.3d 918 (9th Cir. 1996)
9. United States v. $124,570 U.S. Currency, 873 F.2d 1240 (9th Cir. 1989)
10. Martinez v. United States, 669 F.2d 568 (9th Cir. 1981) (Martinez 2)
11. Martinez v. United States, 595 F.2d 1147 (9th Cir. 1979) (Martinez 1)
12. United States v. $186,416.00 in U.S. Currency, 527 F.Supp.2d 1103 (C.D.Cal. 2007) (Wilson, J.)
13. In re Application of Gerard Mgndichian for Return of Property, 312 F.Supp.2d 1250 (C.D.Cal. 2003) (Morrow, J.)
14. United States v. One 1992 Ford Mustang GT, 73 F.Supp.2d 1131, 1138 (C.D.Cal. 1999). (Baird, J.)
15. United States v. Funds Representing Proceeds of Drug Trafficking in the Amount of $75,868.62, Etc., 52 F.Supp.2d 1160 (C.D.Cal. 1999)
16. United States v. One 1996 Toyota Camry Sedan, 963 F.Supp. 903 (C.D. Cal. 1997) (Pregerson, J.)
17. United States v. Real Property Located at 6625 Zumirez Drive, Malibu, California, 845 F.Supp. 725 (C.D.Cal. 1994) (Pfaelzer, J.)
18. United States v. Real Property Located at 25231 Mammoth Circle, 659 F.Supp. 925 (C.D.Cal. 1987) (Hatter, J.)
19. Guerra v. United States, 645 F.Supp. 775 (C.D.Cal. 1986) (Pfaelzer, J.)

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Philip Heithecker

*** City** Chico

*** State** California

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

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

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

---

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

Flat fee retainers in our rurual county allows access to defense attorneys. Simply put, most, if not all, of my clients could not afford my hourly rate. Defendants would be left without representation as they would be too wealthy for the public defender and not wealthy enough for a private attorney.

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation** Law Firm of Carol Langford

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

*** Name** Carol Langford

*** City** Walnut Creek

*** State** California

*** Email address** (You will receive a copy of your comment submission.) langford@usfca.edu

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

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Carol Langford Comments on Proposed Rules of Professional Conduct 1.5(f) Fees for Legal Services

The following is a comment on Proposed Rule 1.5(f), specifically regarding when it is appropriate for a lawyer to make a modification to an agreement. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

A lawyer has a fiduciary relationship, a relationship of confidence and trust, to always put the needs of the client above his or her own. When trust is breached,

**ENTER COMMENTS HERE.**

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Carol Langford Comments on Proposed Rules of Professional Conduct 1.5(f) Fees for Legal Services

The following is a comment on Proposed Rule 1.5(f), specifically regarding when it is appropriate for a lawyer to make a modification to an agreement. You should know that I have served as the Chair and Special Advisor to the State Bar Committee on Professional Responsibility and Conduct, in addition to being a member for several years. I have also chaired the Law Practice Management & Technology Section of the Bar and the Council of Section Chairs. I am currently an adjunct professor at the University of San Francisco School of Law and Hastings College of the Law teaching courses in legal ethics, and I have a full-time practice specializing in legal ethics and attorney conduct.

A lawyer has a fiduciary relationship, a relationship of confidence and trust, to always put the needs of the client above his or her own. When trust is breached, the integrity of the legal system and the public's respect for the legal profession is jeopardized. The Proposed Rules are designed to regulate lawyer's conduct and bolster the public's confidence in the legal profession. I am concerned that the language of Rule 1.5(f) does not set a high enough standard to protect a client's interest in cases of modification.

Rule 1.5(f) language states that a lawyer shall not make a modification that is "adverse." Adverse is defined as a modification that "benefits the lawyer in a manner that is contrary to the client's interests." I am concerned this language is unclear. Whether a particular modification is adverse to the interest of the client always depends on the circumstances. I believe that a modification that increases a client's fee for a project should be adverse. In addition, adverse modification occurs when the client is coerced or agrees to it under duress or threat of non-performance. However, not all modifications are adverse. A modification that extends the time within which a client is obligated to pay a fee ordinarily is not adverse. The current language does make clear these distinctions. It doesn't set forth a requirement that the client who consents to the modification in writing can do so only if it is knowing and intelligent and the deal is fair and reasonable. The proposed rule will not deter adverse modifications and promote ethical transactions between lawyers and their clients.

I support the adoption of a higher standard in evaluating interests adverse to clients as in current Rule 3-300. It states that a lawyer must avoid interests adverse to a client unless all three requirements are satisfied. These requirements are: a) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (c) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition and the lawyer's role in the transaction or acquisition, including whether the lawyer is representing the client in the transaction or acquisition.

It is detailed in scope and stipulates that modification is not allowed unless the client has full and intelligent consent and in writing. My other comments to this and other Rules are set forth in the Hazard/Zitrin professors' commentary.

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation** Attorney in Private Practice

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

*** Name** Eric H Schweitzer

*** City** Fresno

*** State** California

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

---

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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.

Proposed Rule 1.5 would prevent thousands of Californians from obtaining meaningful access to the criminal courts. The scarcity of public defender resources, particularly in misdemeanor matters is becoming worse and worse from coast to coast. Those private practitioners who provide a realistic alternative to going to court and pleading guilty (usually at arraignment) with the public defender must rely on non-refundable retainers in order to remain viable economic enterprises. The non-refundable retainer benefits both the public and the legal profession because fewer and fewer Californians can afford the cost of a jury trial and because most cases that would plead guilty at arraignment (with the public defender) are likely to be settled far more beneficially for the client or dismissed before trial due to the work of a flat fee compensated private counsel. Proposed Paragraph (e)(1) would have disasterous consequences on the adversary system, because most persons who could afford the relatively modest fees for legal assistance from one stage of the proceedings to the next, could in no way afford a retainer based upon availability for a trial that would, in all likelihood, never occur. Clients need certainty about

**ENTER COMMENTS HERE.**

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Proposed Rule 1.5 would prevent thousands of Californians from obtaining meaningful access to the criminal courts. The scarcity of public defender resources, particularly in misdemeanor matters is becoming worse and worse from coast to coast. Those private practitioners who provide a realistic alternative to going to court and pleading guilty (usually at arraignment) with the public defender must rely on non-refundable retainers in order to remain viable economic enterprises. The non-refundable retainer benefits both the public and the legal profession because fewer and fewer Californians can afford the cost of a jury trial and because most cases that would plead guilty at arraignment (with the public defender) are likely to be settled far more beneficially for the client or dismissed before trial due to the work of a flat fee compensated private counsel. Proposed Paragraph (e)(1) would have disasterous consequences on the adversary system, because most persons who could afford the relatively modest fees for legal assistance from one stage of the proceedings to the next, could in no way afford a retainer based upon availability for a trial that would, in all likelihood, never occur. Clients need certainty about the cost of a case that they simply want to have settled without the need for protracted litigation or risk. Lawyers often settle the most egregious cases to the client's benefit solely through reputation, skill and ability that would otherwise be unavailable due to the uncertainty of costs. If changed as intended, Rule 1.5 would cause a division between the lawyer's best interests and those of his or her clients. Lawyers would be logically viewed as prolonging cases just to justify a fee, rather than for any legitimate purpose, and in most instances, those criticisms would be rightly based. Please protect the integrity of the adversary system of criminal justice by allowing Californians to choose to engage qualified legal counsel of their choice, when faced with criminal prosecution.

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June 14, 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 1.5(e) (Fees For Legal Services)**

Dear Ms. Hollins and members of the Rules Revision Commission:

Mr. Balin and I respectfully submit the following comments on Proposed Rule of Professional Conduct 1.5(e) (Fees for Legal Services). We are members of the Bar Association of San Francisco's Legal Ethics Committee. Mr. Balin is the Chair and I am the Vice-Chair. These comments are submitted in our individual capacity as time constraints prevented consideration and potential adoption by the Committee as a whole. We oppose subdivision (e) of rule 1.5 as presently drafted.

Subdivision (e) begins with the predicate that "[a] lawyer shall not make an agreement for, charge, or collect a non-refundable fee, *except*: ...." We respectfully submit that there is no such thing as a "non-refundable" fee and therefore the premise upon which the subdivision is based is misguided and is likely to create unnecessary confusion for both lawyers and clients.

The predicate language carries two implications. First, it implies that a fee can actually be non-refundable. Second, it implies that a non-refundable fee is ethically permissible in certain circumstances. According to proposed rule 1.5(e)(1) & (2), those circumstances include: (1) a true retainer, and (2) a flat fee for specified services.

Even a true retainer, however, is subject to possible refund under the particular facts and circumstances of a case. If a lawyer whose availability is to be secured by a true retainer is not available, then there is no legitimate basis for the lawyer to keep the retainer. Consider, for example, a situation in which the retainer is paid to secure the availability of a prominent criminal defense attorney. The client's willingness to pay the retainer is based on the attorney's high profile in this area of practice, and her busy trial schedule. Were the attorney to subsequently advise the client that she had another case that demanded her attention but someone else within the firm would be available to represent the client, would the client not be entitled to a refund of the true retainer?

A true retainer must also be earned in order for the lawyer to have a legitimate claim to it. *If* the lawyer makes him or herself available for the agreed period of time then she earns the retainer. It may be earned earlier than subsequent fees incurred in connection with the provision of actual legal services, but it is not earned simply by the lawyer's physical receipt of the funds. The same is equally true, if not more so, with regard to a flat fee for specified services. Such fees typically contemplate not only availability of the lawyer or law firm, but the provision of specified legal services in connection with the case. In many cases this includes the totality of legal services that will be required from beginning to conclusion of the representation. A flat fee is not earned on receipt of the funds, but rather upon provision of the specified legal services.

From the misguided premise that a fee can be non-refundable, subdivision (e) compounds the problem by stating "[i]f agreed to in advance, in a writing signed by the client, a flat fee is the lawyer's property on receipt." In our view, it should not be within the purview of the fee rule to try and create, modify or dictate property rights between lawyers, clients and third parties; and, the inclusion of this language does not effectively establish such rights. Moreover, attempting to define such rights and interests under a general rule ultimately fails because the issues of "when" a fee is earned and "whether it is to be refunded" are fact-specific.

Subdivision (e) seems to acknowledge these points when it states that a lawyer who is attempting to earn his or her flat fee "upon receipt" must nonetheless advise the client in writing that the non-refundable fee may in fact be refundable if the agreed-upon legal services have not been completed. Subdivision (e) therefore sets up an oxymoron. It purports to recognize the existence and permissibility of a "non-refundable" fee earned on receipt, while simultaneously acknowledging that such a fee is still "refundable."

The general public and lawyers, who seek guidance from the rules of professional conduct, are not well-served by a facially inconsistent rule - particularly in an area as important as the provision and handling of client funds. It is common knowledge that the

majority of complaints by clients against lawyers, and the majority of cases brought by the State Bar, involve disputes over client funds. This is an area that is critical to clients, to the issue of public protection, and to maintaining public confidence in the legal system. Lawyers (who face potential discipline), as well as clients (who provide funds to lawyers), are entitled to clear guidance regarding these issues.

The confusion created by subdivision (e) is exacerbated by the fact that the requirements of 1.5(e)(2)(iii)-(v)[1] which deal with flat fees are not present in 1.5(e)(1) which deals with true retainers. Proposed rule 1.5(e)(2)(iii)-(v) requires a lawyer to advise a client in writing:

> "... (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed."

Why is a client who pays a flat fee, but whose lawyer does not perform any or all of the contemplated services, entitled on the face of the rule to a potential refund while a client who pays a true retainer, whose lawyer is not in fact available, is not? Why, for that matter, is the flat fee earned on receipt when the true retainer is not? The materials provided by the Commission do not provide a rationale for differentiating between these two types of allegedly non-refundable fees, yet the requirements set forth in 1.5(e)(2) are not set forth in 1.5(e)(1). We respectfully suggest that the answer to these questions is that *neither* fee is truly "non-refundable," and neither is "earned" simply by receipt.

The notion that a true retainer or flat fee can truly be non-refundable is also at odds with the language in proposed rule 1.5, as well as other rules of professional conduct, which recognize that a fee (regardless of type) may not be illegal or unconscionable, and that any unearned portion of a fee must be refunded. See, e.g., proposed rules 1.5(a) and 1.16(e). The provisions of subdivision (e) as drafted make

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[1] Proposed rule 1.5(e)(iii)-(v) provides: "... (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed."

these other provisions and rules, and the relationship between them, all the more confusing for practitioners and clients.

The effort to dictate through a rule of discipline when a fee is earned and whether it is refundable is also inconsistent with the approach taken by the Commission in other rules. For example, proposed rule 1.15(g) recognizes that when there is a dispute between a client and lawyer over funds, the lawyer must place the disputed funds in a trust account until the dispute is resolved. The rule does not seek to determine whether the fees were in fact earned, who they belong to, etc. What principled basis is there for taking a different approach when addressing the important and fact-specific issue of whether a client's fee will be non-refundable?

Given that the provisions of subdivision (e) undermine its central premise (i.e., that a fee can be non-refundable), the question becomes "what is the real purpose and function of subdivision(e)?" The answer apparently is that it is directed at assisting a subset of lawyers (principally, criminal defense lawyers) in trying to fend-off third party efforts to seize client funds. We would respectfully submit that regardless of whether one agrees with the proposition that a fee rule should be drafted for the purpose of delineating property rights between a client and a third party, the effectiveness of the provision is dubious. It is not clear that a rule of discipline would have *any* effect on resolution of the legal issue of who actually owns or is entitled to the property (whether through seizure proceedings or otherwise).

Whatever minimal benefit lawyers might receive from being able to point to such language is significantly outweighed by the confusion and risks that such a rule would create for clients. The esoteric issues, and special interests, that underlie the rationale for subdivision (e) will be lost on clients. At the end of the day, a client who reads subdivision (e) is left with the following: (1) a true retainer to secure availability is non-refundable, and the default is that it is earned upon receipt, even if the lawyer ends up being unavailable, and (2) a flat fee for specified services can be non-refundable but even if the parties agree it is non-refundable it may still be "refundable." Will a client who reads the proposed rule have an accurate sense of the non-refundable nature of the fee?

As the Commission is undoubtedly aware, there have historically been significant differences of viewpoint with regard to true retainers, flat fees and non-refundable fees. This longstanding disagreement, even among lawyers who devote their practices to matters of professional responsibility, demonstrates why subdivision (e), as drafted, is not helpful to lawyers or to clients. Simply put, the subdivision does not provide greater clarity, it only muddies already murky waters.

The language of subdivision (e) comes in large part from Washington State Rule of Professional Conduct 1.5.[2] The use of Washington's language, while undoubtedly well-intentioned, is eventually unproductive because the Washington rule and the proposed rule address different issues. The Washington rule is tied in large part to the placement of funds received from the client. It creates an exception to the general requirement that the funds be placed in a trust account by providing that flat fees do not need to be placed in a trust account. Unlike most other states in the country, California is generally considered not to require an advance fee to be placed in a trust account. See, e.g., *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164; see also Cal. State Bar Form. Opn. 2007-172 ("Under rule 4-100, as it has been construed by the courts, an attorney is ethically permitted, but not required, to deposit fees not yet earned into a client trust account."). The purpose behind the Washington rule therefore doesn't exist in California where the exception has already been embodied by California law.

Which brings us back to the question what is the real purpose and function of subdivision (e)? Subdivision (e) does not benefit clients. A client has no interest in a fee truly being non-refundable, only the lawyer stands to gain. So, at the end of the day, subdivision (e) will exist for the purpose of assisting a subset of lawyers in fending-off third party claims to client funds through provisions that are unlikely to have any substantive impact on the legal issue of who is actually entitled to the funds.

We respectfully urge the Commission to amend proposed rule 1.5(e) to prohibit non-refundable fees in their entirety, as no fee is truly non-refundable. We understand that such a rule was originally proposed by the Commission. We further urge the

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[2] Washington State Rule of Professional Conduct 1.5(f)(2) provides: "[a] lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing he services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed."

Commission not to try and use the fee rule to address when a fee is earned, or who owns it. A straightforward rule prohibiting non-refundable fees would provide clear guidance to both clients and to lawyers. It would also be consistent with established case law and other rules of professional conduct that recognize that a fee must be earned, and that a fee is always subject to "potential refund" depending on the facts and circumstances.

If the Commission does not wish to prohibit non-refundable fees through a rule of discipline, then we urge the Commission to get rid of subdivision (e) altogether. Its inclusion is unnecessary. Clients will not be prejudiced by its omission. Nor will its omission place lawyers (criminal defense or otherwise) in a position any different than that which currently exists, and thus will not prejudice their ability to make the substantive arguments on which they seek to rely in responding to third party claims.

We appreciate the opportunity to have presented our views to the Commission, and the Commission's consideration of our comments.

Respectfully submitted,

Andrew I. Dilworth
William Balin

**Hollins, Audrey**

**From:** Louis J.Goodman [ljgoodman@yahoo.com]
**Sent:** Friday, June 11, 2010 4:06 PM
**To:** Hollins, Audrey
**Subject:** Opposition to proposed Flat-Fee/Non-Refundable restrictions 1.5

Ms. Hollins:

Below, please find a copy of the comments of Ann Moorman. I incorporate her comments herein by reference. Please count me as opposed to the non-refundable/flat-fee restrictions. As a criminal practitioner, I can assure you that there is really no other way to effectively bill clients reasonable fees for service. Thank you.

Louis J. Goodman

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Jon Willis, El Centro
Betsy Wolkin, San Francisco
Thomas S. Worthington, Salinas
May 25, 2010
Howard B. Miller
State Bar President
Girardi & Keese
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Los Angeles, California 90017
Special Commission for the Rules of Professional Conduct
c/o: Ms. Audrey Hollins
The State Bar of California

Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, California 94105
Re: Opposition to Proposed New Rule of Professional Conduct,
Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers
Dear Mr. Miller,
As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.
California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as amicus curiae on matters of importance to the administration of justice, to our members and to our clients.
We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.
Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

We are unclear why the Board is now considering a ban on non–refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.
As with all fees and fee agreements, non-refundable fee arrangements are subject to wellestablished professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.
As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the

ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may be feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified' State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.1

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

1 In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee
forms:

"Lawyers are urges to use the State Bar fee forms [. . .] . These represent the 'gold standard.'
The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify
Regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar
Fee agreement . . ." Diane Karpman, "Time for Tuning Up Those Fee Agreement", California Bar Journal (February 2010)

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used "fixed fee clause" at pp. 30-31 of "The State Bar of
California Sample Written Fee Agreement Forms" available at
http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.



at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of this letter.

Very truly yours,
ANN C. MOORMAN, President

CACJ Board of Governors
cc:
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State Bar Vice President
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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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Alison Bermant, Attorney at Law

*** City** Truckee

*** State** California

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

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

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

---

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

I have been practicing criminal defense law for 11 years now; eight years in private practice after working as a public defender. To have the State Bar suddenly involved in my fee contracts with my clients is very disturbing. 100% of the time that I have allowed clients to make payments to me for work performed, I have not been paid. There are no exceptions to this. My experience is such that if I am not paid in full prior to the making of the first court appearance, I will not be paid. Once a case is resolved, the client no longer has any interest in keeping his or her obligations to me because they are either incarcerated or so focused on paying court fines and reporting to their probation or parole officer that it is not on their agenda to see that the lawyer who helped them gets paid.

Every criminal lawyer I have ever come in contact with works on a flat fee basis for this very reason. In some cases, when a client insists on me working for an hourly rate, I will do so. Generally I end up charging them significantly more because of the amount of time I spend on the phone dealing with my client's emotional issues

**ENTER COMMENTS HERE.**

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I have been practicing criminal defense law for 11 years now; eight years in private practice after working as a public defender. To have the State Bar suddenly involved in my fee contracts with my clients is very disturbing. 100% of the time that I have allowed clients to make payments to me for work performed, I have not been paid. There are no exceptions to this. My experience is such that if I am not paid in full prior to the making of the first court appearance, I will not be paid. Once a case is resolved, the client no longer has any interest in keeping his or her obligations to me because they are either incarcerated or so focused on paying court fines and reporting to their probation or parole officer that it is not on their agenda to see that the lawyer who helped them gets paid.

Every criminal lawyer I have ever come in contact with works on a flat fee basis for this very reason. In some cases, when a client insists on me working for an hourly rate, I will do so. Generally I end up charging them significantly more because of the amount of time I spend on the phone dealing with my client's emotional issues over being prosecuted for their crimes. Flat rate fees in criminal cases are the only way to assure an attorney gets paid.

While many people believe that criminal lawyers are getting rich and some sort of windfall by this agreement, I am here to tell you that there are so few Johnny Cochrans in this world. I still love month to month most times. I have been out of law school for 11 years and every single month have made significant law student loan payments (still am). Not being paid for my work eventually means I go out of business. That is my reality.

I vehemently oppose any modifications to the way I conduct my business. I'm happy to come down and discuss this in person as well so you understand what real life is really about.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.
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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Melyssa A Avola

*** City** Pasadena

*** State** California

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

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

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

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

Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers would radically alter the way the majority of the Criminal Defense Bar does business. "Flat Fees" or "Fixed Retainers" are a common, and accepted way to retain clients in need of a criminal defense attorney. Such a practice keeps fees low to accommodate clients that may not be financially able to pay for accrued hourly fees and costs. Please refer to the attached letter from the President of CACJ Board of Governors, Ann C. Moorman for more information.

# CACJ California Attorneys for Criminal Justice

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May 25, 2010

Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, California 90017

Special Commission for the Rules of Professional Conduct
c/o: Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as *amicus curiae* on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

We are unclear why the Board is now considering a ban on non–refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (*e.g.,* trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may be feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified' State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.[1]

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

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[1] In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

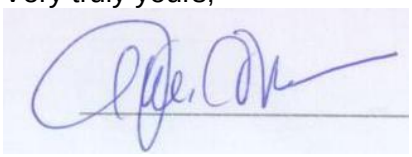
> "Lawyers are urges to use the State Bar fee forms [. . .] . These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify Regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar Fee agreement . . ." Diane Karpman, "*Time for Tuning Up Those Fee Agreement*", California Bar Journal (February 2010)

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used "fixed fee clause" at pp. 30-31 of "*The State Bar of California Sample Written Fee Agreement Forms*" available at http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of this letter.

Very truly yours,



ANN C. MOORMAN, President
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cc:

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June 14, 2010

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The State Bar of California
180 Howard Street
San Francisco, CA 94105

**VIA OVERNITE EXPRESS**

Howard B. Miller
President
The State Bar of California
Girardi & Keefe
1126 Wilshire Boulevard
Los Angeles, CA 90017

**VIA OVERNITE EXPRESS**

Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e) (4-200) (Fees for Legal Services), Abolishing Non-refundable Retainers

Dear Ms. Hollins and Mr. Miller:

As a long time Family Law practitioner I write this letter to express my opposition to the proposed new Rule of Conduct that would abolish the right of lawyers to charge flat or non-refundable fees. For many different reasons, in my area of practice, such a Rule would be grossly unfair to the lawyers and allow many clients to receive services at a cost far below the reasonable compensation for the work, effort and experience that goes into the representation of that client. For example:

In Family Law it is not uncommon for potential clients to go around and conflict out lawyers they do not want to have as opposing counsel. Sadly, this is a practice that is promulgated by some lawyers in our community but also has clearly taken hold in the general community because of the proliferation of this kind of advice on various special

interest web sites. One of the ways a high profile law firm can protect itself from this kind of practice is to have non-refundable retainer agreements so that the client does not hire you, conflict you out and then fire you, paying only for an hour or so of your time. There is truly a premium value to the retention of certain lawyers in all fields, unfortunately in the Family Law field the concept of "conflicting out" has become a tactic used by some litigants and some lawyers.

In Family Law it is not uncommon for some of us to substantially limit the intake of cases so that we can provide full and complete services to the clients we commit to represent. Only by knowing that there will a specific fee [minimum fee] can we afford to do that. If a client is accepted and then we turn away another potential client [as we do at Kolodny & Anteau] because of work load commitments, we should not be prejudiced because the client we accepted then chooses to leave before much work is done.

In Family Law we are often asked to prepare Pre or Post Nuptial Agreements, which are documents that have very substantial potential liability associated with them. The fees charged are document specific fees, not related to time expended. Prohibition of flat fees [which are a form of non-refundable retainers or will ultimately be categorized as such] would severely inhibit the willingness of lawyers to provide services in this difficult area.

To my knowledge, members of the Bar practicing in many fields including bankruptcy, immigration, family law, criminal law, tax law, and SEC law, as well as entertainment and real estate law understand that there is nothing about a non-refundable retainer that permits a lawyer to charge an unconscionable or clearly excessive fee. That is, the non-refundable retainer, as with any other traditional fee arrangement, has always been subject to well-established professional rules that apply to the unscrupulous lawyer who extracts an unconscionable fee as a "non-refundable retainer" from a naive client, has no established basis for doing so or to justify the amount charged, does little or no work, and keeps the clients' money. These rules include: (1) the case-by-case Rule against charging excessive fees (Rule 1.5(a)) and (2) the longstanding Rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). Common sense, fairness, and the existing protections against unconscionable fees, dictate that under a non-refundable retainer arrangement, except as allowed by historical rules and precedent, if a lawyer does very little or no work, the client is entitled to a full refund.

Similarly, members of the Bar have almost universally recognized that when a client signs an agreement and pays a non-refundable retainer, there are unanticipated events that can result in a refund of a non-refundable retainer. For instance, a client would be entitled to a full refund if his/her lawyer gets sick and does no work. Likewise, an honest lawyer would refund a $10,000 non-refundable retainer if, shortly after receiving it, the client changes her mind and fires him/her without cause, and the lawyer has not done any meaningful work. In these and many other unanticipated circumstances, a non-refundable retainer would be "unconscionable" under Rule 1.5(a) and an honest lawyer would refund the unearned portion of the fee.

If adopted, Paragraph (e) to abolish non-refundable retainers (Ex. 2) will fundamentally alter the practice of law in California, create unnecessary complexity and confusion, seriously undermine the attorney-client relationship, and prevent many clients from obtaining representation. It is contrary to the interests of the two groups who are most affected, the lawyers and their clients because, for example:

1. The Board of Governors adopted this 2009 Proposal without any input from the membership. Considering the significance of Paragraph (e) to lawyers and their clients throughout California and the controversy surrounding the Proposal, the Commission should have publicized and/or explained these changes to ensure that a cross-section of the bar knew of their existence so that the membership could meaningfully respond or object before the Board of Governors' tentative approval. Rule of the State Bar 1.10(A) ("Public Comment") requires Proposals for the Rules of the State Bar to be circulated for public comment before adoption, amendment, or repeal by the Board of Governors. Section 1.10(B)(2) states that Public Comment is not required: "(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal." This 2009 proposal cannot be reasonably interpreted as a "non-substantive" "modification" of the abandoned 2008 proposal, Rule 1.5(f). The current after the fact public comment does not solve this problem. See discussion Ex. 1. P. 12.

2. Paragraph (e) prevents fully-informed clients and their lawyers from knowingly entering into a non-refundable retainer agreement that benefits clients. It ignores the reality that since the 19th century, thousands of California lawyers have used

some form of the non-refundable retainer (that falls outside of the limited exceptions in Paragraph (e)'s ban on non-refundable retainers in (e) (1) and (2)).

3. There is no identifiable pattern of abuse or wrongdoing by California lawyers resulting from the current rules that mandates the abolition of the non-refundable retainer or that would be remedied by this sweeping change. The Proposal is a solution in search of a problem.

4. The Proposal ignores the fact that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," and "flat fees," and "non-refundable retainers," to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid." See October 1992 State Bar Memorandum and attachments in connection with a "Request that the Supreme Court of California Approve Amendments . . . to Rules of Professional Conduct." It also ignores the fact that it was the Committee on Professional Responsibility and conduct ("COPRAC") that first suggested (See May 20, 1991 COPRAC Memorandum), that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*

5. Paragraph (c)(1) and Comment [8] prohibit the long-established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received if she does any legal work.

6. Paragraph (e)(2) and Comment [5] would often require that the proposed "flat fee" to cover fees for the entire length of the case, including trial. Since this "flat fee" is required to cover contingencies (*i.e.*, trial or an administrative evidentiary hearing), that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur.

7. Paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the "flat fee" by representing that the fee "is the lawyer's property on receipt." The critical issue is not what the fee is called but who owns the funds.

8. Rather than protecting the client's entitlement to a refund of the proposed "flat fee" (see proposed Rule 1.5(e)(2)(v)). Paragraph 1.5(e)(2) actually will deprive the client from ever receiving a refund if these funds are the subject of any federal or state seizure, jeopardy assessments, restraining order or forfeiture, or even attachment by potential creditors. The lawyer cannot return all or part of the fee to the client because the seizing agency will be entitled to any fee refund.

9. Paragraph (e)(2) exposes lawyers performing all types of legal services to extrinsic litigation or significant financial risk by facilitating the restraining and/or seizure of fees if any client has a potential criminal or bankruptcy problem or has a dispute with the IRS, the Franchise Tax Board, the S.E.C., or is the potential target of a civil or criminal forfeiture or restraining order, or is vulnerable to potential creditors' claims.

10. Because Paragraph 1.5(e)(2) will substantially increase the risk of attorney fee forfeiture or civil seizure, compliance with Paragraph (e) deprives those accused of crimes of their constitutional rights to retain the lawyer of their choice and many family lawyer litigants of their ability to retain counsel.

11. Paragraph (e)(2) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and will result in clients filing arbitration claims, lawsuits, or Bar complaints.

12. The Proposal will generate increased client bar complaints, arbitration claims, and civil actions involving fee disputes, for example, when an attorney and a client cannot agree on the amount of funds that must be returned in an advance fee case even when an attorney is terminated without cause.

13. Paragraph 1.5(e)(2)'s novel requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is unfamiliar with these new Rules and the complex fact patterns that will develop. It is also inconsistent with the "sanctified" State Bar fee forms (that have been distributed by the Bar for approximately the past 20 years) that represent the "gold standard" for California lawyers.[1]

14. The Proposal impacts the economic viability of small law firms and the practice of large firms. If the lawyer agrees to the proposed advance "flat fee" that is earned when received and substantially underestimates the legal work, he will certainly not be terminated by the client. However, when the lawyer through skill and ability has, in a short time obtained a significant result that is not outcome-determined in an ongoing case, the Rule encourages clients to terminate the

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[1] In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

> "Lawyers are urged to use the State Bar fee forms [...]. These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar fee agreement...." Diana Karpman, "Time for turning up those fee agreements," California Bar Journal (February 2010).

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used "fixed fee clause" at pp. 30-31 of "The State Bar of California Sample Written Fee Agreement Forms" available at http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

representation without cause and obtain a refund of a substantial portion of the "flat fee" that under this Proposal would no longer be "the lawyer's property" or property to which the lawyer is entitled. This Proposal effectively penalizes an effective and/or efficient lawyer or the promotion of early resolution of disputes, all of which is contrary to the legislature's stated intent in the Family Code and which should be the principal to which all lawyers should subscribe.

The proposed new Rule 1.5(e), drafted by the Commission, essentially prohibits non-refundable fees for performing legal services. In doing so, it abolishes and/or redefines a widely accepted historical fee arrangement, and in reality will provide that most payments to do legal work in the future will not be earned when received regardless of the attempts in Rule 1.5(e) to inaccurately describe some fees as "the lawyer's property upon receipt."

I attach hereto a "Summary Analysis" done by others, which apears to me to completely address many of the problems in this Proposed Rule.

It is respectfully requested that the Proposed Rule be rejected or, if not, at least delayed until clear, specific comments are sought from the entire Bar.

Very truly yours,

STEPHEN A. KOLODNY
For the Firm

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Enclosure

# SUMMARY ANALYSIS OF PROPOSED NEW RULE OF PROFESSIONAL CONDUCT, RULE 1.5(e) (4-200) (FEES FOR LEGAL SERVICES), ABOLISHING NON-REFUNDABLE RETAINERS

## A. The Proposal is the latest in a continuing effort by the Commission to prohibit non-refundable retainers[1] in California.

Paragraph (e) is the latest effort by the Commission to change fee agreements used by lawyers and clients in California for over 100 years by amending Rule 1.5 (4-200) to abolish non-refundable retainers. This seemingly endless process is a solution in search of a problem. Similar though somewhat different proposals were made: (1) in 1991 by the Commission, (2) in 1997 by the Committee on Professional Responsibility and Conduct ("COPRAC"), and (3) in 2008 by the Commission.[2] The 1991 and 1997 proposals were soundly rejected based on the negative responses from a wide cross section of California lawyers. In August 2008, in the face of widespread opposition, the Commission scrapped the proposed revision to Rule 1.5(f) and instead decided to completely redraft Rule 1.5, by adding and renumbering newly proposed paragraph (e) and adding a number of Comments. In November of 2009, without any meaningful notice to members of the Bar, the Commission presented this latest Proposal to the Board of Governors for approval along with 34 other separate rule revisions. As far as I can determine, almost no one in the general bar membership who opposed the discarded proposal was aware of the request to approve these revisions and therefore no one could or did submit their opposition or appear to oppose these extreme changes that had never been publicly circulated for comment.

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1 "Non-refundable retainer" refers to non-refundable retainers, advance fees earned when received, and minimum fees.

2 The 2008 Proposed Rule 1.5(f) stated:

> "A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purpose of ensuring the availability of the lawyer for the matter."

The latest Proposal (Ex. 2) begins with the statement that a lawyer "cannot make an agreement for, charge, or collect a non-refundable fee, except . . ." This language demonstrates the Commission's clear intent to abolish non-refundable retainers subject to the limited exceptions in (e). The relatively narrow exceptions of paragraph (e), however, do not permit traditional non-refundable fee arrangements that benefit clients.

### 1. Exception (e)(1) – "True Retainer"

Paragraph (e)(1) prohibits, for example, the long-established practice of charging a minimum fee to ensure availability (true retainer) where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer. This arrangement benefits the client because the client does not need to pay additional attorney's fees until: (1) the true retainer is used up under the hourly calculation and/or (2) until some conditional event occurs (i.e. filing of criminal charges or a civil suit), even though the lawyer will remain available and do all work, under the initial true retainer, for agreed upon services (i.e. attempting to prevent the filing of a case). Paragraph (e)(1), however, does not permit this arrangement because if any portion of the original true retainer is used to pay for the attorney's work in the potential case, then the entire fee is automatically converted into an advance, unearned fee. *See* Comment [8]. Paragraph (e)(1), therefore, deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client (and which no client would refuse) and prevents the lawyer from receiving a true retainer earned when received.[3]

### 2. Exception (e)(2) – "Flat Fee"

Paragraph (e)(2) (*see* Exh. 2) is the product of the Commission's attempts to "assuage" their critics by attempting to make their attempted abolition of the

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[3] Paragraph (e) also reflects the lack of practical experience by the members of the drafting four-person subcommittee (which includes a law professor who served as a consultant and actually drafted Paragraph (e)) in how non-refundable retainer and fixed fees are set and earned in private practice.

non-refundable retainer "more palatable" to their critics.[4] This novel and convoluted fee arrangement appears at first to allow for "non-refundable" flat fee agreements "which constitute[] complete payment for those services" so long as there is a written fee agreement that states, "in a manner that can easily be understood by the client," a number of things including: "(v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed." The obvious problem with paragraph (e)(2) is that if any portion of a "non-refundable" fee "may be" refundable, then the entire fee cannot be the lawyer's property.

The less obvious but equally troubling problem is that when read in context of the entire Rule and Comment [5], Paragraph (e)(2) would often require that the presumably "non-refundable" flat fee cover fees for services spanning the entire length of the case, including trial.[5] Particularly in complex

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[4] *See, e.g.,* Dashboard for Paragraph (e) at p. 65 (when presenting Paragraph (e) to the California Bar Board of Governors, the Commission explained that the "changes" to the prior Proposed Rule 1.5(f) "may assuage the concerns raised" by public commenters in 2008).

[5] Comment [5] states, in part, that:

> "An agreement may not be made whose terms might induce the lawyer improperly curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction."

Paragraph (e), however, fails to provide any guidance on what it means to "adequately explain" that "more extensive services probably will be required." Unfortunately, it will certainly be clarified in the future bar complaints and fee disputes. In practice, it is often difficult to precisely estimate the work that needs to be done in any reasonably complex case since for example no one really knows if the case will be tried or not. In civil cases and in the criminal

cases, since this flat fee is required to cover contingencies (i.e. trial or an administrative evidentiary hearing) that often cannot be reasonably predicted prior to being retained, the significant portion of the flat fee that covers these contingencies is refundable, at least until the time that the contingencies occur. If the attorney was either fired without cause or withdrew from the case before trial or the case resolved before trial, the fees that would have covered the trial would have to be refunded (either on a pre-tax or post-tax basis)[6] because they are not earned.[7]

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law context, in most felony cases, particularly in anything that is relatively complicated, a lawyer cannot obtain discovery before being retained, to assess the merits of the case (and also to determine whether or not a lawyer wants to take on the case). For this reason, practitioners in complex civil or criminal cases often use hybrid fees which might use a true retainer, a nonrefundable retainer earned when received with hourly credits that would cover the provision of legal services through the different steps (i.e. pre-filing, discovery, pre-trial, trial, administrative hearings, post-trial, sentencing) of a complicated case. In these situations, non-refundable retainers are often used as a partial payment in combination with fixed fee payments or often hourly credits against the retainer.

Paragraph (e), however, would force attorneys not only to speculate about what services "probably will be required," but somehow also to "adequately explain" this "situation" to the client, without any guidance before being retained and without any meaningful analysis of the case. It is unclear how a lawyer can "adequately explain" the "situation" to the client when the attorney herself often cannot determine, with any reasonable degree of certainty, whether "more extensive services probably will be required" prior to meaningfully evaluating the case.

[6] Lawyers pay income taxes on non-refundable fees. Under Paragraph (e), the lawyer may have to pay income tax on the "non-refundable" flat fee paid when received from the client even though it may be refundable.

[7] One important purpose of a "flat fee" or "fixed fee" that is earned when received is to assure the client in advance that the fee will be no more than a particular amount. Many clients who have become relatively sophisticated consumers of legal services do not want fees calculated or based upon the time

On closer examination, Paragraph (e)(2) does not actually permit truly "non-refundable" "flat fees" as the Commission asserts that it does. The Commission's effort to dress up the ban on non-refundable retainers in an attempt to make it more palatable to the critics fails and actually creates more problems for the lawyer and the client. My detailed and lengthy analysis of the significant, additional problems created by these proposed changes will be made available to you, if you would like to review it.

**B. Paragraph (e) is a Solution in Search of a Problem.**

There simply has not been a pattern of abuse by California lawyers resulting from the current rules which mandates the abolition of the non-refundable retainer or which would be remedied by this sweeping change. With the latest Proposal, the Commission offers a one-sentence rationale, unsupported by any California case authority:

> "Paragraph (e) has no counterpart in the [ABA] Model Rule.[8] **The Commission recommends its adoption because charging a nonrefundable fee is inimical to California's strong policy of client protection. . .**" (Commission's Explanation of Changes to the ABA Model Rule, Ex. 2 to Executive Summary at p. 77)

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that is expended. This type of fee is not determined based on fixed values for individual steps in the litigation. Cases develop differently and the "fixed fee" is often an educated but fair estimate, since there is no way to determine when or how, for example, a civil litigation or administrative matter or a criminal case will be resolved.

[8] The ABA Model Rules contain no prohibition on "nonrefundable fees" and "earned upon receipt fees." *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §44, cmt.[f] (2000) ("if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer" and need not be deposited in a client trust account).



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The Commission, however, fails to demonstrate that clients need protection from the pattern of misconduct by the membership of the State Bar involving the non-refundable retainer. No recent California reported cases have demonstrated any pattern of abuse involving non-refundable retainers. The Commission has not only failed to cite a single, reported recent case to support the need for Paragraph (e) (despite our repeated requests since 1991), it ignores the reality that thousands of Californian lawyers have been using some form of the non-refundable retainer (that fall outside of the limited exceptions to Paragraph (e)'s ban on non-refundable retainers in (e)(1) and (2)) since the 19th century without creating any identifiable pattern of abuse.[9]

The Commission ignores and does not even disclose that in October of 1992, the Board of Governors concluded that a non-refundable retainer "earned when paid" was a perfectly appropriate fee arrangement. The Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" to be earned when paid, with title immediately transferring to the attorney so long as the written fee agreement explicitly spelled out the arrangement with the inclusion of an express statement that such fees paid in advance of legal services are "earned when paid."[10]

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[9] There are a myriad of examples of legal transactions other than criminal matters that have traditionally involved non-refundable retainers, fees earned when received, and minimum fees and are not calculated based on the time devoted to the assignment. These legal transactions are in a variety of practice areas, including: (1) real estate, (2) criminal law, (3) securities, (4) family law, (5) tax, (6) entertainment, (7) bankruptcy, (8) immigration, (9) appellate law, and (10) SEC matters.

[10] Ironically, it was COPRAC that first suggested (*see* May 20, 1991 COPRAC memorandum) that any change to the rules should explicitly add "non-refundable retainers" as part of the definition of "true" retainers earned upon receipt. COPRAC is also on record as stating it is "concerned" that any proposed rule change not "unduly restrict" a lawyer's ability to charge a truly non-refundable retainer in appropriate circumstances. *Id.*



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Indeed, in many jurisdictions, the use of non-refundable retainers is recognized as appropriate, if not essential in both civil and criminal cases.[11] Although Paragraph (e) abolishes the well-recognized and long-utilized non-refundable retainer (with the exception of the extremely limited categories discussed above), the Commission: (1) has not, and indeed cannot, demonstrate any need to completely alter the way law has been practiced in California or (2) how well this novel procedure will work in the actual practice of law.

The critical question here is not whether a rogue lawyer can gouge, exploit, and steal from his/her client using a non-refundable retainer or whether non-refundable retainers are prudent or wise in any given situation (this should be left to the lawyers and fully-informed clients to decide between themselves and memorialized in a written fee agreement that meets the requirements of Cal. Bus. & Prof. Code §6148(a) and Rule 1.5(a).).[12] Rather, the critical inquiry is whether the non-fraudulent or ethical use of non-refundable retainers is nonetheless so corrosive as to require a per se prohibition. The answer to this question is a resounding no.

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[11] John M. Burkoff, Criminal Defense Ethics: Law & Liability, § 10.1, at 501-505 (2d ed. 2003); John Wesley Hall, Jr, Professional Responsibility of the Criminal Lawyer (2d. ed. 1996) at p. 163. *See also, e.g., Bunker v. Meshbesher,* 147 F.3d 691 (8th Cir. 1998) (Minnesota); Tennessee Op. 92-F-128(b) (1993) (reaffirming earlier opinion approving nonrefundable retainers); Georgia Op. 03-1 (2003) (affirming use of non-refundable retainers); South Carolina Rule 1.16(d) ("The lawyer may retain a reasonable nonrefundable retainer."); Texas Op. 431 (1986) (affirming use of non-refundable retainers); Maryland Op. 87-9 (1987) (a non-refundable retainer is ethically proper so long as the amount involved is reasonable); Louisiana Rule 1.5(f)(2) ("When the client pays the lawyer all or part of a fixed or of a minimum fee for a particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid..."); Kentucky Op. 380 (1995) (affirming use of non-refundable retainers).

[12] Do California lawyers really need to consult a Rule of Professional Responsibility to determine that a law license is not a permit to steal, pillage, and plunder?



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Paragraph (e) is a source of overreaching and proves too much. A few dishonest lawyers may cheat their clients by removing money from their trust accounts. Yet, no one has proposed that the solution is to abolish trust accounts.

## C. The Washington Rule

The Commission's claim that the Proposal relied on, and is supported, by the Washington Rule (Rule 1.5(f) of Washington's Rules of Professional Conduct), *see* Dashboard and Introduction to proposed Rule 1.5(e)), is simply incorrect. First, non-refundable fees, advance fees, and fees earned when received are not prohibited under the Washington Rule. This fact is supported by: (a) the plain language of the Washington Rule, (b) Washington Supreme Court's rejection of the proposal to ban the use of the terms "nonrefundable," "earned upon receipt," and "minimum," and, (c) the fact that the Washington Rule does not even mention the word non-refundable and the fact that Washington previously had no rule requiring written fee agreements. Second, the Washington Rule has little, if any application, to the stated purpose of the Commission's Proposal. Rather than preventing lawyers from "charging or collecting a nonrefundable fee" as the Proposal seeks to do, the Washington Rule instead was intended to (a) change the rule that prevented lawyers from placing a fee for future services in their trust accounts and (b) impose requirements requiring lawyers to inform the client about the nature of the fee arrangements since Washington (unlike California) does not have a statute requiring lawyers to explain the fee arrangement in a written fee agreement.

The Proposal is a solution in search of a problem. The unconscionable fee limitation already protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. In the absence of a pattern of demonstrable abuses that can be remedied by either a limitation or a ban on the use of the non-refundable retainer, the primary concern of the State Bar ought to be the protection of the interests of clients and lawyers.

## D. Significant Problems Created by Paragraph (e)

Paragraph (e), if codified, will impact on lawyers who practice in every area including entertainment law, matrimonial/divorce, immigration law, civil

litigation, securities, bankruptcy, tax, real estate, appellate, and criminal law. In fact, prohibiting non-refundable retainers will in essence appear to make these fee payments the property of the client until the work is performed, regardless of the intent of the lawyer or client set out in a written fee agreement. This will expose lawyers performing any type of legal work to great financial risk, by facilitating the restraint or seizure of their fees if the client has a potential problem involving securities law,[13] bankruptcy, criminal law[14] and jeopardy tax assessments[15] and even creditors' claims.

The forfeiture/restraining order problems raised by the previous Proposed Rule 1.5(f) have not been resolved by the Commission as it claims. Rather than protecting the client's entitlement to a refund of the "non-refundable" flat fee (*see* proposed Rule 1.5(e)(2)(v)), the convoluted theoretically "non-refundable" flat fee structure created by the Commission in the proposed Rule 1.5(e)(2)

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[13] *S.E.C. v. Interlink Data Network of Los Angeles*, 77 F.3d 1201, 1205 (9th Cir. 1996) (portion of advance fee payment not for services already rendered remains property of client for purposes of determining whether the funds are subject to seizure).

[14] *See United States v. Saccoccia VI,* 165 F.Supp.2d 103, 111-13 (D.R.I. Aug. 3, 2001) (discussing government forfeiture of attorneys' fees); *People v. Superior Court, (Clements)*, 200 Cal. App. 3d 491 (1988) (refusing to recognize an exemption for attorneys' fees under California's forfeiture statute).

[15] *See Buker v. Superior Court*, 25 Cal. App. 3d 1085 (1972) (developed principles involving an "irrevocable assignment," the equivalent of a non-refundable retainer, in a jeopardy assessment case, enabling the client to receive representation and the lawyer to maintain the fee); *People v. Vermouth, supra*, 42 Cal. App. 3d at 359.and *People v. Vermouth*, 42 Cal. App. 3d 353, 359 (1974) (reversing conviction holding that the trial court deprived the defendants of their right to be represented by the counsel of their choice by failing to determine the validity of Mr. Tarlow's irrevocable assignment (treated as a non-refundable retainer) of the seized funds that had priority over the IRS lien). This approach has been used by hundreds of California lawyers to protect their client's constitutional right to representation while collecting their fee. *See also* Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 UCLA L. Rev. 1191 (1976).



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requiring lawyers and clients to inaccurately describe that the fee is "the lawyer's property on receipt" actually will deprive the client from ever receiving a refund if these funds are the subject of any seizure, forfeiture, or restraining order arising out of any: (a) criminal case, state or federal, (b) SEC civil restraining order, or (c) a jeopardy assessment by the IRS or the Franchise Tax Board. In fact, to make the situation even more egregious, if money to be paid to the lawyer is contingent on an event that never occurs (i.e. trial), in the face of either (a), (b), or (c) above, the lawyer cannot return these funds to the client. The attorney may not return any funds subject to restraint to the client even when she is fired by the client and even if they are necessary to retain a new lawyer. Lawyers have been accused of and charged with obstruction of justice and/or criminal contempt as well as being subject to discipline by the court which issued the restraining order if the money is returned to the client. The fee agreement required under Paragraph (e)(2) does not even attempt to focus on or resolve this significant problem.

A client's funds that are deposited in a trust or general account under this Proposal will often be subject to federal or state restraint and/or forfeiture or attachment by potential creditors. Paragraph (e) will substantially increase the risk of attorney fee forfeiture or civil seizure because it will be impossible for an attorney who holds a fixed fee payment in trust or who has deposited it in a general account even when it is owned by the client to assert that he or she is a bona fide purchaser for value without knowledge. Therefore, compliance with the proposed rule and amendments will make it impossible for a client to be represented by any counsel in many civil and criminal matters.

Moreover, paragraph (e)(2) requires the lawyer and client to inaccurately describe the actual nature of the fee by asserting that the fee "is the lawyer's property on receipt." The problem is not what the fee is called but who owns the funds.

There are a number of other, significant policy reasons why these changes should never be adopted, including unnecessary interference in attorney-client relationships, the generation of increased client bar complaints, arbitration proceedings and civil suits, the substantial economic impact on small and large law firms, increased unnecessary accounting and record keeping, the resulting increase in legal fees and the need to preserve the availability of legal services to the people of California including consumers of low, fixed fee services, as

well as to protect the constitutional rights of those accused of crimes to retain the lawyer of their choice.

In fact, on August 26, 2008, the Office of the Chief Trial Counsel of the State Bar ("OCTC"), recognized that the impact of a ban on non-refundable retainers is that "it will make members subject to discipline for charging or collecting a non-refundable retainer," when currently, any disputes related to the charging or retention of a non-refundable fee are "typically handled as either a fee arbitration matter or, in egregious cases . . . as a failure to return unearned fees in violation of current rule 3-700(D)(2)." OCTC's 8/26/08 comment on prior, revised Rule 1.5(f).

Current California law does not prohibit non-refundable fees and existing protections against unreasonable and unconscionable fees currently protects clients from: (1) the crooked lawyer and (2) unanticipated circumstances. Rather than bringing current California standards into the Rule, Paragraph (e) creates ambiguities and uncertainties in the Rules in part by grossly departing from the current and long-standing California custom, standards, practice, and principles governing fee agreements (even including the specific form fee agreements that have been endorsed and distributed by the State Bar for years and are still available on its website[16]). The current standards, custom, and

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[16] The existing "fixed fee clause" distributed in the form fee agreements by the State Bar (and likely included in hundreds of fee agreements across the spectrum of specialties in State Bar sample fee agreements) explicitly provides that:

> "unless the attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under the agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed." "The State Bar of California Sample Written Fee Agreement Forms" at pp. 30-31 (available at http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf).

practice (endorsed by the State Bar which provides that the fixed fee will be earned in full and no portion of it will be refunded once any material services have been provided) are entirely irreconcilable with Paragraph (e), which in paragraphs (e)(2)(iv) and (v) permits a client to terminate representation without cause, before all of the work has been completed and after the lawyer has performed a substantial amount of work, and then file an arbitration claim, a lawsuit, or a Bar complaint against the lawyer. It appears the Commission has never addressed this significant inconsistency.

## E. Failure to Effectively Advise the Bar of the Amendment

When the Commission attempted to prohibit non-refundable fees in 2008, it was done in a manner that was not designed to notify a meaningful cross section of the California Bar of the amendment.[17] With the latest proposal, the Commission totally redrafted and expanded Rule 1.5(e) and presented it along with 34 other rules to the Board of Governors for conditional approval in

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In her latest column of the California Bar Journal, legal ethics expert Diana Karpman describes these "sanctified" State Bar fee forms as the "gold standard" and urges California lawyers to use them. She states:

> "Lawyers are urged to use the State Bar fee forms [. . . ]. These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar fee agreement. . ." Diane Karpman, "Time for tuning up those fee agreements," California Bar Journal (February 2010)

[17] With the 2008 proposed revision to abolish non-refundable fees, aside from the posting of the 209-page Discussion Draft of 13 proposed amendments to the rules of professional conduct (including the prior proposed Rule 1.5(f) banning non-refundable retainers) on the state bar website, it was not publicized (as far as we know) other than a short article in the May 2008 California Bar Journal that made no mention of non-refundable retainers. Most California lawyers were completely unaware that these significant changes to Rule 4-200 had been proposed.



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November of 2009, without informing the membership of the State Bar and the known stakeholders who opposed the 2008 proposal. It is unlikely that any meaningful number of members of the California bar, other than a lawyer who is on the Commission or a member of the Board of Governors, actually knew about the latest Proposal (draft Rule 1.5(e)) and the Commission's attempt to present it to the Board of Governors for approval. There was no time or opportunity to learn about, scrutinize, or comment on draft Rule 1.5(e). Obviously, since no notice that the meeting agenda involving a proposed draft of Rule 1.5(e) that in fact dealt with a ban on non-refundable retainers was distributed to the members of the Bar, no one could appear before the Regulations and Admissions Oversight Committee ("RAC") or the Board of Governors on November 12 through 14, 2009 to raise the host of problems with this novel, wide-ranging version of Rule 1.5(e). The public comment letters sent in the spring of 2008 before it was abandoned in August 2008 could not have addressed the significant changes to Rule 1.5 submitted to the Board of Governors in November of 2009.

Considering the significance of this Proposal to lawyers and their clients throughout California, the controversy surrounding the Commission's prior efforts to abolish the non-refundable retainer, and the fact that public commenters in 2008 complained vigorously about the lack of publicity surrounding the 2008 proposed Rule 1.5(f), I am especially concerned that the Commission sought and received the Board of Governor's endorsement for Paragraph (e) without (1) publicizing, disseminating, or explaining, in a manner that actually informs a cross-section of the bar of its existence and (2) did not permit the membership to meaningfully respond or object before the Board of Governors' tentative approval of revised proposed Rule 1.5(e).



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HALT *Simple · Affordable · Accountable · Justice for All*

June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,

Theresa Meehan Rudy
Executive Director

1612 K STREET, NW • SUITE 510 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

June 15, 2010

**Comments by**
**HALT—*an Organization of Americans for Legal Reform***
**on**
**Proposed California Rules of Professional Conduct**

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

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consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

**Rule 1.4 Communication.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

**Rule 1.4.1 Disclosure of Professional Liability Insurance.** HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Propose Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

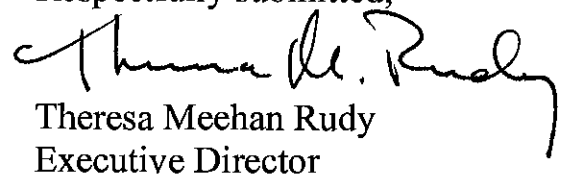
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

**Rule 1.8.10 Sexual Relations With Client.** There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy
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HALT, Inc.—
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1612 K Street NW
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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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Criminal Defense Attorney; former Public Defender; cur

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

*** Name** Allen Bloom

*** City** San Diego

*** State** California

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

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

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

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

The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case.

As an attorney who left school over three decades ago and applied to every single public defender and legal aid office in the country, and as someone who spent his first year in practice as a Peace Corp volunteer (VISTA Volunteer) working for $185 per month (plus food stamps) at the San Diego Legal Aid office, and as someone who has for over thirty three years maintained his commitment and dedicated a considerable portion of his practice to representing the indigent defendant, I am NOT someone who has ever placed money ahead of the rights of my clients.

It is with that background that I can unequivocably state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis.

**ENTER COMMENTS HERE.**

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The prohibition of a non-refundable fee option would have serious negative consequences on the rights and benefits of a client/defendant in a criminal case.

As an attorney who left school over three decades ago and applied to every single public defender and legal aid office in the country, and as someone who spent his first year in practice as a Peace Corp volunteer (VISTA Volunteer) working for $185 per month (plus food stamps) at the San Diego Legal Aid office, and as someone who has for over thirty three years maintained his commitment and dedicated a considerable portion of his practice to representing the indigent defendant, I am NOT someone who has ever placed money ahead of the rights of my clients.

It is with that background that I can unequivocably state that the benefits and rights of an defendant/client in a criminal case would be considerably benefitted by having the option of being able to accept an attorney fee agreement on a non-refundable fee basis.

The foundation for my beliefs are as follows:

1. A non-refundable and fixed fee agreement provides certainty to the client. They know what they are going to pay at the beginning of the case and they never have to worry that their fee will increase. In my cases, it usually means that I have greatly undercharged the client, because I end up spending more time on the case than I originally estimated, yet never charge a client more.

2. It provides better and full service to the client. The client never has to practice "check-book defense", deciding whether a particular meritorious motion or legal task should be taken as compared to what it would cost. There never is a "short changing" of services, but rather is an expansion of services available.

3. It increases access to the attorney. A client doesn't ever have to worry that he is going to suffer financially by being billed by communicating with his attorney a multitude of times. In this regard, I am reminded of a true story involving the client who met his lawyer at the Padre game, talked about Tony Gwynn and the Padre pitching and asked about the status of his case, only to receive a bill the following week for legal consultation.

4. It eliminates the chances of conflict between the client and his attorney. Because the attorney also gains certainty in the receipt of a non-refundable fee at the beginning of the case, there never is a situation where the attorney is not paid for his services, either intentionally or because of a change of financial circumstances of the client, meaning that the attorney does work for the client - maybe is forced to go to trial for the client cuz the judge will NOT relieve an attorney just for the client's failure to pay - all of which builds in a sometimes subtle and sometimes not so subtle conflict between client and attorney.

One of the most repugnant examples of this circumstance relates to a story that I saw on the CBS News Program "60 Minutes", where Morley Safer was interviewing a defense attorney on the day before his trial. The attorney told Mr. Safer that he hadn't been paid by his client on the day before the trial despite his multiple efforts to have the client pay. The attorney told Safer, that he wasn't worried because he "had a way to convince the client". What was the way? The trial started; the judge asked if the defense had an opening statement: The attorney responded, "We will waive your honor." The first DA witness finished direct; the court said, "defense counsel, you may cross examine". The defense attorney responded: "We will waive, your honor."

At the end of the day, the defense attorney smiled toward the camera and showed Safer a bag full of money and said "See Morley, I told you I had a way to make him pay."

It was as repugnant an exhibition of defense representation as I've ever heard. In the worst tradition of this profession.

Yet this behavior is ripe where the a non-refundable fee agreement is not allowed.

It also must be remembered, that just because an attorney requests a non-refundable fee agreement does not mean that it is something which the client MUST accept. Of course, the client can say, "I will not accept this term" or can seek other counsel. This is NOT a situation where the attorney has a "monopoly" on representation. Simply put, the client can simply say: "I will hire someone else."

It It should also be noted, that a non-refundable fee agreement is really a much fairer system, if there is ever a dispute as to the fee. This works to the benefit of the client. Let's look at the two circumstances: non-refundable and refundable.

If there is a NON-refundable fee agreement, and at the end of the case or anywhere in the middle, the client disputes the fee, the client has the right to (a) attempt an informal resolution, but if such a resolution is not successful, has the right to (b) DEMAND arbitration and the atty MUST, as a matter of state law, accept the arbitration requirement. Of course, the client has the option of (c) filing a law suit. In all matters the attorney is obligated to try to resolve the matter.

On the other hand if there is a REFUNDABLE fee agreement, and the client disputes the fee, the client has the right to (a) seek an in informal resolution, but if such a resolution is not successful, but here the situation changes. The disputed funds now have to be placed in a special trust account and though the client has the right to demand arbitration, the attorney does NOT have the right to do so. In short, the client can refuse to try to settle the issue, and ignore all the efforts of the attorney to resolve the situation. The money remains in the trust account and the client, if she wishes, can do absolutely nothing and if she acts in this way, the ONLY resolution that the atty has is to SUE HIS CLIENT. It destroys atty-client trust; it works greatly to the detriment of the client; it potentially opens the door to privileged communications - it's just bad.

Finally, it should be remembered that, of course, it is possible that there could be abuses by the unscrupulous atty taking advantage of a non-refundable fee agreement. There is a remedy is place to deal with such a circumstance. If a case is dismissed two days after filing, then, of course, the prohibition against unconscionable fees and my own ethics, demand that I return a large, if not all, the fee. If I, not my client, were to walk away from representation, then the full fee should be returned.

But problems with unscrupulous attorneys can occur with equal frequency with any other billing system: hourly (where the hours can be gouged and multiplied for unnecessary work); task (where poor work can be done for services). simply put, there is no billing system which is immune for an unscrupulous attorney, or for that matter, an unscrupulous client. The best way to have fair fees and good services for clients, is to have good attorneys and fair clients, and no system of billing guarantees that, however, we should look to create a system which enhances the chances of good representation, and I have found, after 35 years of practice, that the best method is through a non-refundable fee system.

# LAW OFFICE OF RICHARD P. BERMAN

Richard P. "Rick" Berman, Attorney

2333 Merced Street
Fresno, California 93721
(559) 438-7425
FAX (559) 233-6947

June 15, 2010

Mr. Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017

Special Commission for the Rules of Professional Conduct
c/o Ms. Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Opposition to Proposed New Rule of Professional Conduct Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Dear Mr. Miller:

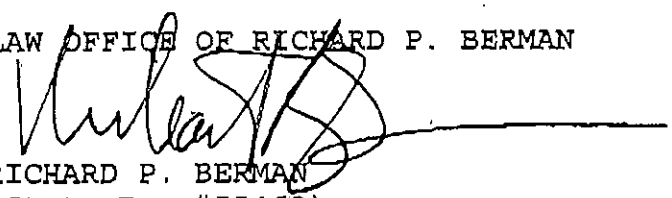
The new proposed State Bar Rule 1.5(e)(4-200) to prohibit non-refundable retainers is an anti-consumer measure. I have been practicing criminal law, both as a prosecutor and a defense attorney, for almost 40 years. During that time I have won numerous awards and received the highest possible peer ratings and reviews. It is unfair to the public to prohibit them from negotiating a reasonable and fair price for my services. In America, competition and the free market are hallmarks of our success. If a consumer wants to pay for my years of experience, track record of success, thousands of hours of post-law school education, reputation and expertise, they should be free to do so.

If I could not charge a significant non-refundable retainer, I would be likely forced to charge an hourly fee which could not be reflective of my past accomplishments and experience in relationship to a relatively new and unproven attorney. If the new attorney is charging the "going rate" of $250.00 to $350.00 per hour, I would have to charge many times that amount per hour to reasonably value my services. Simply put, a large non-refundable retainer paid to me may provide the results and the piece of mind that a new attorney may never be able to provide, and do so with a fair and reasonable cost to the client.

Anyone who has dealt with a person charged with a serious crime, or their family, knows the stress that a criminal prosecution visits upon a defendant and his/her family. If I can save a person's liberty, reputation, life savings, and professional license, and do so in an expeditious manner that does not force him/her and the family to go through protracted proceedings, then the consumer has enjoyed the freedom to hire the lawyer they desire at the price that they are free to negotiate and to enjoy the results. Of the many thousands of clients I have represented the complaints about the fees can be counted on the fingers of one hand. That is in almost 40 years of handling both serious and mundane criminal matters and charging what I and the client feel is fair and reasonable. I simply cannot provide such services under the new proposed State Bar Rule. Both the public and I will lose a great deal if this measure is passed.

Sincerely yours,

LAW OFFICE OF RICHARD P. BERMAN



RICHARD P. BERMAN
(State Bar #55462)

RPB:as
Enclosure

# Richard P. Berman (AV)

**Law Office of**
**Richard Berman & Eric Schweitzer**
**Fresno, CA**

**Partner**
**2333 Merced Street**
**Fresno, CA 93721**
Tel: 559-233-2333; 559-438-7425
Fax: 559-233-6947
Fresno Co.


***Practice Areas:*** Criminal Law, White Collar Criminal Defense, Sexual Offenses and Internet Pornography, Drug Crimes, Traffic Violations, Homicides, Driving While Intoxicated, Personal Injury

***Admitted:*** 1973, California

***Biography:*** Phi Alpha Delta. Recipient, Northern California Super Lawyer, 2009. Instructor, "Criminal Law," Fresno City College and State Center Peace Officers Academy, 1974-1979. Deputy District Attorney, 1972-1977 and Chief Deputy, 1977, Fresno County. Dean's Advisory Council, California State University, Fresno, School of Social Sciences, 1986-1998. Listed in Best Lawyers in America, Criminal Defense, 1987. Listed as one of top 100 trial lawyers in California 2007 by Association of Trial Lawyers of America. Northern California Super Lawyer, 2009.

***Member:*** Fresno County Bar Association (Director, 1992-1994; President, 1994-1995; Chair: Criminal Law Section, 1982 and 1984; Bench, Bar and Media Committee, 1990. Member, Blue Ribbon Committee on Court Coordination); Federal Bar Association; State Bar of California (Member, State Bar Public Affairs Committee, 1986-1989); Consumer Attorneys of California (Recognized Experience as a Trial Lawyer and in the Field of Criminal Defense, 1981); Fresno Trial Lawyers Association (Director, 1979-1985); California Attorneys for Criminal Justice (Life Member and Patron, Board of Governors, 1983-1989, 1992-2001); National Association of Criminal Defense Lawyers (Life Member); Consumer Attorneys of Los Angeles; American Inns of Court (Master).

***Military:*** Captain, U.S. Army Reserve, Medical Service Corps, 1975-1979

***Educated:*** University of California at Los Angeles (B.A., 1968); University of California, Hastings College of Law (J.D., 1972)

***Born:*** Los Angeles, California, October 26, 1946

***Associations:*** ABA

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

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

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

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

Please see attached 3 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 1.5 [4-200]:**
**"FEES FOR LEGAL SERVICES"**
**(DRAFT #11, 12/14/09)**

***INTRODUCTION***

The State Bar of California Law Practice Management & Technology Section (LPMT) comment on Proposed Rule 1.5 concerns 1.5 in general and Comment [1B] in particular:

> Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Contingent fees, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

***ANALYSIS***

**The State Bar Should Acknowledge and Encourage Alternative Fee Arrangements**

LPMT believes that Proposed Rule 1.5, as drafted, would hamper the development of alternative fee arrangements, arrangements that would benefit clients and attorneys alike. This consequence is particularly likely given the

historical emphasis on hours as the billing touchstone – a touchstone that will likely be less relevant in evaluating alternative arrangements. The Proposed Rule should more directly acknowledge and encourage such alternative fee arrangements, in addition to contingency fees and strictly flat fees.

The failure to remove hours expended as the litmus test of conscionability interferes with the development of alternative fee arrangements, which can be of great worth to clients as they plan and budget. Hours expended are often irrelevant and should not be the standard by which such alternative fee arrangements should be judged. Many lawyers on fixed fees do not keep track of time – that is one of the benefits to both lawyer and client. Rather, alternative fee arrangements can provide the client with much-valued specificity and certainty of cost and time.

On the lawyer's side, such arrangements encourage the lawyer to invest in technology, which will yield a better and more efficient result for the lawyer's clients. Without the ability to thus amortize the capital expense of new technology and innovate, lawyers will see no incentive to change to more dynamic fee arrangements that would benefit both client and lawyer

While it might not be advisable to address specific alternative arrangements in the Proposed Rule itself, LPMT does urge the Commission to revise its Comments to Proposed Rule 1.5. In particular, we highly recommend that the Commission:

- note that such alternative fee arrangements are subject to the proscription against unconscionable fees; and

- acknowledge that the factors used to evaluate the conscionability of fees can and should be weighted differently in certain alternative fee arrangements.

By doing so, the Commission would clarify that Proposed Rule 1.5 is not meant to chill the development of such alternative fee arrangements, while at the same time ensuring that such arrangements are nevertheless subject to a fundamental ethical standard.

*(c't'd)*

***CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE***

For the foregoing reasons, we recommend that Comment [1B] be amended as follows:

> Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Indeed, it is anticipated that the weighting of factors and the relevance of each factor would be dependent upon the facts of a given fee arrangement. Contingent fees and other alternative fee arrangements, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.
>
> Clean version of Comment [1B]:
>
> > Paragraph (b) defines an unconscionable fee. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402 [49 P.2d 832]; *Goldstone v. State Bar* (1931) 214 Cal. 490 [6 P.2d 513].) The factors specified in paragraphs (c)(1) through (11) that are to be considered in determining whether a fee is conscionable are not exclusive. Nor will each factor necessarily be relevant in each instance. Indeed, it is anticipated that the weighting of factors and the relevance of each factor would be dependent upon the facts of a given fee arrangement. Contingent fees and other alternative fee arrangements, like any other fees, are subject to the unconscionability standard of paragraph (a) of this Rule. In-house expenses are charges by the lawyer or firm as opposed to third-party charges.

**THE STATE BAR OF CALIFORNIA**

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ENFORCEMENT
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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.5. Fees for Legal Services.**

1. **Unconscionable Fees**. OCTC still prefers the ABA's language for this rule. Further, OCTC remains opposed to any attempt to specifically define the term "unconsionability" in subsection (b) of proposed rule 1.5. The phrase "unconsionable fee" is sufficiently defined by case law and has been found not to be unconstitutionally vague. (*In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 732.) In our view, any attempt to specifically define what constitutes an unconscionable fee is likely to be overbroad or under inclusive. Sufficient guidance regarding the determination of whether a fee is unconscionable is provided by a list of facts set forth in subsection (c) of proposed rule 1.5.

2. However, we urge the Commission to consider adding additional factors to the list set forth in subsection (c). Those additional factors are (1) whether the fee involves an element of fraud or overreaching on the attorney's part (see *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 403; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989); (2) whether there was any failure on the attorney's part to disclose the true facts to the client (see *Herrscher v. State Bar*, *supra*, 4 Cal.2d at 403); (3) whether the client consented or authorized the legal service (see *In the Matter of Connor* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 104); (4) whether the attorney fully explained the fee agreement to the client and/or the client understood the terms of fee agreement (see *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980); and (5) whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. *In re Green* (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc]; *Prof'l Ethics & Conduct of Iowa State Bar v. Zimmerman* (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and discussing toiletry needs]; *Cincinnati Bar Ass'n v. Alsfelder* (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)

3. The Commission may want to state in the rule that the factors set forth in subsection (c) are not exclusive. At least one appellate court has expressed some uncertainty on this issue. (See *Shaffer v. Superior Court* (1995) 33 Cal.App.4$^{th}$ 993, 1003.) Although this is stated in Comment 1B, OCTC believes it is more appropriately stated in the rule itself.

4. We believe that the proposed definition of an "unconscionable fee" as currently drafted is inconsistent with case law. The proposed definition in subparagraph (b) states in pertinent part, that a fee is unconscionable if the lawyer "has engaged in fraudulent conduct or overreaching." Proposed rule 1.0.1(d) states "fraud or fraudulent means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive." This suggests that all the elements of civil fraud must be present to constitute unconsionability. However, under the case law, it is sufficient that the negotiation, setting or charging of the fee "involves an element of fraud or overreaching, which may not require proof of all of the elements of civil fraud. (See *Herrscher v. State Bar*, *supra*, 4 Cal.2d at 403; *In the Matter of Van Sickle*, *supra*, 4 Cal. State Bar Ct. Rptr. at 989.)

5. OCTC supports the concept proposed in subparagraph (e) regarding true retainers, non-refundable fees, and flat fees. Proposed paragraph (e) is nothing more than a reiteration of

current law regarding true retainers, non-refundable fees, and flat fees. Several of the commentators opposed to subparagraph (e) appear to be under a misunderstanding of current law. It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do is disciplinable. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; *Matthew v. State Bar* (1989) 49 Cal.3d 984.) Flat fees also must be earned by performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules as proposed by some of the other commentators is beyond the scope of the Rules of Professional Conduct.

6. The one change subparagraph (e) does add to the rule is the requirement for written fee agreements. Given the unusual nature of these agreements and the need to make sure the clients are aware of and understand them, it is good public policy to require that they be in writing and places California closer to what is required in other jurisdictions.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Law Office of Richard A. Loftus

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

*** Name** Richard A. Loftus

*** City** Westlake Village

*** State** California

*** Email address** (You will receive a copy of your comment submission.) ralpml2510@msn.com

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5 Fees for Legal Services [4-200]

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

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

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

I am a sole practitioner in the area of criminal defense. The proposed rule is unnecessary, interferes with my ability to contract with potiential clients, and in many cases would result in my charging fees that would be much greater than those chargfed as a flat fee.
In many cases, I make court appearances over and above the necessary minimum number strickly for the purpose of benefitting an interest of the client. If my fee arraignments were now all going to be done on an hourly basis, the cost to the client would increase dramatically. Most of my clients could not afford this increase, and be forced to make difficult decisions, based upon limited resources, that would not be in their best interest.
I would respectfully urge the rejection of the Proposed New Rule 1.5(e)(4-200)

**From:** John Breeze [mailto:plourd-breeze@sbcglobal.net]
**Sent:** Tuesday, June 15, 2010 11:56 AM
**To:** Feedback; The State Bar of California
**Subject:** Proposed Amendment to 2008 Rule 1.5(f), abolishing nonrefundable retainers

Dear State Bar:

As an attorney that has been in private practice for the last 33years, I highly disagree and oppose the proposed change to Rule 1.5(f), providing that "a lawyer shall not make an agreement for, charge, or collect a nonrefundable fee, except that a lawyer may make an agreement for, charge or collect a true retainer fee that is paid solely for the purposes of insuring the availability of the lawyer for the matter."

This language clearly demonstrates the Commission's clear intent to abolish nonrefundable retainers subject to the limited exceptions in subparagraph (e). It prohibits the long-established practice of charging a minimum fee to insure availability where the client will also be credited for future work done either on an hourly basis or for the amount of the true retainer.

The obvious problem with subparagraph (e)(2) is that if any portion of a "nonrefundable" fee "may be" refundable, then the entire fee cannot be the lawyer's property.

As a lawyer who has been in private practice since 1976, I highly oppose this amendment to the rules that would basically outlaw nonrefundable retainers. Isn't there anyone that has actually practiced in the private sector who understands what a nonrefundable retainer is? These types of fees are necessary in order to secure the attendance of attorneys at upcoming court proceedings and to guarantee that the client will be represented at those proceedings. If I am going to be required to refund, non refundable retainer fees, then I might as well get out of private practice.

The amendment also fails to take into consideration that lawyers pay income taxes on nonrefundable retainer fees and if these fees are going to be refundable, it will have an impact on the lawyer's ability to report his true income to the Franchise Tax Board and the IRS.

I ask you whether the State Bar has received any complaints from any of my clients dealing with the issue of nonrefundable retainer fees. I have no knowledge that any of my clients have ever objected to being charged a nonrefundable retainer fee. Therefore, there is no need to amend the Rules of Court if there are no complaints regarding the way I deal with nonrefundable retainers. This is just another example of how the State Bar is trying to legislate in an area that properly needs to be addressed either by the state legislature or by lawyer professional groups as opposed to the State Bar.

I strongly recommend that this amendment be rejected.

John W. Breeze

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

~~2. *Rule 1.13 – Organization as client*~~

~~Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.~~

## V. Rules related to lawyers' financial interests

### 1. *Rule 1.5 – Use of the term "unconscionable"*

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."

~~2. *Rule 1.15 – Trust accounts*~~

~~The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.~~

~~However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary *and wary* practitioners.~~

~~We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.~~

~~The Board should return this rule to the Commission with appropriate instructions.~~

~~3. *Rule 1.17 – Sale of a law practice*~~

~~A. Geographical area~~

~~The Commission has conflated the reference to "geographic area of practice" in the ABA rule – allowing a selling lawyer to cease practice in a state or particular "geographic area" – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.~~

~~Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing~~

ROBERT SHEAHEN
ATTORNEY AT LAW
9025 WILSHIRE BOULEVARD
SUITE 500
BEVERLY HILLS, CALIFORNIA 90211

TELEPHONE: (310) 550-1275

June 14, 2010

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

Facsimile: (415) 538-2171

re: Abolition of Nonrefundable Retainer Fees in Proposed Rule 1.5(e)

Dear Ms. Hollins:

I am an attorney in Los Angeles and I have been a member in good standing of the Bar since 1973. I have been made aware of Proposed Rule 1.5(e) and its abolition of nonrefundable retainer fees.

With all respect to the drafters of this proposal, I am afraid they do not toil in the humble vineyards of modern-day criminal defense practice. I am reminded of Mr. Bumble's analysis from Oliver Twist:

"If that's the eye of the law, the law is a bachelor; and the worst I wish the law is his eye may be opened by experience -- by experience."

Those of us who have the experience of day-to-day work as criminal defense lawyers know that nonrefundable retainer fees benefit both attorney and client.

We are not talking about gigantic or unconscionable fees. But a reasonable nonrefundable retainer fee is of the essence in the practice of criminal law.



Jun 15 10 01:17p Robert Sheahen 8187892298 p.2

Suppose, for example, Attorney A charges a refundable $10,000 fee against $350 an hour. Attorney A then proceeds to spend 30 hours on the case -- doing, say, "research." The fee is exhausted and the client has received nothing -- except a request for an additional fee.

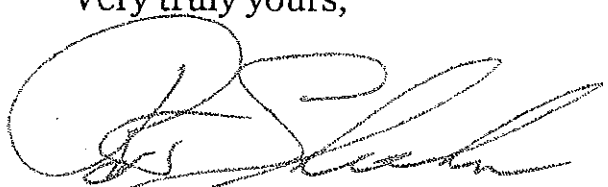
Attorney B, however, knows his way around. He charges a nonrefundable fee of $10,000 -- or a minimum fee of $10,000 -- and puts in only ten hours on the case -- and gets a dismissal for the client. Should this attorney -- having achieved a great result for the client -- be forced to return most of the fee?

In the situation of Attorney B, the new Rule would encourage attorneys simply to waste their time to build up "hours" to justify the larger fee.

We are not civil lawyers. We are criminal defense lawyers. We live in a different world.

The proposed new Rule is not workable. I urge the Bar to reject it and to create a new Rule guided by "the eye of experience."

Very truly yours,



Robert Sheahen



Jun 15 10 01:17p Robert Sheahen 8187892298 p.3

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June 14, 2009

To: The State Bar Representatives **and**
State Bar Board of Governors Representatives

Re: Proposed (New) California Rule of Professional Conduct 1.5(e)(2)

Dear State Bar Personnel:

I am writing to express my opposition to proposed new California Rule of Professional Conduct 1.5(e)(2). I have been an attorney since 1971, and currently practice Administrative Law and Criminal Law.

As you know, the current version of proposed California Rule of Professional Conduct 1.5(e)(2) provides, in relevant part:

1.5 (Fees for Legal Services) . . .

(e) A lawyer shall not make an agreement for, charge, or collect a non-refundable fee, except: . . . .

(2) a lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt; (iv) that the fee agreement does not alter the client's right to terminate the lawyer-client relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.

*See*: http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRulesB1B6.pdf (at p. 10)

My concerns about this proposed new rule include the following:

1. It is unnecessary in light of California's long-standing prohibition on charging unconscionable fees, a standard which is sufficient to safeguard clients from lawyers' who over-charge, and which provides a uniform yardstick regardless of the type of billing arrangement (hourly, contingency or flat);

3. It will cause litigation in the context of an injunction, jeopardy assessment or forfeiture because the language providing that "the client may be entitled to a refund of a portion of the fee" appears to give clients a residual interest in a fee that purportedly was "the lawyer's property immediately on receipt." This will lead to a proliferation of litigation in bankruptcy, tax, collections, criminal, family law, and other matters in which both flat fees arrangements, and injunctions, assessments and/or forfeitures, are commonplace;

4. It may incentivize lawyers to prolong matters rather than resolve them as soon as possible (already a common complaint regarding hourly billing by some lawyers), to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed";

5. It may incentivize lawyers to minimize in retainer agreements the extent of the work for which a flat fee is being paid, in order to avoid disputes with clients seeking a refund because "the agreed-upon legal services have not been completed." Greater clarity and detail in retainer agreements, not less, should be encouraged, not discouraged;

6. It has no counterpart in the ABA Model Rules. Thus, it does not advance the goal of national uniformity, which was among the goals of revising California's existing rules of professional conduct. There also is no judicial or other authority, or national experience, to inform us of the consequences of adopting the novel rule; and

7. It was submitted to the State Bar Board of Governors for preliminary approval without the ***prior*** public comment that is mandated by State Bar Rule 1.10, and thus suffers from a lack of input by the array of practitioners who would be impacted by the rule.

Because of the preceding issues, if the proposed new rule were adopted in its existing format, many lawyers would decline to represent clients on a flat-fee basis. Ultimately this would be a substantial disservice to clients because many require the certainty that a flat-fee arrangement provides, and cannot afford the potentially limitless costs of retaining counsel on an hourly basis.

Thank you for considering my views.

Sincerely,

SPITAL AND ASSOCIATES

SAMUEL SPITAL, LAWYER

**State Bar Representatives**

Howard B. Miller, President, The State Bar of California
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, CA 90017-0211

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

**District 7 (Los Angeles) - State Bar Board of Governors Representatives**

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Hon. Michael D. Marcus
ADR Services,Inc.
1900 Avenue of the Stars, Ste 250
Los Angeles, CA 90067
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Angela Joy Davis, AUSA
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LOS ANGELES, CALIFORNIA 90012
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**MICHAEL P. JUDGE**
PUBLIC DEFENDER

**EXECUTIVE OFFICE**

June 14, 2010

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

Dear Ms. Hollins:

This letter address the public comment provided for the 69 proposed new or amended Rules of Professional Conduct developed by the Commission for the Revision of the Rules of Professional Conduct.

There is a rule and comment that seem to be internally inconsistent. Rule 3.8(e), concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the rule, saying it is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

There is no "genuine need" exception written into the Rule and it should not swallow up the Rule's protections.

There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.

Comments [7] and [8] to Rule 3.6 seem duplicative.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

JAMES S. THOMSON
Attorney and Counselor at Law

June 18, 2010

Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, California 90017

Special Commission for the Rules of Professional Conduct
c/o: Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, California 94105

**Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers**

Dear Mr. Miller,

As a lawyer in private practice for the last thirty plus years in California, I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

As with all fees and fee agreements, non-refundable fee arrangements are subject to well established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules control unscrupulous lawyers as it stands.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified' State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.[1]

819 DELAWARE STREET ■ BERKELEY, CALIFORNIA 94710 ■ TEL 510.525.9123 ■ FAX 510.525.9124

The proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged at an hourly rate.

For these and the many other reasons, offered by individuals and organizations, I ask that you reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of my request.

Sincerely,

JAMES THOMSON

cc.

Richard A. Rubin
State Bar Vice President
Richard A. Rubin Associates
7 Jackson Street
San Francisco, California 94111

Cheryl L. Hicks
1440 Broadway, #814
Oakland, California 94612

Jon Streeter
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June 18, 2010

Howard B. Miller, State Bar President
Girardi & Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017

Special Commission for the Rules of Professional Conduct
c/o Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, CA 94105

*Re:* *Opposition to Proposed New Rule of Professional Conduct Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers*

Dear Mr. Miller:

As a criminal defense practitioner, I am writing to object to proposed Rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

It is unclear why the Board is now considering a ban on non-refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from

receiving a true retainer earned when received fi he/she performs any legal work whatsoever. These types of ee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (e.g., trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly unforeseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may feel the need to charge a larger fee to cover unforseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

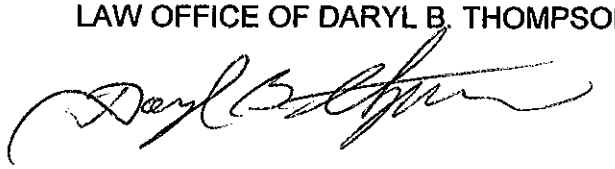
Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patters that potentially will develop. It is also inconsistent with the "sanctified" State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.

I believe the proposal overlooks some of the realities of the practice of law. Flat fees, earned when paid, often work to the benefit of the client, especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford, and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, he or she will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or results in the dismissal of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee," which, under this proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, I urge the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200).

Respectfully yours,

LAW OFFICE OF DARYL B. THOMPSON



DARYL B. THOMPSON
A Professional Law Corporation

DBT:st

# Rule 1.5.1 – Public Comment – File List

X-2010-425-8h SDCBA [1.5.1]

X-2010-485a Toby Rothschild [1.5.1]

X-2010-513-8 OCTC [1.5.1]

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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**MEMORANDUM**

Date: October 16, 2006

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

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

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

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

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

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

* * * * *

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

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

Comment 1:

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

Comment 2:

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

Comment 3:

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

Dissent 1:

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

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Toby Rothschild

*** City** Los Angeles

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) trothschild@lafla.org

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.5.1 Financial Arrangements Among Lawyers [2-200(A))

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

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

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

Comment [1] seems to limit the restriction on fee divisions to fees "paid by a client." Does this mean that a fee paid by a third party on behalf of a client (such as a family member or an insurer) can be divided without regard to consent or written agreement? The comment should probably say "by or on behalf of a client."

**THE STATE BAR OF CALIFORNIA**

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

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.5.1. Financial Arrangements Among Lawyers.**

1. Many of the Comments to this rule are more appropriate for treatises, law reviews, or ethics opinions. OCTC is concerned that Comment 4 appears more limited than the purposes stated in *Chambers v. Kay* (2002) 29 Cal.4th 142, 156-157 and, thus, could be confusing and misleading. If the purposes of the rule are to be stated, all of the purposes should be stated.

2. OCTC disagrees with Comment 5. There is nothing in the rule which would void or limit the rule regarding fee sharing by a court's approving a fee, which is what Comment 5 seems to be saying, although it provides no authority for this proposition. (OCTC believes this comment is not in the Model Rules.) In *In the Matter of Harney*, the attorney argued that he could not be disciplined for his illegal fee because a court had approved his fee. The Review Department rejected this claim. *(In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 277-278.) Likewise, an attorney is currently arguing to the Supreme Court that the State Bar Court erred in finding he violated rule 2-200 because they are court awarded fees. (*In the Matter of Philip Kay*, 01-O-1930, Supreme Court Case No. S180405.) Unless and until the Supreme Court agrees with this argument, the Comment should be stricken.

3. OCTC strongly disagrees with Comment 6. Comment 6's statement that the rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee is inconsistent with subparagraph (a)(2) of the rule, which states that attorneys must obtain the client's consent "at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable." While there are civil cases that have held that current rule 2-200 does not apply until the actual division of fees, those cases addressed the civil enforceability of fee agreements between lawyers, not attorney discipline (see *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 320. The Supreme Court denied a petition for review in *Mink*, but two justices voted to take it up and a third justice was absent from the consideration.) Further, those decisions were based on the current rule, not the proposed rule. Other jurisdictions have found that the fee sharing rules require attorneys to disclose and obtain the client's written consent even if no payment has actually been made to the other attorney. (See *Saggese v. Kelley* (Mass. 2005) 837 N.E.2d 699, 706 [finding that attorneys must disclose fee sharing agreements and obtain the client's written consent before attorney refers client to second attorney]; *In the Matter of Mendelson* (Ill.Atty.Reg.Disp.Com.1996) IL Disp. Op. 95 CH 339, 1996 WL 931273 [holding that an attorney can be disciplined for entering into an agreement to split fees with another attorney, even though no payment has actually been made to the other attorney].) Comment 6 would permit attorneys to violate the rule with no consequences.

   Even under the current rule, Comment 6 would be overbroad, confusing, and misleading, implying that there can be no disciplinary consequences for a failure to advise the clients of the agreement between the lawyers and obtaining the client's informed written consent to the fee sharing at the time the lawyers enter into the agreement to divide fees if the fees are not actually paid. However, the State Bar Court has found attorneys culpable of soliciting, assisting, or inducing a violation of current rule 1-120 and violating the duty to keep clients informed of significant developments under current rule 3-500 and Business & Professions Code section 6068(m) when attorneys enter into an agreement to share fees without advising clients of the agreement and obtaining the client's informed written consent, even when the fees were not ultimately shared. (See e.g. *In the Matter of David D. Mangar*, Case No. 06-O-10183; *In the*

*Matter of Philip E. Kay, Case No. 01-O-193.* The hearing department finding and recommendation in Kay's case is currently pending before the California Supreme Court, Supreme Court Case No. S180405. The Supreme Court approved the hearing department's findings and ordered the disbarment of Mr. Mangar on May 14, 2010 in Supreme Court Case No. S180863.) At the very least, the Comment should advise that attorneys may be disciplined for 1) failing to advise the client of the agreement at the time of the agreement, in violation of their duty to advise the client of significant developments under Business & Professions Code section 6068(m) and rule 1.4 (current rule 3-500) (see *Chambers v. Kay*, *supra*, 29 Cal.4th at 157); and 2) assisting in, soliciting, and/or inducing a violation of the Rules of Professional Conduct or the State Bar Act in violation of proposed rule 8.4(a) (current rule 1-120).

# Rule 1.6 – Public Comment – File List

X-2010-410 Patrick Santos [1.6]

X-2010-421d COPRAC [1.6]

X-2010-425 SDCBA [1.6]

X-2010-430b Glenn Alex [1.6]

X-2010-513-9 OCTC [1.6]

X-2010-517n Zitrin-Multiple [1.6]

X-2010-529c SCCBA [1.6]

DATE: April 6, 2010

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 new rules**

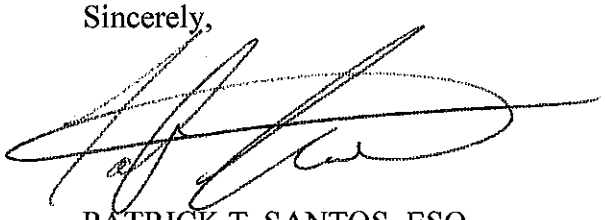
Dear Mr. Hollins:

The enclosed comment is in response to the new proposed amendments to the ethical standards for California Lawyers. I hope that you will find my work helpful in the matter and extremely comprehensive regarding Confidentiality, both on the state and the ABA level. (Bus. & Prof. Code § 6068(e) re rule 1.6.)

The comment advocates for the adoption of an exception in the case of wrongful incarceration - currently Massachusetts is the only state which has a rule like it. The ABA is currently considering a counterpart. The research in the comment might be useful for the public debate.

Please do not hesitate to contact me if you have an questions concerns or comments.

Sincerely,



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# WHY THE ABA SHOULD PERMIT LAWYERS TO USE THEIR GET-OUT-OF-JAIL FREE CARD: A THEORETICAL AND EMPIRICAL ANALYSIS

*Patrick Santos*[*]

## INTRODUCTION

A recent study in Southern California questioned law students about the following attorney-client communication:

> *A, a stranger to you, has been convicted by a jury of his peers and sentenced to life imprisonment. B, also a stranger, comes into your law office and you agree to represent him on an unrelated matter. During the course of your representation, B tells you that he committed the crime for which A is currently serving his life sentence. After some probing questions on the matter you reasonably believe that B is telling the truth and he is the one who did the crime. B refuses to voluntarily disclose this information.*[1]

The current American Bar Association (ABA) standard under the Model Rules of Professional Conduct (Model Rules), Model Rule 1.6

∗ Patrick Santos currently works at the Law Offices of Ronald Richards & Associates, A.P.C. in Beverly Hills, California. He obtained his Juris Doctorate, *magna cum laude*, in May 2009, from the University of La Verne College of Law in Ontario, California. In May 2006, he obtained his B.A. in Political Science from the University of Southern California. He would like to thank the following Professors of Law for their help in administering the survey presented herein: Kevin S. Marshall, Charles Doskow, Juanda Daniel, Edward Perez, Kenneth Rudolf, and Jane Egly. Patrick may be contacted at patsan1@aol.com.

1. *See infra* app., question three.

specifically, requires that the hypothetical lawyer remain silent.[2] Although lawyers within the individual states are not bound by Rule 1.6, just one state permits a different response.[3] Only 26% of the law students in this survey agreed with the position of the ABA.[4] This Comment presents the results of the "lawyers-to-be" study, and uses them to advocate for the amendment of Model Rule 1.6, to include a narrow exception that could lead to the exoneration of "A."

The benefits of the rules on attorney-client confidentiality oftentimes depend upon assumptions about human behavior—i.e. how will a client react if she knew of a new exception that allowed attorneys to divulge her secrets? Might the adoption of such an exception reduce candor? Will it turn lawyers into compliance officers? Will it change the fundamental relationship that secrecy has nurtured between lawyers and clients for centuries? These questions necessarily require more than theory to answer, they require data. Conclusory examinations are no longer sufficient. "Too often, the fundamental precepts of professionalism remain unexamined; arguments over candor, confidentiality and client loyalty proceed without rigorous empirical or philosophical foundation."[5] Too much professional responsibility scholarship is data-free doctrinal analysis: the functional equivalent of "geology without rocks."[6]

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2. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (providing in pertinent part: "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime of fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client had used the lawyer's services.").

3. MASS. RULES OF PROF'L CONDUCT R. 1.6 (1998) (b)(1) (providing in pertinent part: "A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.").

4. *See infra* tbl. V.

5. Deborah L. Rhode, *Ethical Perspective on the Legal Practice*, 37 STAN. L. REV. 589, 589 (1985).

6. Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1560 (2002) (citing PAUL WICE, JUDGES AND LAWYERS: THE HUMAN SIDE OF JUSTICE 16 (1991), citing Lawrence M. Friedman, quoted in JAMES WILLIAM HURST, THE GROWTH OF AMERICAN LAW 265–66 (1950)); *see* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS 56 (1998) (recognizing confidentiality's justifications depends upon assumptions about behavioral trends, of which are supported by only causal empiricism); *see also* Albert W. Alschuler, *The Preservation of a Client's Confidences: One Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981) (recognizing the question of whether protecting client confidences has any affect on truth seeking is an unresolved empirical question); Roger C. Crampton & Lori P. Knowles, *Professional*

Although conjuring up hypotheticals in which confidentiality's exceptions fall short has become something of a law school parlor game, this admittedly exceptional scenario is based on many real life situations.[7] The organized bar has recognized as much, as the ABA's Criminal Justice Section's Ethics, Gideon & Professionalism Committee is presently considering a draft proposal to amend Model Rule 1.6 that might allow disclosure of confidential information to prevent wrongful incarceration.[8] The question the committee will face is deceptively simple: whether the benefits of confidentiality to B are outweighed by its costs to A. To answer this question, confidentiality's

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*Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 115 (1998) (stating "[i]t must be conceded that there is little solid empirical evidence to support firm conclusions in either direction."); Mary C. Daly, *To Betray Once? To Betray Twice?*: *Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1625 ("Another and even more significant difficulty . . . is the paucity of empirical data demonstrating that a guarantee of confidentiality is an essential precondition to the 'full and frank communication between attorneys and their clients [that is necessary to] promote broader public interest in the observance of law and administration of justice.' However, only intuition supports the fundamental assertion upon which the attorney-client privilege and ethical obligation of confidentiality rest. Empirical data are virtually nonexistent."); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 352–53 (1989) [hereinafter *Rethinking Confidentiality I*] (stating "[e]minent commentators thus have called for empirical research testing the benefits of strict confidentiality. The academic community has, however, uniformly ignored the call.").

7. *See* Frank v. Magnum, 237 U.S. 309 (1915) (explaining that while Frank was serving his life sentence, and ultimately was lynched by fellow inmates, a client of attorney Arthur Powell revealed to Powell that he, not Frank, was responsible for the murder); *see also* State v. Macumber, 544 P.2d 1084 (Ariz. 1976) (describing how the Arizona Supreme Court affirmed the trial court, which asserted the attorney-client privilege after the death of the client); Commonwealth v. Sullivan, 239 N.E.2d 5 (Mass. 1968), *cert. denied*, 393 U.S. 1056 (U.S. Jan. 20, 1969); State v. Hunt, 659 S.E.2d 6 (N.C. 2008) (detailing how two men, Hunt and Cashwell, were convicted of a murder only to have Cashwell subsequently confess to his public defender of being the sole perpetrator, which the attorney did not reveal until after Cashwell's death); Editorial, *Imprisoned in the '66 Killing, He Goes Free in Boston*, N.Y. TIMES, Aug. 31, 1982, at A10, *available at* 1982 WLNR 290599 (detailing how Mr. Reissfelder spent years incarcerated at Walpole State Prison for a crime he did not commit); 60 Minutes: 26-Year Secret Kept Innocent Man in Prison (CBS television broadcast Mar. 9, 2008), *available at* http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtmal (showing that Andrew Wilson confessed to his public defenders that he committed a shotgun murder which Alton Logan served 26 years of a life sentence for before the public defenders released an affidavit, which they kept in a lock box for a quarter century).

8. *See* Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46 (2008) (describing that co-chairs Bruce Green and Ellen Yaroshevsky have drafted the following exception: "(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another.").

foundations must be examined, both theoretically and empirically.[9] This Comment will provide assistance on both fronts.

Part I briefly but thoroughly explores attorney-client confidentiality's theoretical justifications and its critiques. Part II discusses the ABA's relevant third-party harm exceptions to confidentiality and their justifications. Part II provides insight into how and why exceptions to confidentiality are adopted and which costs have outweighed confidentiality's benefits in the past. Part III presents the results of primary research based on the hypothetical in the introduction above, distributed in the form of a survey to 260 law students in an effort to add to the ongoing debate. Part IV then presents the proposed amendment to Model Rule 1.6 and a supporting argument that explores the fundamental policy implications behind the adoption of such an exception. Part IV asserts that the justifications supporting strict confidentiality do not apply to this hypothetical, and even if they did, a new narrow exception, which might exonerate A, would do much less harm to attorney-client confidentiality than the current exceptions have already done—especially considering the scenario's high level of improbability. In the interests of justice, secrecy can do more harm than good. The conclusion points out that only one step remains to bring the rules of attorney-client confidentiality up to date with the modern realities of an imperfect justice system—a new exception that could exonerate an innocent convict.

## I. CONFIDENTIALITY'S JUSTIFICATIONS AND FOUNDATIONS

The attorney's duty of confidentiality was incorporated into lawyer codes as an obligation beginning 100 years ago.[10] The duty to maintain the confidence and to preserve the secrets of the fruits of representation is, arguably, the most important feature of the attorney-client relationship.[11] The ABA contends that confidentiality contributes to the trust that is the hallmark of the attorney-client relationship and induces and promotes assistance of legal counsel in a full and frank

9. *Rethinking Confidentiality I*, *supra* note 6, at 355.

10. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 287 (1953) (providing that a lawyer has an "obligation to represent the client with undivided fidelity and not divulge his secrets or confidences . . ."); *but see* L. Ray PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY (Mathew Bender 1984) (noting that confidentiality, as an ethical duty, made its first appearance as such in the 1887 Alabama Code of Ethics).

11. David Rosenthal, *The Criminal Defense Attorney, Ethics and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153, 159 (1993).

environment. [12] Confidentiality's justifications have been shaped and molded *ad nauseam* over the past several decades.[13]

The following sub-sections will discuss and review these justifications, which are at the heart of attorney-client confidentiality rules, because the first step in assessing whether strict rules err in rejecting exceptions that allow disclosure is to analyze the strength of the rules' justifications.[14] Most of confidentiality's justifications are abstract,[15] and oftentimes lines of demarcation can blur. This section

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12. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

13. Crampton & Knowles, *supra* note 6, at 123–24 (suggesting a complete substitute for Model Rule 1.6, including an exception for wrongful incarceration); Daly, *supra* note 6; Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003 (2004) (describing a step-by-step overview of the Model Rule changes in August 2003 and examination of the benefits and drawbacks of confidentiality); Krysten Hicks, *Thresholds for Confidentiality: The Need for Articulate Guidance in Determining When to Breach Confidentiality to Prevent Third-Party Harm*, 17 TRANSNAT'L LAW 295 (2004) (arguing that a rule which explicitly denotes factors that a lawyer might consider before breaching confidentiality will serve to remove ambiguity); Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyers Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994) (showing another empirical study, which inspired this study, in which Professor Levin surveyed 776 lawyers in New Jersey); Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberations as Ethical Obligation*, 37 IND. L. REV. 21, 36 (2003) (positing a Deliberative Model of ethical decision making, imposing on lawyers an obligation to exercise their discretion through ethical decisions that are the product of articulable and justifiable ethical deliberation); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165 (2007) (arguing, in part, that formulating and interpreting various ethics provisions to impose a greater degree of mandatory ethical conduct, comparable to Jewish law, might demonstrate a resolve among lawyers to take their ethical obligations more serious); David McGowan, *Why Not Try the Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825 (2004) (using a cost-benefit analysis to argue that the recent amendments to Rule 1.6 will do little to change the actual practice of lawyers in disclosing client misconduct); *Rethinking Confidentiality I*, *supra* note 6 (describing an empirical study, which inspired this study, concerning Professor Zacharias surveying 108 Laypersons and 125 Lawyers in an effort to question and rethink attorney-client confidentiality and its justifications); Rhode, *supra* note 6, at 613; SIMON, *supra* note 6 (pointing out that such justifications are easy to produce and depend on social contingencies regarding behavior which are pointless to try and refute because "as soon as I had shown one to be false, a horde of new ones would show up like ants at a picnic."); Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT. 439, 470-92 (1993) (using hypotheticals to argue for a more ethical outcome under the Model Rules which would require lawyers to disclose in life or death situations and would also require use immunity); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 635 (1990) [hereinafter *Rethinking Confidentiality II*] (analyzing whether attorneys have a constitutional right to disclose confidential information).

14. *Rethinking Confidentiality I*, *supra* note 6, at 363.

15. *Rethinking Confidentiality II*, *supra* note 13, at 637.

seeks to remedy this flaw by clearly denoting the justifications and separating them as a means to avoid the jumbling of justifications.

### *A. Client Candor*

Confidentiality's primary systemic justification is simple: strict confidentiality promotes client candor.[16] Stated differently, if the duty has been eroded, clients will have an incentive to hide information from their attorneys.[17] Anything short of strict attorney-client confidentiality would have a chilling effect on client communications.[18] This would result in lawyers giving less effective advice, thereby affecting the adversarial system and overall truth-seeking.[19] Thus, the protection of confidentiality serves the public interest by encouraging client disclosure, which enables lawyers to better advise and assist their clients.[20] Lacking full disclosure, the lawyer might apply the wrong law or give incorrect legal advice or both, which in turn will reduce public confidence in the legal system and in lawyers.[21]

As early as 1888, the United States Supreme Court explained:

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.[22]

Prior to 2004 when the California Supreme Court approved a new confidentiality rule, Rule 3-100,[23] California's duty of confidentiality

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16. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 129 (LexisNexis/Matthew Bender 3d ed. 2004) (1990).

17. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 87–108 (Matthew Bender 1990).

18. Cal. Rules of Prof'l Conduct R. 3-100 cmt. 10 (2009).

19. SIMON, *supra* note 6, at 54.

20. *In re* Jordan, 500 P.2d 873, 879–80 (Cal. 1972) (describing the duty to preserve confidentiality as being of "paramount" importance).

21. *See* DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 64 (Foundation Press 2002).

22. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).

23. Cal. Rules of Prof'l Conduct R. 3-100 (2009) (providing in the pertinent part: "A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes that disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in

perhaps best exemplified this systemic justification, as the state had the strictest duty of confidentiality in the country, with no express exceptions.

Opponents have attacked this justification on several fronts. Professor Fred C. Zacharias has pointed out that this systematic syllogism requires two premises to be met, without which, the justification falls apart.[24] The argument presupposes that (1) the client is aware of the rule, and (2) the client understands the rule.[25] Given the many aspects of confidentiality, the argument goes, clients are unlikely to ever meet these requirements.[26] Indeed, the instant study supports as much: only 60% of the sample understood the ABA's current rule.[27] Therefore, critics argue that creating limited additional disclosure exceptions are unlikely to affect a client's decision to confide.[28]

More recently, others have pointed out that although this justification has been repeatedly asserted, it is an "empty" argument used as a front for the real reason strict confidentiality is promoted: to raise the demand for lawyers.[29] It is argued that the historical origins of the privilege are related to nothing more than the need to create incentives for clients to hire lawyers.[30]

### *B. Client Autonomy and Privacy*

The arguments for autonomy and privacy are fairly straightforward, but mainly philosophical in substance. There is a distinguished tradition in Western philosophy enshrining autonomy as a fundamental right of all human beings.[31] Promoting autonomy and protecting privacies enhances the attorney-client relationship itself: it often makes the client *feel* as if the lawyer is a true fiduciary, with

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death of, or substantial bodily harm to, an individual."); *see* Kevin E. Mohr, *California's Duty of Confidentiality: Is It Time for a Life-Threatening Criminal Act Exception?*, 39 SAN DIEGO L. REV. 307, 309 (2002) (pointing out that the California duty requires every lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

24. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 1 (1998); *see also Rethinking Confidentiality I*, *supra* note 6, at 365–66.

25. *See Rethinking Confidentiality I*, *supra* note 6, at 365–66.

26. *Id.* at 365 ("As a practical matter clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed.").

27. *See infra* tbl. I.

28. *See Rethinking Confidentiality I*, *supra* note 6, at 366.

29. Fischel, *supra* note 24, at 1.

30. *Id* at 2.

31. Daly, *supra* note 6, at 1623.

loyalty to no one other than the client.[32] This enhances the client's comfort level and serves to buttress the client's feeling that the lawyer will never take the stand against him. Without the assurance of confidentiality, a client will not jeopardize the privacy of intimate details, which will ultimately corrupt the client's autonomy because the lawyer's advice will be hobbled.[33]

Under this view, autonomy (client-centered decision making) is enhanced along with the client's dignity.[34] Protecting the client's confidential information respects the autonomy and personal integrity of the client, recognizing that the client retains the right to make ultimate decisions regarding the outcome of the engagement.[35] This deontological view holds that confidentiality promotes respect for client autonomy by guaranteeing trust and privacy in the attorney-client relationship.[36] By promoting a sphere of privacy, confidentiality advances the individual's right to personal space required to plan and define his own meaning of life, free from government intervention in the form of the legal system that may seek to invade it.[37] Thus, confidentiality serves to foster the lawyer's central obligation to "enhance . . . the client's autonomy as a free citizen in a free society."[38]

This justification is not without its critics.[39] Those against strict confidentiality argue that client distrust may actually increase if the lawyer insists that she will always act in accordance with the client's wishes.[40] Further, clients are not always "free citizens," but are also many times profit-driven corporations whose costs of confidentiality are borne by individuals whose health, safety and autonomy are not adequately represented.[41]

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32. *Rethinking Confidentiality I*, *supra* note 6, at 367.

33. Daly, *supra* note 6, at 1624.

34. *Rethinking Confidentiality II*, *supra* note 13, at 635.

35. Blanton v. Womancare, Inc., 696 P.2d 645, 648–51 (Cal. 1985); *see* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) (amended 2002) (stating "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . ."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 cmt. e (2000) (discussing the allocation of authority).

36. SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW AND PROFESSIONAL RESPONSIBILITY 122 (Aspen Publishers 1st ed. 2004).

37. *Id.* at 123.

38. Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1727 (2002).

39. MARTYN & FOX, *supra* note 36, at 123.

40. *Id.* (citing JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (Prentice Hall 1972) (explaining that since criminal defendants perceive public defenders to be on the side of the state, counterintuitive claims by attorneys that they will never act against the client can only serve to put them on guard even further)).

41. Rhode, *supra* note 5, at 1546.

### *C. Preventing Client Misconduct*

Perhaps the most persuasive justification provided for confidentiality[42] is that confidentiality allows lawyers to obtain information that enables them to advise clients against committing improper acts or filing frivolous claims.[43] By refusing to disclose to outsiders, the lawyer may give up some deterrent leverage in the short run, but she remains free to dissuade the client from illegal conduct in the long run.[44] This justification is built into the new exception to confidentiality in California, as well as the ABA's rule.[45] Thus, confidentiality remains an essential incentive for clients to disclose their plans to lawyers, who then are in the best position to dissuade clients from engaging in the illegal activity.[46]

Although dealing with the attorney-client privilege, the rationale in the landmark case of *Upjohn v. United States* lends a relevant understanding.[47] The Court in *Upjohn* found that the attorney-client privilege "promote[s] broader public interests in the observance of law and administration of justice."[48] The Court asserted that, "[i]n light of the vast and complicated array of regulatory legislation confronted by modern corporations, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law."[49]

Furthermore, proper legal advice, given under the assurances that confidentiality guarantees, can prevent massive personal and social

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42. *See* Levin, *supra* note 13, at 111–12, 115–16 (noting that the author bases his belief on a significant empirical study done by Professor Leslie Levin in New Jersey in which 67 out of 776 lawyers surveyed stated that they had encountered at least one occasion where they reasonably believed a client was going to commit harm to a third party. The lawyers would often respond strongly to the client's statements in order to deter the client from making serious plans to commit these acts); *see also Rethinking Confidentiality I*, *supra* note 6, at 381 (describing a study which found that over three-quarters of lawyers in the sample claimed to have at some point in their careers used the fruits of confidentiality to dissuade their clients from engaging in improper conduct).

43. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2002).

44. SIMON, *supra* note 6, at 55.

45. Cal. Rules of Prof'l Conduct R. 3-100(c) (2009) (requiring that "before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances: (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii)"); *see* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2002) (explaining that "[w]here practical, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure").

46. *See* RHODE & HAZARD, JR., *supra* note 21, at 177.

47. Upjohn v. United States, 449 U.S. 383 (1981).

48. *Id* at 389.

49. *Id* at 392.

costs of criminal and fraudulent activity.[50] Information solicited from a client based on her faith in secrecy may prevent injury to the economic system itself: fraudulent practices can undercut competition, raise the price of goods, and cause a loss of confidence in the market system, thereby creating barriers to entry.[51] Thus, confidentiality may actually serve to protect consumers in the free market economy itself.

Not everyone accepts this rationale. Critics argue that allowing clients to discuss planned misconduct with no fear of consequence might actually help the client commit wrongdoing.[52] If the client discovers that the penalty for the illegal conduct is less than what she thought it would be, and in some cases much less, the lawyer's attempted dissuasion might have the opposite tendency of promoting client misconduct.[53] This might be especially apt in the cases of complex regulatory requirements. When a client is unclear as to whether a certain activity might be sanctionable, a client who had decided to avoid the activity (under a better-safe-than-sorry rationale) might reverse this decision after having been given confidential advice pertaining to either the likelihood of detection or the probability of being sanctioned.[54] This client, after receiving more accurate information, may conclude the expected gains from engaging in the activity outweigh its costs.[55]

Critics also argue correlation is not causation.[56] How can we be sure it is strict confidentiality that provokes client candor about such intentions?[57] The available studies suggest that strict confidentiality rules serve this rational only marginally.[58] Furthermore, some have pointed out, to the extent an exception to confidentiality might force a lawyer to think about moral issues or enhance a client's respect for his attorneys (i.e. fear of possible disclosure), it is the exception rather than

50. RHODE & HAZARD, JR., *supra* note 21, at 196.
51. *Id.*
52. *Rethinking Confidentiality I*, *supra* note 6, at 370.
53. SIMON, *supra* note 6, at 60.
54. Fischel, *supra* note 24, at 30; *see Rethinking Confidentiality I*, *supra* note 6, at 375 (noting that "[t]he attorney will be happy to describe options, in secret, for getting around government regulations or contractual obligations – to the point of evaluating which of the options are illegal, which are not, and which are shady but unlikely to be punished.").
55. Fischel, *supra* note 24, at 30.
56. *Rethinking Confidentiality I*, *supra* note 6, at 369.
57. *Id.*
58. *Rethinking Confidentiality II*, *supra* note 13, at 640.

the basic rule that may produce the lawyer's ability to dissuade the client from misconduct.[59]

### *D. Facilitating Effective Representation*

Another argument for strict confidentiality concerns past conduct. Here, the argument is that a client who is not legally sophisticated may fail to disclose information that is highly relevant to a present cause of action because the client misunderstands her interests or rights.[60] If the lawyer cannot gather all the necessary information, free from the threat that these confidential communications will be shared with those whose interests may be adverse to the client, the lawyer's ability to serve her client will be hindered.[61] Although at first glance this may seem duplicative of confidentiality's systemic justification (confidentiality promotes candor), this justification addresses the genuinely confused client who needs advice and representation but misunderstands the nature of the attorney-client relationship. By providing confidential guarantees, a lawyer may best serve both the client's instant legal needs and the public interests of conformity to law and sound administration of justice.[62] Thus, confidentiality may facilitate effective legal representation.

Critics respond that any injustice that may result from a client withholding relevant information is an appropriate price for her dishonesty.[63] The law should not be written for liars and perjurers.[64] Furthermore, the argument assumes an unlikely scenario: a client who does not know enough to discern what information might help her cause, yet knows enough to understand the confidentiality rules that define what she can tell her lawyer.[65]

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59. Robert Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1032–34 (1981).

60. SIMON, *supra* note 6.

61. RHODE & HAZARD, JR., *supra* note 21, at 147 (citing ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992)).

62. Crampton & Knowles, *supra* note 6, at 102.

63. *Id.*

64. *Rethinking Confidentiality I*, *supra* note 6, at 366 (citing Edmund M. Morgan, Foreword to MODEL CODE OF EVIDENCE 27 (1942)).

65. Morgan, *supra* note 64, at 61.

### *E. Preventing Negative Externalities and Promoting Positive Externalities*

Externalities are forms of market failure, and thus are an oft-stated justification for government intervention in the market system.[66] Since much of economic analysis begins with the assumption that decision makers bear all the costs and receive all the benefits of their actions, the picture becomes askew when some of the costs of production spill over and injure third parties that are not part of the process—negative externalities.[67] Similarly, in many instances, some of the benefits of creating or consuming a product may spill over and benefit third parties—positive externalities.[68] These secondary and unforeseen third party effects are called externalities.[69]

Conduct regulation of lawyers, which includes the rules on confidentiality, has also been justified as a means to prevent externalities that might spill over onto third parties as a result of substandard practitioners.[70] Negative externalities might be grouped into three general categories: harm to adversaries, harm to the court system, and harm to the public at large.[71] As noted above, confidentiality guarantees can conceivably prevent severe market mishaps by encouraging a client not to engage in fraudulent activities that might severely affect the market and damage social ties, many of which depend upon trust.[72] Thus, confidentiality can prevent this public harm.

Conduct regulating devices, such as Model Rule 1.6, can also promote positive externalities. The total cost to society in terms of resources consumed is the sum of the private costs paid by the producer and the external costs that must be borne by third parties.[73] This cost can be minimized by regulatory devices such as Model Rule 1.6. For example, confidentiality can prevent unnecessary bargaining costs between the parties themselves, and can save precious time on matters not directly connected with the provision of justice.[74] Society's faith in

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66. HENRY N. BUTLER & CHRISTOPHER R. DRAHOZAL, ECONOMIC ANALYSIS FOR LAWYERS 175 (Carolina Academic Press 2006).

67. *Id.*

68. *Id.*

69. *Id.*

70. Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429 (2001).

71. *Id.* at 470.

72. RHODE & HAZARD, JR., *supra* note 21, at 196.

73. BUTLER & DRAHOZAL, *supra* note 66.

74. *Id.* at 450.

the justice system might also ascend if lawyers were perceived as upstanding citizens who have the best interests of the public in mind, instead of the interests of the guild and other smaller groups.[75] Arguably, consumers in society are better protected in the legal system as a result of such regulatory devices, insofar as across the board confidentiality rules protect those unsophisticated clients who might not otherwise think to bargain for such consideration.[76] Clearly stated and fairly applied rules, including rules on confidentiality, promote an evenly distributive outcome when members of society enter the legal system, which in turn allows individuals to adjust their behavior to the law and better predict the outcome of their actions.[77] This translates into a positive externality, which supports the bases of modern liberal democracy: fostering maximum personal freedom and protecting individual rights. Therefore, by protecting consumers and effecting greater faith in the legal system and lawyers in general, confidentiality rules can have positive secondary effects.

## II. RELEVANT THIRD PARTY HARM EXCEPTIONS

Rules regarding strict confidentiality have undergone several changes in recent years.[78] Those changes relevant to this analysis (third party harm prevention) will be explored in this section. The ABA's vision of the role the lawyer should play in this new millennium has been revolutionized with respect to secrecy and keeping client confidences.[79] The dawn of evolving corporate scandal and national security concerns has ushered in new guidelines for lawyers to follow, and the ABA is leading the way.

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75. *Id.* at 469–470 (citing HARPER LEE, TO KILL A MOCKINGBIRD (HarperCollins Publishers 1988) (1961)).

76. *See Rethinking Confidentiality I*, *supra* note 6, at 361 n. 45 (arguing that in the absence of rules, sophisticated clients might negotiate for confidentiality while less educated clients would then be protected by across the board confidentiality rules).

77. Barton, *supra* note 70, at 479 (citing JOHN RAWLS, A THEORY OF JUSTICE, 239–40 (Belknap Press of Harvard Univ. Press 1971), stating that "[t]he principle of legality has a firm foundation, then, in the agreement of rational persons to establish for themselves the greatest equal liberty").

78. *Id.* at 430.

79. THE ATTORNEY–CLIENT PRIVILEGE IN CIVIL LITIGATION: PROTECTING AND DEFENDING CONFIDENTIALITY 114 (Vincent S. Walkowiak ed., American Bar Association 4th ed. 2008).

### *A. Model Rule 1.6(b)(1): Preventing Physical Injury*

The physical harm exception has broadened significantly since it was first recognized by the ABA in 1983.[80] Model Rule 1.6 provides that a lawyer may reveal information relating to the representation of the client if she reasonably believes it necessary to prevent reasonably certain death or substantial bodily harm.[81] This exception does not require an element of client criminality as the original Model Rule 1.6(b)(1) required.[82] The effect of this change is that a lawyer may breach confidentiality in order to prevent bodily harm, even for rectifying past harms, even if the harm is general to the public, and even if the harm is not statutorily criminal. Also, the exception no longer requires that the harm be imminent, as was previously required, only reasonably certain.[83]

### *B. Justifications and Critiques*

> "*As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it.*"[84]

The rationale behind the new rule is simple: the value of human life and bodily integrity trumps keeping client confidences. The interests that confidentiality preserves, as discussed above, seem less important when juxtaposed with another human good—such as when life itself is at stake. Even Professor Monroe Freedman, the nation's most prominent and ardent defender of strict confidentiality, declines to defend it to the detriment of human life.[85] According to the ABA, the overriding value of life and physical integrity outweigh client trust.[86]

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80. ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 95 (American Bar Association Center for Professional Responsibility, 5th ed. 2003).

81. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2002) (explaining "paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm"; using toxic waste in the water example for illustrational purposes).

82. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2000) (stating "a lawyer may reveal such information to the extent the lawyer reasonably believes necessary: to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").

83. *Id.*

84. JOHN STUART MILL, ON LIBERTY 99 (Alan Ryan ed., W.W. Norton & Co. 1996) (1859).

85. Freedman, *supra* note 17, at 103.

86. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2002).

The ABA's view is in line with most attorneys' views, insofar as saving lives is worth relaxing the duty of confidentiality.[87]

Although most lawyers would agree with the ABA's Model Rule 1.6, opponents remain. Critics' arguments usually rest on the premise that the new exception has turned the attorney-client relationship on its head,[88] turning lawyers into "compliance officers forced to monitor, prosecute, and judge their clients."[89] Others have maintained that it is unfair to both clients and themselves to require lawyers to "serve two masters."[90] All fifty states currently agree, in some form, that a lawyer either may or must disclose confidences to prevent serious bodily injury.[91] California was the last state to concede as much, doing so in 2004.[92]

### *C. Model Rule 1.6(b)(2) & (b)(3): Preventing Financial Injury*

In August 2003, the ABA welcomed the two newest members of the Model Rules' exceptions to confidentiality in the midst of corporate misdeeds and the SEC's proposed rules implementing section 307 of the Sarbanes-Oxley Act.[93] In March 2002, in response to the changes in the ethical climate, the ABA appointed a Task Force on Corporate Responsibility to once again reexamine the ethics rules in light of the "tumultuous effects of major corporate failures."[94] Two brand new exceptions emerged. The first, Model Rule 1.6(b)(2), provides that a lawyer may reveal information relating to the representation of the client if the lawyer reasonably believes it necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in

87. *See* Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret?*, N.Y. TIMES, Aug. 11, 2001, at B7.

88. Vance, *supra* note 13, at 1014 (citing Mohr, *supra* note 23, at 356–57).

89. *Id.* (citing Emiley Zalesky, *When Can I Tell a Client's Secret? Potential Changes in the Confidentiality Rule*, 15 GEO. J. LEGAL ETHICS 957, 966 (2002)).

90. Alschuler, *supra* note 6, at 354.

91. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 109–115 (Thomson/West 2007–2008 ed.) (indicating that Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin currently require a lawyer to disclose in this situation, New Mexico states a lawyer "should" disclose, and all other states permit the lawyer to use their discretion).

92. Nancy McCarthy, *New Ethics Rule Clarifies Confidentiality Exception*, CAL. B.J., Aug. 2004, *available at* http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (in "Search Calbar Site" type "McCarthy 'New Ethics Rule'").

93. McGowan, *supra* note 13, at 1827 (enacting of § 307 required the SEC to establish minimum standards of conduct for attorneys practicing before the commission, including rules requiring counsel who learn of unlawful corporate conduct to report it).

94. John K. Villa, *Final Report of the ABA's Task Force on Corporate Responsibility: A Look at the Proposed Amendments to the Model Rules*, 21 No. 7 ACCA DOCKET 116, 116 (2003).

substantial loss to the financial interests or property of another, but only if the client has used or is using the lawyer's services to commit the crime or fraud.[95] The client can, of course, prevent such disclosure by refraining from the wrongful conduct, unlike the next exception, wherein the client no longer has the option of preventing disclosure.[96]

The second new rule, Model Rule 1.6(b)(3), addresses the situation in which the lawyer does not learn of the client's crime of fraud until after it has been consummated.[97] It allows the lawyer to disclose in order to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud, but again, only if the client has used the lawyer's services in furtherance of the crime or fraud.[98]

### *D. Justifications and Critiques*

The new exceptions, the latter being a rectification provision, are forfeiture provisions. The rule recognizes that the client forfeits her protections of secrecy when the relationship is abused in such a manner that causes financial harm to third parties.[99] The exceptions are similar to the Restatement (Third) of the Law Governing Lawyers, sent to press a few years before the ABA adopted its new position.[100] The exceptions are a basic recognition that a human's willingness to lie can cause serious harm; confidentiality exceptions have long been recognized when clients seek to use lawyers to promote fraudulent activity.[101] The efficient market economy and democratic government require honesty and the ability of a client to use lawyers to practice his own illegal deception undercuts these fundamental premises.[102] The Ethics 2000 Commission explained that the interests of the affected persons in

95. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2002).
96. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmts. 7–8 (2002).
97. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 8 (2002).
98. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2002).
99. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 7 (2002).
100. *See generally* RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 67 (2000); *see, e.g.*, David W. Raack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 240 (2001) ("The new or redrafted confidentiality exceptions in 1.6(b)(1)–(3) are very similar to the Restatement provisions. This is one clear example of the influence that the Restatement had on the work of the Ethics 2000 Commission.").
101. RHODE & HAZARD, JR., *supra* note 21, at 177.
102. *Id.*

mitigating or recouping their substantial losses outweighs the interests of the client who has so abused the attorney-client relationship.[103]

Rebuilding a broken connection to the public trust can also be seen as justification for the new exception. Since in the public eye, lawyers are often seen as individuals who are willing to cover up damaging information, some see the need to break down the strong confines of confidentiality as a means to regaining the public trust.[104] It has been argued that perhaps this drastic step towards breaking down confidentiality is, at least in part, due to the ABA's effort to "beat the government to the punch" given the public demand for such disclosure in light of Enron and its progeny, and concerns for security after September 11.[105]

Opponents copiously object on the ground that the new rule leaves them in a precarious position, facing a troubling duality: zealous representation versus policing client's conduct. Critics have argued that the new exception completely redefines what it means to be a lawyer and has created a situation in which corporate clients will be discouraged from seeking legal advice at all—lest they turn their trusted legal advisor into a "cop on the beat."[106] The new exceptions have also been labeled as "snitch provision[s]."[107] Many see the new exceptions as overbroad, and feel that clients may hide quite a bit of information from their lawyers, whether that information be illegal or not.[108] Others have argued that the exception operates from a false premise that fraud is something which is apparent on its face, when in reality it does not appear that way except in the rarest of cases.[109] "That is why it's called

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103. MODEL RULES OF PROF'L CONDUCT R. 1.6 (Reporter's Explanation Memo 2000), http://www.abanet.org/cpr/e2k/e2k-rule16rem.html.

104. Vance & Wallach, *supra* note 13, at 1015 (citing *Whose Side Are They on?*, THE ECONOMIST, Jan. 25, 2003, at 58).

105. *Id.* at 1016; *see also* MODEL RULES OF PROF'L CONDUCT pmbl. (2002) ("In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."); American Bar Association Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 BUS. LAW 189, 207 (2002); Tuoni, *supra* note 13, at 498–99 (pointing out that public dissatisfaction has lead to greater involvement of public regulatory authorities in matters of lawyer conduct, which was previously wholly regulated by the bar, and adopting changes in client confidentiality may preserve the autonomy of the legal profession).

106. Lawrence J. Fox, *It Takes More Than Cheek to Lose Our Way*, 77 ST. JOHN'S L. REV. 277, 286 (2003).

107. *Id.* at 278.

108. Vance & Wallach, *supra* note 13, at 1017.

109. Fox, *supra* note 106, at 284.

fraud."[110] Whatever objections and concerns may arise, it is undeniable that the ABA's new exceptions have fundamentally changed the attorney-client relationship. The extent to which it has been altered remains to be seen.[111]

## III. PRESENTATION OF EMPIRICAL RESEARCH

### *A. Methodology*

The Ethics, Gideon & Professionalism Committee of the ABA's Criminal Justice Section is presently considering a draft proposal to amend Model Rule 1.6 to allow disclosure of confidential information to prevent wrongful incarceration.[112] This Comment seeks to lend a hand to the scholarly debate, which is ongoing and in a state of flux, by presenting the findings of the lawyers-to-be study. This study presents some much-needed data on the issue in the form of survey responses voluntarily and anonymously given by law students at the University of La Verne College of Law in Southern California. The survey was distributed to a pool of nearly 300 law students in one of the country's most diverse law schools.[113] This survey should expand the limited research data available in this field.[114] Law students stand in a unique position between the layperson and the lawyer, and thus provide edification in a way never done before.

The survey, listed in the appendix, sought to discover what lawyers-to-be would do if presented with the vexing hypothetical posed at the outset of this Comment. By distinguishing between those who understand the rules in their current form and those who do not, the results serve to undercut those that might argue that because law students are not lawyers, they do not understand the issues and what is really at stake. Arguably, a law student who has recently taken a professional responsibility course, and who is thereby required to know

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110. *Id.*

111. The author has found no situations in which a lawyer has disclosed such information.

112. *See* Joy & McMunigal, *supra* note 8, at 46 (proposing "(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another").

113. *See Law School Diversity*, U.S. NEWS & WORLD REPORT, May 1, 2009, at 76, *available at* 2009 WLNR 8463941. *See infra* app.

114. Levin, *supra* note 13, at 110 n.118 (explaining that Professor Levin surveyed 776 lawyers in New Jersey); *Rethinking Confidentiality I*, *supra* note 6, at 377 (stating that the Yale study surveyed 108 laypersons and 125 lawyers); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962).

the rules in their current form, is more familiar with such issues than a long-standing practicing attorney. Furthermore, a law student who has only learned the rules of confidentiality in their newly revised form is more attuned, and perhaps better suited, to analyze the hypothetical. As discussed above, confidentiality rules are not what they used to be, and law students are not tainted by the rules in their previous form. In any event, the results will serve to provide fresh results of what up-and-coming attorneys will do when codified ethics and personal morals clash.

### *B. Findings*

A total of 260 law students were surveyed regarding the wrongful incarceration hypothetical. Of this number, 115 were first-year students, ninety-one were second-year students, and fifty-four were third or fourth-year students. At this law school, law students are not confronted with confidentiality and its exceptions until the second year when they take a professional responsibility course. Thus the 115 first-year students might better be understood as laypersons. Of the total second-year students, 70% had either taken or were currently taking the professional responsibility class when the survey was administered. Thus, they stood somewhere between the first-year lay students and the third-year students, who had all taken professional responsibility and therefore more closely resembled practicing attorneys.

#### *1. Question One – Separating the Laypersons from the Pack*

The first question was designed to gauge the respondent's understanding of the rules. It asked whether, under the current ABA standards, the hypothetical lawyer might disclose B's confession. The correct answer is that the lawyer must not disclose because none of Model Rule 1.6's exceptions apply.[115] Among the entire pool, only 56% understood that B's confession must not be disclosed ("got-it-right" hereinafter). At first blush this might seem like a grave problem, but when adjusted to reflect the year of study the respondents were in, the results are rational. Among the first-year students, 59% got-it-right as did 50% of the second-year students and 81% of the third and fourth-year students. This is reflective of a direct correlation between the

115. *But see* Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Exception to Attorney–Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 397 (arguing that inmates are exposed to a substantially higher risk of substantial bodily harm inherent in incarceration, and therefore, a wrongful incarceration exception can be implied from the current rules).

completion of a professional responsibility course and a firm understanding of the rule of confidentiality and its exceptions. Therefore, third-year students best resembled practicing attorneys.

*TABLE I- QUESTION ONE: UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION?*

| Year of Study | Must Disclose | May Disclose | Must Not Disclose |
|---|---|---|---|
| 1st (115) | 26% | 15% | 59% |
| . . . . . | | | |
| 2nd (91) | 7% | 43% | 50% |
| . . . . . | | | |
| 3rd (54) | 4% | 15% | 81% |
| . . . . . | | | |
| Overall | 15% | 25% | 56% |

*2. Question Two – Reflections on Ambiguity*

The second question in the survey changed the facts of the hypothetical slightly in an effort to show that determining whether an exception applies to a given set of facts can be tricky business. The question added the fact that the innocent convict, A, was being assaulted in jail, causing him substantial bodily harm. This question was also designed to test the limits of student's understanding of the rules. Under current Model Rule 1.6(b)(1), this situation is one in which the hypothetical lawyer should be able to disclose B's confession because the lawyer knows (is reasonably certain) that the disclosure is necessary to prevent reasonably certain substantial bodily injury. However, since the lawyer has heard of the assault (knows of it) after it happens, the implication could be that it has *already taken place*. Thus, one could argue that the hypothetical lawyer's disclosure is no longer permitted because she will not be *preventing* anything. On the other hand, the question asks if disclosure is allowed where the hypothetical lawyer knew that "A was *being assaulted* in prison," which implies a sense of perpetuity in the assault, and thereby falling back into the exception.

Certainly this added fact rings loud to show just some of the issues that might arise on the part of the lawyer trying to decide whether or not his situation falls within the exception. It is somewhat of a trick question in the sense that the answer may change based on interpretations of the ambiguity. In any event, of those that got-it-right (those which most closely resemble practicing lawyers), 38% thought that B's confession may be disclosed on these facts. Among the lay

first-year student pool, 77% felt that B's confession either must not or must be disclosed (39/115 must; 50/115 must not). Of the third-year students, 61% felt that B's confession must not be disclosed, and exactly one-third felt that it may be disclosed. Given the ambiguity of the question, any results are questionable, and this Comment does not conclude anything based on these responses. The question was designed to reflect upon the exception's inherent ambiguities, which some would argue need to be resolved.[116]

*TABLE II - QUESTION TWO: UNDER THE CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION IF YOU KNEW THAT "A" WAS BEING ASSAULTED IN PRISON CAUSING HIM SUBSTANTIAL BODILY HARM?*

| Year of Study | Must Disclose | May Disclose | Must Not Disclose |
|---|---|---|---|
| 1st (115) | 34% | 23% | 43% |
| . . . . . | | | |
| 2nd (91) | 19% | 60% | 21% |
| . . . . . | | | |
| 3rd (54) | 6% | 33% | 61% |
| . . . . . | | | |
| Overall | 23% | 38% | 39% |

### *3. Question Three – Rule Breakers*

"*The legal system itself needs people who are willing to break the law for political reasons . . . . The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.*"[117]

This question was designed to determine to what extent the lawyers-to-be would engage in civil disobedience.[118] The pool of

116. Hicks, *supra* note 13, at 319.

117. Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723, 741 (1991).

118. Daly, *supra* note 6, at 1628 ("Civil disobedience is traditionally associated with acts that are 'public, nonviolent, conscientious yet political . . . done with the aim of bringing about a change in the law or policies of government.' Although . . . I have located no instances of civil disobedience directed at the judicial branch in its capacity as the regulator of the legal profession . . . I see no reason why the absence of precedent should be should be fateful to my claim.").

students was asked whether they would disclose *regardless* of what the rules said. Among the entire sample, 41% said they would disclose B's confession regardless (first-year students: 34%; second-year students: 43%; third-year students: 46%). If adjusted to include those who said they might disclose (maybe), the number changes to 68%. This shows that as students become more familiar with the rules, they are more willing to disregard them and engage in civil disobedience.[119] However, among the total number of students that got-it-right, 80% said they *would not* disclose, regardless of what the rules say. This serves to undercut the conclusion that as students become more familiar with the rules, they are more willing to break them. Conversely, it suggests an opposite conclusion: those who know the rules and their exceptions are intent on following them.

*TABLE III - QUESTION THREE: WOULD YOU DISCLOSE REGARDLESS OF WHAT THE RULES MIGHT SAY?*

| Year of Study | Would Disclose | Would Not Disclose | Maybe |
|---|---|---|---|
| 1st (115) | 34% | 41% | 25% |
| . . . . . | | | |
| 2nd (91) | 43% | 32% | 25% |
| . . . . . | | | |
| 3rd (54) | 46% | 22% | 30% |
| . . . . . | | | |
| Overall | 41% | 34% | 27%[120] |

### *4. Question Four – Putting the Client First*

Question four was created to measure where the lawyers'-to-be considerations lie when deciding whether to disclose. The question asked whether they might disclose if they knew that releasing the information *might* lead to A's release from prison and if they *knew* that their client B would not be implicated and suffer criminal consequences. The question provided a win-win for the hypothetical lawyer: she could possibly exonerate A and simultaneously protect B from criminal prosecution.

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119. The survey tried to gauge why the students were willing to break the rule. Many responses included words or phrases such as "the right thing," or "morally right," or "A should not suffer because of B," and "justice."

120. The numbers throughout the section were rounded up. Thus, the percentages may not always equal exactly 100%.

This question brought the second highest level of agreement among the pool. Sixty-two percent (161/260) said they would disclose if they knew that their client B would not be implicated and suffer criminal consequences. If adjusted to include those who thought they might disclose (maybe), the percentage becomes 76% (197/260). Of those who got-it-right and said they might disclose (maybe), nearly half (49%) changed their minds and decided they would disclose if their client B would not suffer any criminal implications.

These results clearly reflect that the lawyers-to-be put the client's interests first. Thus, the notion that the duty of confidentiality is meant to protect the interests of the client first and foremost is supported by the instant study. The high level of across-the-board agreement shows that lawyers-to-be recognize and relate to the best interests of the client when considering whether to breach confidentiality. However, given the fact that the question provided a win-win for the hypothetical lawyer, these results are not surprising. They are, however, informative.

*TABLE IV - QUESTION FOUR: WOULD YOU DISCLOSE INFORMATION THAT MIGHT RESULT IN "A's" RELEASE FROM PRISON IF YOU KNEW THAT YOUR CLIENT "B" WOULD NOT BE IMPLICATED AND SUFFER CRIMINAL CONSEQUENCES?*

| Year of Study | Yes | No | Maybe |
|---|---|---|---|
| 1st (115) | 61% | 28% | 10% |
| . . . . . | | | |
| 2nd (91) | 64% | 20% | 14% |
| . . . . . | | | |
| 3rd (54) | 61% | 19% | 20% |
| . . . . . | | | |
| Overall | 62% | 23% | 14% |

*5. Question Five – Hypothetical Consequences and Their Implications*

Question five added more facts to the hypothetical in the form of consequences that the hypothetical lawyer would face.[121] It asked whether they would disclose if they knew what consequences they would suffer. The consequences were, ranging from highest to lowest: disbarment, suspension for an unspecified period, monetary sanction of unspecified amount, and a public reprimand. The question was

121. *See infra* app., question five.

designed to assess if, and to what extent, the students' own self-interest might determine whether they chose to breach confidentiality. Without such a question, it might be argued that the entire survey is without merit because it would not take into account the hypothetical lawyer's own costs and benefits.

As the consequences became less severe, the lawyers-to-be became more willing to breach confidentiality. Among the entire pool, 79% said they would not disclose if the consequences were disbarment. If suspension would result, with an unspecified time period, 58% would not disclose. If the consequences were an unspecified monetary sanction, 43% said they would not disclose. If the consequences were public reprimand, 48% would not disclose. Thus, at least some see public reprimand as a more taxing consequence than a monetary sanction. This is likely because of the role that a reputation can play in an attorney's career, and concerns over what other attorneys may think or how potential clients would react.

Of those who knew that the confession could not be disclosed under the Model Rules (got-it-right) and said they would disclose (knowing-rule-breakers), 87% changed their minds if they knew that the consequence was disbarment. However, only 26% changed their minds if they knew that an unspecified monetary sanction would result. Of those who got-it-right and of those who said they might disclose (potential knowing-rule-breakers), 63% changed their minds and said they *would* disclose if the consequence was merely an unspecified monetary sanction.

The implication from these hypothetical consequences, although not conclusive, is that the lawyers-to-be are in some sense self-interested (not surprisingly). Thus, although protecting the client's interests reflected a very high level of agreement among the pool (197/260), disbarment as a consequence reflected the highest level of agreement (200/260), but only by 1%. Therefore, although client concerns in a large part dictate the lawyer's course of action, most lawyers-to-be will not sacrifice their careers to save A.

### *6. Question Six – Consensus Versus Divergence*

This question was designed specifically with the proposal of this Comment in mind. It sought to discover whether an exception, which would allow the hypothetical lawyer to disclose B's confession and thereby possibly exonerate A, would be supported by popular opinion.

The question, partially in line with the Tomkins study,[122] asked if the lawyers-to-be thought the hypothetical lawyer should be able to disclose B's confession, and why.

Of those who got-it-right and said they would not disclose (the knowing-rule-followers—arguably the most skeptical of such an exception) nearly half (44%) thought that lawyers should be able to disclose B's confession. Not surprisingly, of those who got-it-right and of those who said they would disclose (the knowing-rule-breakers—arguably the most welcoming of such an exception), there was a consensus (100% thought that lawyers should be able to disclose this information). Among the entire pool, 61% thought that lawyers should be able to disclose B's confession. If adjusted to include those who were unsure (maybe lawyers should be able to disclose), the percentage becomes 74%. Thus, of the entire pool, only 26% of the lawyers-to-be believed that lawyers should not be able to disclose B's confession. Although not a consensus, this data suggests that the lawyers-to-be believe that the interests of confidentiality are outweighed by A's interests in physical liberty and being exonerated.

*TABLE V - QUESTION SIX: DO YOU THINK YOU SHOULD BE ABLE TO DISCLOSE THIS INFORMATION? WHY OR WHY NOT?*

| Year of Study | Yes | No | Maybe |
|---|---|---|---|
| 1st (115) | 57% | 23% | 15% |
| . . . . . | | | |
| 2nd (91) | 66% | 21% | 14% |
| . . . . . | | | |
| 3rd (54) | 61% | 20% | 11% |
| . . . . . | | | |
| Overall | 61% | 26% | 13% |

*7. Question Seven – Affecting Client Candor?*

The last question of the survey covertly attempted to gauge to what extent the pool accepted confidentiality's primary systemic justification, which, as discussed in Part I, is promoting client candor. The question, also partially in line with the Tomkins study,[123] asked the lawyers-to-be whether people's willingness to use attorneys might be affected by an exception allowing the hypothetical lawyer to disclose B's confession.

122. *Rethinking Confidentiality I*, *supra* note 6, at 392.
123. *Id.* at 395.

If potential clients are not willing to use an attorney's services, then it might easily be conceded that client candor is being discouraged.

Of those who thought lawyers should be able to disclose B's confession, 39% were willing to make the sacrifice, insofar that they believed that people's willingness to use attorneys would be affected, thereby discouraging candor. Of the entire pool, almost half (47%) thought that such an exception would decrease demand for lawyers, thereby chilling client candor. If adjusted to include those who were unsure (maybe it would affect willingness to use attorneys), 74% felt that it would or it might. Only 23% felt that such an exception would not affect client candor. Therefore, a significant majority of the lawyers-to-be accept confidentiality's primary systemic justification—that protecting secrets promotes client candor and the data supports the warning that such an exception to confidentiality would impact the way clients use attorneys. On the other hand, it simultaneously casts doubt on whether the effect is as substantial as proponents of confidentiality presume—only 47% were completely sure.

*TABLE VI - QUESTION SEVEN: IF ATTORNEYS WERE ALLOWED TO DISCLOSE IN CASES SUCH AS THESE, DO YOU THINK THAT WOULD MAKE PEOPLE LESS WILLING TO USE ATTORNEYS SERVICES?*

| Year of Study | Yes | No | Maybe |
|---|---|---|---|
| 1st (115) | 51% | 17% | 32% |
| . . . . . | | | |
| 2nd (91) | 50% | 29% | 19% |
| . . . . . | | | |
| 3rd (54) | 31% | 30% | 30% |
| . . . . . | | | |
| Overall | 47% | 23% | 27% |

### *C. Significance*

Several of these results are telling. First, the study revealed widespread misunderstanding among first and second-year law students, who more closely resemble laypeople, as to confidentiality and its scope. Half of the second-year students, and 40% of the first-year students, answered incorrectly by concluding that the hypothetical

lawyer either may or must reveal B's confession. These findings are consistent with the other limited empirical data on confidentiality.[124]

Second, of the entire pool, 63% stated that they either would or might disclose regardless of what the rules say. This result is also remarkably consistent with comparable empirical data.[125] For those who believe in professional codes of conduct, the picture that results from these responses is disturbing because, despite the fact that the code forbids disclosure, many lawyers-to-be might nonetheless disclose if their personal morals conflicted with the ABA's codified ethics. However, among those who understood the rules (those answering question one correctly—"got-it-right")—those most closely resembling practicing attorneys, 80% said they would not disclose.

Third, an amendment to the confidentiality rules allowing lawyers to disclose B's confession would clearly be popular. Only 26% of the entire pool thought that lawyers should not be able to disclose this information. Thus, 74% of the survey takers thought either that a lawyer should be able to disclose (158/260) or maybe should be able to disclose (34/260). This figure is also markedly consistent with similar studies.[126]

Fourth, the results suggest that the lawyers-to-be place their client's interests in high regard when considering a breach of confidentiality. Reflecting the second highest level of agreement among the lawyers-to-be, 161/260, or 62%, replied that they would disclose the information if they knew that their client B would not be implicated or suffer criminal consequences. If one includes those who thought they might disclose in this situation, the number increases to 76% (197/260).

Fifth, the lawyers-to-be showed a noteworthy level of selflessness, as 42% of the pool actually said that they would take a suspension of unspecified time in order to disclose and potentially exonerate A. However, the highest level of agreement, perhaps not surprisingly, was reflected by an unwillingness to be disbarred—200/260 lawyers-to-be,

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124. *Rethinking Confidentiality I*, *supra* note 6, at 381 (explaining how half of the clients relied on confidentiality and wrongly assumed the governing standard was absolute); *see also* Comment, *supra* note 114, at 1236 (revealing widespread misinformation concerning privileges in various professions and particularly the attorney-client privilege).

125. *Rethinking Confidentiality I*, *supra* note 6, at 392 (finding in the Tompkins study that 65% of the lawyers asked stated that they thought a good attorney would disclose in the innocent convict hypothetical and noting that the study did not provide for a "maybe" answer; the only options were "would disclose" or "would not disclose").

126. *Id.* at 395 (finding in the Tompkins study that 80% of clients thought lawyers should have to disclose in order to save the innocent defendant).

or 77%, said they would not disclose if they knew they would be disbarred.

Inconsistent with the Tomkins study were the results regarding what effect disclosure would have on potential clients' willingness to use attorneys (thereby affecting client candor). In the Tomkins study, 19% of the clients surveyed felt that disclosure of the innocent defendant information would affect their willingness to use an attorney.[127] In the lawyers-to-be survey, almost half (47%) felt that if disclosure were allowed to exonerate A, people would be less willing to use an attorney's services. Twenty-two percent thought that it might. Thus, the lawyers-to-be, unlike the actual clients in the Tomkins study, implicitly accepted confidentiality's primary systemic justification—i.e., confidentiality promotes client candor. Therefore, to the extent that a new exception would negatively affect demand for lawyers, the justification that confidentiality promotes client candor is supported by this data.

Ultimately, this study is not conclusive on these issues. It merely attempts to draw upon its data in an objective manner in order to provide code drafters with a way to avoid unsupported assumptions about client behavior.

## IV. PROPOSAL & ARGUMENT

> "*It is better that 100 guilty men go free than 1 innocent man go to jail.*"[128]

The Model Rules' Preamble states that a lawyer's responsibilities to serve the interests of the client, the demands of the legal system, and the public are *usually* harmonious.[129] The innocent convict hypothetical, which was designed to force a clash of the hypothetical lawyer's personal morals and codified ethics, highlights a troubling duality: the categorical mandates that Model Rule 1.6 provides versus the morally conscious lawyer seeking justice. The extreme, although not uncommon, example is one that pits three duties against themselves: duty to client, duty to self, and duty to society. The resolution of this

127. *Id.*
128. 4 WILLIAM BLACKSTONE, COMMENTARIES *352.
129. MODEL RULES OF PROF'L CONDUCT pmbl. (2002).

conflict is one that the ABA has yet to provide, although it is currently considering at least one possibility.[130]

This section seeks to help resolve the problem, arguing that the ABA should adopt a narrow, permissive, wrongful incarceration exception for two reasons: (1) because none of the interests attorney-client confidentiality is meant to serve apply in this hypothetical; and (2) because, after balancing the utilities, B's secrets are far outweighed by A's fundamental right to freedom from physical restraint.

This Comment proposes that the ABA should adopt the following additional exception to attorney-client confidentiality under Model Rule 1.6(b): *a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the wrongful incarceration of another person.*

In order to decide if the rules err by not adopting such a wrongful incarceration exception to cover the hypothetical scenario, three central policy issues in drafting exceptions to confidentiality must be addressed. First, the justifications providing for strict confidentiality, as outlined in Part I, should be applied to the current hypothetical to determine if they are properly served in this context. Next, the interests that justify a possible sacrifice of attorney-client confidentiality must be clearly defined.[131] Last, whether the proposed exception should be permissive or mandatory must be addressed.[132]

### *A. Justifications Applicable?*

#### *1. Client Candor*

The major argument against broadening exceptions to confidentiality, as fully discussed above, is that clients will be deterred

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130. See Joy & McMunigal, *supra* note 8, at 46–47 which considers the ABA's proposed amendment to comment [15] of MODEL RULE 1.6. This amendment states that the drafters:

> [R]ecognize[] the important societal interest in preventing and rectifying wrongful convictions . . . . The interests underlying the confidentiality obligation are usually paramount in the case of living clients. . . . However, the societal interests in disclosure may be paramount when the client is deceased, particularly when the client's reputation and estate will not be prejudiced by disclosure.

*Id.* at 47–48. Therefore, the rationale behind the exception is that deceased client's secrets are outweighed by society's interest in disclosure. This Comment asserts that this rationale is flawed because it misstates what the real interest should be: "A's" physical liberty.

131. *See* Crampton & Knowles, *supra* note 6, at 112.

132. *Id.*

from confiding information to their lawyers, thereby chilling attorney-client communications. Here, the client, B, has already provided the lawyer with full and frank information. He has entered a law office and told a lawyer that he broke the law by committing the crime for which A is currently serving his life sentence. It might easily be conceded that this client is as full and frank as a client can possibly be.

Necessarily, the justification applies not only to the present client, but also to other potential clients. Given the rarity of this exceptional scenario, it is highly unlikely that overall attorney-client communications would be chilled.[133] Moreover, currently recognized exceptions, such as those pertaining to third-party injury as outlined in Part II, seem much more likely to be triggered than the proposed wrongful incarceration exception, and thus more likely to impede the full and frank communication that confidentiality is designed to facilitate.[134] Therefore, the proposed exception would do little more than the current exceptions have already done to chill communications.

Opponents to such an exception face another hurdle because in order to argue that such a narrow exception would affect client candor, or at the very least lead to some lay hesitation, they must concede that clients understand the rules. This necessary premise, which is the very bedrock of attorney-client confidentiality's justifications, is called into question with the data presented herein. The survey revealed a widespread misunderstanding of the rules—nearly 40% of the 260 polled thought that B's confession either may or must be disclosed.[135] These findings are also consistent with other limited empirical data.[136] At least one third-year respondent in the lawyers-to-be survey exclaimed, "[t]hey won't know!" (referring to potential clients). Thus, potential clients that are unaware of the exception would not be affected by an exception they do not know exists. Perhaps more importantly, however, those clients who are aware of such an exception already have good reason not to confess to a crime for which another person has been charged or convicted.[137]

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133. *See generally Rethinking Confidentiality I*, *supra* note 6, at 365–66 ("[a]s a practical matter, clients thus probably end up with only a general understanding that attorney-client conversations usually remain confidential but occasionally may be revealed. If that is the case, creating limited additional disclosure exceptions is unlikely to affect a client's decision to confide.").

134. Joy & McMunigal, *supra* note 8, at 46.

135. *See supra* tbl. I (showing poll of student opinion regarding client confidentiality).

136. *See Rethinking Confidentiality I*, *supra* note 6, at 381 (citing authority evidencing confidentiality issues).

137. Miller, *supra* note 115, at 401.

Widespread misunderstanding of the rules aside, the lawyers-to-be lend at least some credence to those who feel that such an exception would affect client candor and chill communications. Seventy-four percent of the lawyers-to-be felt that if lawyers were allowed to disclose B's confession that people either would, or might be, less likely to use an attorney's services.[138] However, only 47% were sure (26% answered "maybe"). Thus, this data might also support those who argue that an exception would negatively affect client candor, but it simultaneously casts doubt on whether the effect is as substantial as proponents of confidentiality presume. Furthermore, the level of understanding of the rules on confidentiality is objective—i.e., measurable—whereas whether demand for lawyers might be affected by a new exception is a subjective and conjectural question. Thus, the former is less speculative than the latter and seriously undercuts those who argue that a narrow exception for wrongful incarceration might chill client communications.

### *2. Client Autonomy and Privacy*

Next, regarding client autonomy, privacy, and dignity, the argument, as explained above, is that the client's autonomy demands a certain level of dignity that allows the client to exercise her private decisions under a veil of secrecy as a free citizen in a free society. The application of this *purely* philosophical justification to the hypothetical is tenable at best. This justification is, by its very nature, an abstract one that cannot be proven. The position of this Comment is that when a person's physical liberty is at stake, the reality of that more certain harm should clearly trump dubious assumptions about effects on a client's personal feelings or autonomous dignity. Furthermore, studies indicate that mistrust and suspicion are already frequently encountered in the attorney-client relationship as it stands.[139] Therefore, even though adding an exception to cover the hypothetical scenario might philosophically affect a client's intangible subjective feelings and autonomy, such considerations should be overlooked in light of the objective and tangible harm faced by A.

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138. *See supra* tbl. VI.

139. *See, e.g.*, Robert A. Burt, *Conflict & Trust Between Att'y & Client*, 69 GEO. L.J. 1015 (1981) (arguing that expanding exceptions to confidentiality would enhance trust between attorney and client).

### *3. Preventing Misconduct*

The strongest justification for confidentiality,[140] preventing client misconduct, does not apply here. It cannot meritoriously be argued that the hypothetical lawyer might use B's confession to prevent B's misconduct because the harm *has already occurred* and is therefore impossible to prevent. Ironically, there is a stronger guarantee of preventing harm in general under the proposed exception than there is under the current exceptions.[141] This is because a client that discloses an intention to commit a *future* crime might actually change her mind, whereas under the proposed exception, the lawyer cannot disclose until *after* the harm has already been committed and is ongoing—i.e., the wrong person has been sentenced and is incarcerated. Therefore, since there is nothing the hypothetical lawyer can conceivably do to prevent the client's misconduct, this justification does not apply on these facts.

Incidentally, it is professional misconduct for a lawyer to engage in conduct which is prejudicial to the administration of justice.[142] Arguably, by disclosing B's confession to a prosecutor, for example, a lawyer would be serving the interests of justice overall and would greatly promote the administration of justice. In August 2008, the ABA amended Model Rule 3.8 ("Special Responsibilities of a Prosecutor") to address a prosecutor's obligations, in particular with respect to wrongful incarcerations/convictions.[143] It codified prosecutors' post conviction obligations of disclosure and investigation when they know of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted.[144] This new amendment is proof positive of the ABA's willingness and commitment to preventing wrongful convictions in general. Specifically, however, the amendment proposed herein would give non-prosecutors—i.e., defense attorneys—the tools they need to assist the prosecutor in his new duty of investigation, and thereby promote the overall administration of justice.

### *4. Facilitating Effective Representation*

The fourth justification, which is partially duplicative, posits that lawyers need all relevant information in order to be effective and to

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140. Again, the author uses this language because, as pointed out above, there is at least some empirical data on the matter.

141. Miller, *supra* note 115, at 399.

142. MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2003).

143. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

144. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2008).

facilitate effective representation for the client. Here, however, the information at issue has not been disclosed for the purpose of seeking legal advice and will not result in such advice because the hypothetical lawyer is representing "B" on an *unrelated matter*. The crime has already been committed. Since the matter is wholly unrelated, it necessarily has no bearing on the facilitation of effective legal advice. Furthermore, there is at least some evidence that professional and legal rules have little effect on the willingness or unwillingness of clients to talk to their lawyers, as legal advice is usually sought out as a matter of necessity, especially in the criminal defense realm.[145] However, there is no evidence that the current broad exceptions, which are much more likely to be triggered than the proposed exception, have had any undesirable effect on facilitating effective representation. Therefore, since this justification does not apply on these facts, ABA code drafters should have no problem disregarding it.

### *5. Preventing Negative Externalities and Promoting Positive Externalities*

An externality, as discussed above, is an unforeseen cost placed on a third party as a result of a producer or consumer creating or consuming goods.[146] Here, disclosure by the hypothetical lawyer might actually promote positive externalities in several ways. The disclosure of this information will actually deflect costs associated with housing inmates and appellate review.[147] Society's view of lawyers might increase if they knew lawyers were allowed to disclose this type of information and were driven to do so in order to uphold justice, as opposed to protecting those narrower groups with special interests.[148] The more that professional standards prescribe conduct inconsistent

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145. *See* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 683 (1978). Murray claims that, in general, lay persons visit accountants, psychiatrists, social workers, and other specially trained professionals expecting secrecy of most information. *Id.* However, there are circumstances which allow the shield of confidentiality to be pierced. *Id.* Nevertheless, clients continue to use these services because the risk of disclosure is simply insignificant in the face of the benefits the client obtains. *Id.*

146. *See generally* BUTLER & DRAHOZAL, *supra* note 66.

147. McCoy v. Court of Appeals of Wis., 486 U.S. 429, 436 (1988) (holding that the State is required to provide counsel for first appeal by right).

148. *But see* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS 147 (Lexisnexis/Matthew Bender 2d ed. 2002) (worrying that under a permissive exception to confidentiality "lawyers will be more likely to use or disclose a client's confidential information . . . when the client is an indigent . . . than any other client," resulting in "an even greater divide between the kind of legal services- and loyalty- provided to some clients than that provided to others").

with society's general ethical perceptions, the more likely society is to view the profession with cynicism.[149] Indeed, such a result is not unlikely given the fact that wrongful convictions have attained such prominence in today's legal and popular culture.[150] It may also prevent negative externalities because the failure to recognize an exception for the innocent convict is likely to attract public attention and undermine public confidence both in lawyers and our criminal justice system in general.[151] Therefore, the hypothetical lawyer's disclosure of B's confession might actually help serve the very interests which confidentiality currently is supposed to serve. Thus, the argument actually cuts the other way.

### *B. Balancing the Interests: Physical Liberty Versus Confidentiality*

> *"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are . . . Liberty."*[152]

Confidentiality rules have always recognized exceptions.[153] The comments to Model Rule 1.6 reveal that the ABA code drafters engage in a balancing act to determine whether an exception should exist. This utilitarian balancing runs parallel to the process courts may employ in the area of attorney-client privilege, which is beyond the scope of this Comment.[154] Thus, in order for the ABA to adopt a new exception, they must find a countervailing interest that outweighs the interests confidentiality preserves.

The search for utility need not extend past the current comments to Model Rule 1.6, which recognize *physical integrity* as such an interest. Physical integrity is part and parcel of physical liberty, which is a value upon which this country was founded. The right to be free from physical restraint is so basic a human right and fundamental to our precepts as just beings that it must not be overlooked or taken for granted. Currently, America is engaged in two wars that are, at least nominally, to fight for liberty and freedom. Any conceivable

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149. *Rethinking Confidentiality I*, *supra* note 6, at 376 (citing Note, *Attorney Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685, 688 (1976).

150. Joy & McMunigal, *supra* note 8, at 48–49.

151. *Id.*

152. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

153. *Id.*

154. *See generally* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 486–87 (1977).

justification for confidentiality pales in comparison to spending every waking hour behind bars. Clearly, Model Rule 1.6, as applied here, results in the maintenance of confidentiality, even in light of wrongful incarceration and the great physical, mental, emotional, and spiritual harm that such incarceration would cause to an innocent human being.[155] The data provided by the lawyers-to-be supports such notions—68% said that they either would or might disclose *regardless* of what the rules might say, and only 26% thought that lawyers should *not* be able to disclose this information.[156] This result is also supported by similar empirical research.[157] If the notion that an innocent man's physical liberty outweighs attorney-client confidentiality is a notion so commonly shared by lay persons, why as lawyers is it so hard to accept? Are the profession's interests really all that different from society's?

Currently, the two utilities on the ABA's balancing hierarchy that sufficiently outweigh attorney-client confidentiality are lawyer-centered.[158] These two interests are collecting fees and self-defense.[159] When juxtaposed against the right to be free from physical restraint, collecting fees and defending against professional negligence actions seem quite small in stature. Moreover, the high likelihood that such exceptions will be triggered, versus the low likelihood that a lawyer might have a client admit to committing a crime for which another is incarcerated, must not go unnoticed. Nonetheless, the same lawyer that is prohibited from disclosing on these facts is perfectly free to disclose confidential information when he or she is the one accused, whether falsely or not. There is no requirement that the lawyer's liberty be at stake; a simple fee dispute will suffice. At least one scholar has noted, "[n]o exception to the attorney-client privilege has done as much to draw [confidentiality] into question as the exception allowing lawyer self-protection."[160] Others have pointed out that allowing lawyers to disclose confidences for the purpose of collecting fees "is sanction for

155. Tuoni, *supra* note 13, at 473; *see also* Miller, *supra* note 115, at 397 (citing Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462–65 (1993) and pointing out that inmates face an increased risk of physical violence based upon factors such as concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality).

156. *See supra* tbls. III & V.

157. *See e.g. Rethinking Confidentiality I*, *supra* note 6, at 394 (stating that 80% of clients surveyed believed that lawyers should be able to disclose information regarding an innocent defendant).

158. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4), (5) (2003).

159. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2003).

160. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 308 (West Publishing Co. 7th ed. 2005).

blackmail."[161] Professor Daniel R. Fischel has argued that confidentiality rules benefit lawyers but are of dubious value to clients and society as a whole, and do nothing more than increase the demand for lawyers.[162] Other scholars have shared their views on the ABA's current enigmatic position.[163] If nothing else, this Comment can assist code drafters in basing confidentiality's exceptions on empirically supported contentions and thereby forestalling the public perception, both by lawyers and laypersons alike,[164] that ethical regulations merely protect the guild.

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161. FREEDMAN & SMITH, *supra* note 16, at 155.

162. *See* Fischel, *supra* note 24, at 33.

163. Tuoni, *supra* note 13, at 446, 469 ("It is difficult to understand how a lawyer's self reputational interests are regarded as more worthy of protection than societal and individual interests in not being victimized . . . . The Model Rules set forth a very strange hierarchy of protections in the area of client confidentiality . . . . Perhaps the *coup de grace* of the model Rules' 'slap in the face' to the needs of those outside of the legal system is the enhancement of lawyer's ability to protect themselves through the use of confidential client information."); *see also* FREEDMAN & SMITH, *supra* note 16, at 144 ("[S]ome of the ABA's exceptions to lawyer-client confidentiality are a mockery of an ideal . . . ."); Cramton & Knowles, *supra* note 6, at 111 ("[A] profession that justifiably asks for and receives permission to disclose confidential information when its own economic self-interests are at stake (e.g. to collect a fee from a client) cannot plausibly take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality."); Daly, *supra* note 6, at 1625 ("Less noble and even more firmly established is the exception that permits disclosure to the extent necessary to collect a lawyer's fee or to defend against an accusation of wrongdoing."); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 738 (1977) (explaining that the code effectively ends attorney's obligations of confidentiality when it becomes uncomfortable for an attorney); William H. Simon, *The Belated Decline of Literalism in Professional Responsibility Doctrine: Soft Deception and the Rule of Law*, 70 FORDHAM L. REV. 1881, 1901 (2002) [hereinafter Simon, *Belated Decline*] ("Literalism has at least a modest correlation with the economic self-interest of the bar. It is consistent with the bar's perceived material interest in minimizing the lawyer's responsibilities to people who do not pay for legal services. Moreover, it seems to have a tendency to enlarge demand for legal services."); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 652 (2003) [hereinafter Simon, *Professional*] ("[T]hese [confidentiality] rules are less often seen as an expression of economic self-interest than the rules specifically focused on admission and marketing. Critics are as likely to explain the bar's ethical orientation in terms of ideological commitments as in terms of economic self-interest."). *See generally Rethinking Confidentiality I*, *supra* note 6, at 353–71 ("[T]he tradition of strict confidentiality has helped teach lawyers and clients to rationalize amoral representation . . . . The resulting patchwork of standards governing attorney-client secrets casts doubt on the ideals to which confidentiality rules aspire.").

164. *See* Daniel R. Fischel, *Lawyers & Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (providing that lawyers are the beneficiaries of the rule of confidentiality); *see also* Colin Miller, *Ordeal by Innocence: Why There Should be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391 (discussing the importance of the wrongful incarceration exception).

After all is said and done and both sides have made their arguments, what remains is a hierarchy of interests that places lawyer self interest higher than the exoneration of A. When viewed in this light, the primary beneficiary of the rules of confidentiality is not the client, as the ABA contends, but rather it is the lawyer. This argument is not an attack on the ABA, because as recent amendments have proved, their concerns are headed in the right direction; it simply is made to show that one last step needs to be taken. The recognition of a wrongful incarceration exception is consistent with the recent trend to ease confidentiality restrictions when doing so allows lawyers to serve an important public purpose. This trend expands a lawyer's duty to act cooperatively in preventing and remedying wrongdoing, emphasizing the lawyer's role as an officer of the court rather than the lawyer's role as a zealous advocate for the client.[165]

### *C. Permissive Versus Mandatory: Practical Considerations*

This Comment suggests that the discretion to disclose should remain with the lawyer herself despite the fact that a mandatory rule might lead to a more uniform and predictable outcome. The Model Rules are just that; they are guidelines for the professional lawyer and they are rules of reason.[166] The rules do not exhaust the moral and ethical considerations that should inform a lawyer, "for no worthwhile human activity can be completely defined by legal rules."[167] The rules are primarily an ethical framework that stitch appropriate considerations into a lawyer's moral fiber. As such, the lawyer should be able to exercise her discretion in each individual context whilst considering and weighing what the lawyer "may" do if need be, as opposed to what she shall do no matter what. This also allows proper time and peace of mind to consider all the relevant factors before disclosing. Much of the law of lawyering makes room for morals by giving lawyers discretion in determining what they ought to do; confidentiality exceptions should provide the same level of flexible regulation.[168] Furthermore, few

165. Joy & McMunigal, *supra* note 8, at 49.

166. MODEL RULES OF PROF'L CONDUCT, scope 14 (2002).

167. *Id.* at 16.

168. Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 596 (1991). *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 69 (West Publishing Co. 1986) ("Most lawyer decisions are open-ended and discretionary in the sense that a lawyer can choose between a variety of tactics or outcomes with no fear of violating any legal rule. In making those decisions, lawyers rely on some innate sense of proper behavior. One lawyer's sense might be the result of a very thought out and consciously followed system of moral values. Another lawyer's sense might be nothing more complicated than an instinct

States, nor either the current Model Rule 1.6 or the Restatement (Third) Governing Lawyers, mandate disclosure, they merely allow it.[169]

A mandatory rule would not reflect the complexity this hypothetical presents. Disclosing B's confession can be costly to lawyers. Such costs can present themselves in a variety of ways. A more realistic ramification for the lawyer who decides to disclose might be professional martyrdom.[170] From an economic standpoint, harm facing the attorney can be staggering in a freely competitive market, and disclosure can jeopardize a young criminal defense attorney's career, possibly resulting in occupational suicide.[171] Such a notion is supported by the lawyers-to-be study, insofar that more were willing to disclose in the event a monetary sanction would result than when the consequence was a public reprimand.[172]

Some have used the rational actor model to argue that allowing the attorney to maintain discretion in deciding whether to disclose confidences will not result in actual disclosure in practice.[173] If the costs outweigh the benefits, then the simple economic model dictates that the lawyer will not disclose. This much is supported by the instant study: the highest level of agreement among the lawyers-to-be was reflected in the consensus that if disbarment would result, then they would not disclose (200/260). The significance of the self-interest assumption is that it allows economists to predict changes in individual behavior in response to changes in economic variables.[174] However, the self-interested rational actor model does not take into consideration the subjective costs and benefits of the decision not to disclose—another type of cost. The model fails to account for the guilt associated with allowing an innocent man spending his life in prison. The potential psychological ramifications that may result from non-disclosure elude

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that a lawyer may engage in any conduct that leads to a higher fee. Both lawyers are making decisions about the rightness or wrongness of conduct.").

169. *See* DZIENKOWSKI, *supra* note 91, at 109–15 (providing that Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin are the only states which require a lawyer to disclose confidential information); Mohr, *supra* note 23, at 351.

170. Rosenthal, *supra* note 11, at 168.

171. *Id.* at 167 (pointing out that the reputation of a criminal defense attorney travels swiftly through the ranks of criminal defendants and once the attorney is labeled as untrustworthy, that attorney may be hard pressed to retain any future clients).

172. *See* app., question five (providing that 48% of lawyers would not disclose if public reprimand would result, whereas 43% would not if unspecified monetary sanction would result).

173. *See* McGowan, *supra* note 13, at 1828 ("A simple rational actor assumption suggests that lawyers are reluctant to create costs for themselves.").

174. BUTLER & DRAHOZAL, *supra* note 66, at 5.

measurement and the hypothetical lawyer cannot be made whole unless disclosure is made. Certainly, not all lawyers would feel a sense of perpetual guilt, but indeed some may.[175] Whatever the personal costs and benefits may be, the discretion should remain with the lawyer to weigh them accordingly in a contextual setting.

A mandatory rule might cause more harm than good. A lawyer's professional responsibility necessarily carries with it a duty to exercise discretion by considering the relevant legal issues.[176] Since a rigid rule dictates what the lawyer shall do when given a particular happening of a small number of factors, it thereby leaves the lawyer with no discretion to consider factors that are not specified under the rules. This presents a problem because given the nature of the legal practice, few fact patterns are the same. Ultimately, by requiring a given response, a mandatory disclosure rule disregards this fundamental premise. Consider the client's confession in the hypothetical. After some probing questions, the lawyer reasonably believes that B is telling the truth and he is the one who committed the crime. Now consider a second situation in which the client's confession is questionable and the alleged facts are not adding up. Out of a fear of disciplinary action against her if she did not disclose, the second lawyer reveals the information that turns out to be false. She might have caused more harm than would have resulted under a discretionary rule, which would have allowed a proper consideration of all the relevant factors. A person's credibility is unquestionably relevant and may be hard to make. A discretionary rule might have allowed the second lawyer to meet with the prosecuting attorneys to get a stronger understanding of the facts of the case, thereby leading to the conclusion that the client is not credible. Now, subject to potential civil damages and being stigmatized amongst potential clients, lawyer two has done more harm than good; both to herself and to the administration of justice. This admittedly exceptional situation demonstrates at least one way in which a rigid rule might be counterproductive and not allow for contextual judgment.

Credibility aside, a permissive exception recognizes the importance in allowing the lawyer to assess the substantive merit (i.e., admissible evidence) and to decide whether or not she should disclose. This allows the lawyer to determine if the confession is or might be admissible as evidence, and even if the confession is admissible, if it is

175. The lawyer in Logan's case said he thought about it every day; there wasn't a day that went by where he didn't consider it. 60 Minutes, *supra* note 7.

176. Levine, *supra* note 13, at 188 (citing Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006)).

enough to vindicate A and induce a court to overturn his conviction. Several actual cases are illustrative of the issues a lawyer may face when confidentiality rules clash with evidentiary rules relating to the attorney-client privilege.[177] The rules of hearsay also present troubling and arguably unresolved legal issues to the hypothetical lawyer, which are beyond the scope of this Comment.[178]

Furthermore, the hypothetical attorney, after having decided that she has admissible evidence, must then decide if said evidence is sufficient to meet the burden of production and burden of persuasion. In most jurisdictions, the burden of proof at trial differs from the burden in post-conviction proceedings.[179] To obtain an acquittal, a defendant bears no burden of proof and the state must prove each element of the charged offense beyond a reasonable doubt.[180] A defendant on a post conviction writ, however, typically bears a heavy burden.[181] Thus, what burden will apply to a given proceeding indefinitely raises yet another question a rigid rule cannot conceivably address: *when* should the disclosure occur? The proposed permissive exception states that the lawyer may reveal the information to *prevent* the wrongful incarceration of another person. Considering the fact that juries are unpredictable,

177. *See* Morales v. Portuondo, 154 F. Supp. 2d 706, 730–31 (S.D.N.Y. 2001) (relying on Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973) (permitting a lawyer to disclose that his deceased client had confessed to a murder for which another man was convicted on the grounds that habeas action due process required admission of the evidence to guarantee fundamental fairness to the defendant)); *see also* State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976) (refusing to admit the testimony of the attorneys which might have revealed the wrongful conviction on the grounds that it violated attorney-client privilege); State v. Valdez, 618 P.2d 1234, 1237 (N.M. 1980) (holding attorney-client privilege prevented lawyer from testifying that a former client confessed to a robbery); State v. Doster, 284 S.E.2d 218, 220 (S.C. 1981) (applying attorney-client privilege to prevent lawyer from testifying about deceased client's statements that may have exonerated defendant).

178. *See generally* FED. R. EVID. 801–804. Since "B" in the hypothetical scenario would likely plead the 5th in a proceeding, it is likely he would be "unavailable" under FRE 804(a)(1). In consequence, the key question is whether the declarant, in this case "B", made a statement against interest under FRE 804(b)(3) becomes at least one potential issue. Also, if introduced during trial by defense counsel of the accused, the statement then becomes double hearsay: statements relating to someone else's statements. *See, e.g.*, *Portuondo*, 154 F. Supp. 2d at 730–31.

179. *See generally* Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449 (2001).

180. *In re* Winship, 397 U.S. 358, 361 (1970).

181. *See, e.g.*, *Ex parte* Thompson, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005). A defendant seeking to overturn a conviction based on newly discovered evidence indicating actual innocence must show "that the newly discovered evidence unquestionably establishes his or her innocence." *Id.* (quoting *Ex parte* Elizando, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996)). To grant relief, "the reviewing court must believe that no rational juror would have convicted the applicant in light of the newly discovered evidence." *Id.* (quoting *Ex parte* Elizando, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996)).

one lawyer may choose to await the verdict before disclosing while another may decide to disclose before the jury comes back. While different states may place different burdens on defendants seeking post-conviction relief on actual innocence grounds, the burden of proof is yet another factor the hypothetical lawyer must consider, as it might be insurmountable in certain contexts. Such questions are contextually driven and should be left up to the lawyer under a permissive exception.

Still other considerations remain. Although the lawyer in the hypothetical might be barred from disclosing such information in a court of law because of evidentiary barriers, the lawyer may reveal the information to the accused's defense counsel, the prosecutor, the governor, or the press. Such disclosures might lead to revelations about the case that otherwise might not have been available, which could prevent wrongful incarceration.[182] For example, the revelation might help a wrongfully convicted person attract public support and attention, prompt the prosecution to re-examine the case, or lead a state governor to consider his unchecked executive power of pardon. It might also lead to a re-investigation that might reveal, for example, DNA evidence, transforming the underlying dispute into a matter of science as opposed to a matter of law.

The hypothetical lawyer also has one last consideration, which is arguably the most important: the effect that disclosure would have on his client, B. Fundamental to the rules on confidentiality are two notions: (1) it is a duty, which is a basic obligation; and (2) it is owed to the client, and not to society in general. Thus, in considering a breach of this duty, the hypothetical lawyer must be cognizant of the client's interests, and what a breach would mean to the client. Reflecting the second highest level of agreement among the pool, the lawyers-to-be recognized the importance of the client's interests and how the client would be affected. One hundred and ninety-seven of the 260 surveyed, or 77%, responded that they might or would disclose client B's confession if they knew he would not be implicated and suffer criminal consequences (62% would; 15% might).[183] The question is concededly imperfect because it lacks a pecuniary element of consequence; but it is informative. Interestingly, of those who understood the rules (got-it-right) and also said they might disclose regardless of what the rules said, nearly half (49%) changed their minds and said they would disclose if their client, B, would not suffer criminal consequences. Overall, the client's interests add another piece of the puzzle for the lawyer to

182. *See e.g.*, Joy & McMunigal, *supra* note 8, at 47.
183. *See supra* tbl. IV.

consider, and a permissive rule, as opposed to a mandatory one, would allow the lawyer to mull over these considerations.

The multitude of both legal and practical considerations facing the hypothetical lawyer are astounding and cannot be taken into account by the rules of professional responsibility. Discretionary disclosure allows for an analytical and efficient case-by-case determination, resulting in proper service to the court, the client and society.[184] Therefore, by allowing the discretion to remain with the lawyer, the rules better serve the interests of all parties involved and better promote the overall administration of justice—something a one-size-fits-all rule could never accomplish.

## CONCLUSION

The study presented herein is by no means meant to be conclusive; it seeks only to uniquely add to the scholarly debate on confidentiality and wrongful incarceration. Thus, overreliance on the study is cautioned against because its methodology is somewhat unscientific.[185] Although this Comment advocates the adoption of a new exception to confidentiality, the relevant data it provides should prove important to both proponents and opponents of confidentiality exceptions alike because, as with most empirical evidence, differing interpretations are possible. The study's methodologies are imperfect and the results are not definitive, but they serve an important function for ABA code drafters: avoiding unsupported theoretical assumptions about attorney-client behavior and its relation to confidentiality's exceptions.

This Comment is not the first to advocate for the inclusion of a wrongful incarceration exception to the ABA's Model Rule 1.6,[186] and it should not be the last. As of June 1997, only Massachusetts' Rules of

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184. Hicks, *supra* note 13, at 317 (citing Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 689 (1999)).

185. NOREEN CHANNELS, SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS 53–81, 148–81 (Rowan & Allanheld 1985).

186. *See* Cramton & Knowles, *supra* note 6, at 124; *see also* Miller, *supra* note 115, at 393 (pointing out that in 1979, the ABA's Kutak Commission prepared a draft proposal which allowed a lawyer to disclose to the extent necessary to prevent wrongful detention (citing Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System,* 35 SETON HALL L. REV. 613, 631 n.99 (2005))); *see generally* Alschuler, *supra* note 6, at 355 ("[W]hen a client has confessed that he is guilty of a crime and has given his lawyer information that he would not have known unless he were guilty in fact, the lawyer ought at least attempt to prevent the imprisonment . . . of another person for this crime." (citing THE AMERICAN LAWYER'S CODE OF CONDUCT: PUBLIC DISCUSSION DRAFT, JUNE 1980 §1.2 Alternative A) (1980))).

Professional Conduct has adopted an exception for wrongful incarceration.[187] The Innocence Project has reported that there have been 223 post-conviction DNA exonerations in United States history.[188] Another recent study indicates that there were 340 exonerations in our criminal justice system between 1989 and 2003, including 196 that did not involve DNA evidence.[189] The common themes that run through these cases and that plague our criminal justice system are eyewitness misidentifications, corrupt scientists, overzealous police and prosecutors, and inept defense counsel.[190] Whatever the cause, the effect cannot continue to be ignored. The ABA's motto is "Defending Liberty, Pursuing Justice."[191] It is the assertion of this Comment that the ABA can best defend liberty by announcing the adoption of a new exception to confidentiality, which is grounded in the fundamental notion that physical liberty outweighs client candor. The recent trend to relax the duty of confidentiality in the face of a greater good is a testament to our partial progress. Only one step remains.

Only one-quarter of lawyers find that legal practice has lived up to their expectations in contributing to the social good, and this lack of contribution is the greatest source of career dissatisfaction.[192] Ethical mandates can frequently conflict with moral initiative, oftentimes making a good person and a good lawyer mutually exclusive creatures. Lawyers who feel compelled to do the right thing deserve more support from the organized bar. A great number of law students enter the profession partly out of a commitment to social justice, only to find out that the connection has been partially lost. Too often, lawyers have "file[ed] a demurrer, rather than an answer, to the charge of immorality."[193] Lawyers must not be deterred by what has been, but rather, use the profession as a means to rebuild the bond with society and push the system closer to justice as most Americans conceive it. The special obligations to pursue justice and uphold the rule of law necessarily carry with it a greater accountability for the performance of

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187. MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) ("A lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another.").

188. Innocence Project Case Profiles, *available at* http://www.innocenceproject.org/know/ (last visited Nov. 14, 2008).

189. ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006).

190. *Id.*

191. *See* ABA Home Page, http://www.abanet.org.

192. *ABA Young Lawyers Division Survey: Career Satisfaction* 19 (2000).

193. Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 674 (1978).

the system as a whole. The system, although efficient, is not perfect. The rules which lawyers model their behavior after should reflect this imperfection by allowing lawyers to correct grave misfortunes had by the likes of Alton Logan, who spent more than a quarter century in prison, while an affidavit attesting to his innocence remain locked away in a lawyer's closet.[194]

194. *See generally* Miller, *supra* note 115.

## APPENDIX[195]

**Instructions to read before distributing survey:** I have been asked to administer a survey to you to gather law student's perspective and opinion on a matter. I would ask that you take it seriously and think about your answers as the issues it presents may one day effect you as future attorneys. It should not take more than a few minutes. I cannot say anything more about the survey. Your responses will remain completely anonymous unless you choose otherwise.

**Instructions for law students:** all answers will remain anonymous.

Please answer the questions in the order they appear. Do not read the next question until you have answered the first. Answer to the best of YOUR knowledge.

1) What year of law school are you currently in?

2) Have you taken Professional Responsibility yet?

3) Under current ABA standards regarding lawyer-client confidentiality, please read the following hypothetical and answer the questions that follows.

"A", a stranger to you, has been convicted by a jury of his peers and sentenced to life imprisonment. "B", also a stranger, comes into your law office and you agree to represent him on an unrelated matter. During the course of your representation, B tells you that he committed the crime for which A is currently serving his life sentence. After some probing questions on the matter you reasonably believe that B is telling the truth and he is the one who did the crime. "B" refuses to voluntarily disclose the information.

1) UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION?

(Please Check One)

Must Disclose_____ May Disclose _____ Must Not Disclose ____

2) UNDER CURRENT ABA STANDARDS, MAY YOU DISCLOSE THIS INFORMATION IF YOU KNEW THAT "A" WAS BEING ASSAULTED IN PRISON CAUSING HIM SUBSTANTIAL BODILY HARM? (Please Check One)

---

195. The survey has been recreated exactly as it appeared when utilized by the author.

Must Disclose_____ May Disclose _____ Must Not Disclose ____

3) WOULD YOU DISCLOSE REGARDLESS OF WHAT THE RULES MIGHT SAY?

(Please Check One)

Would Disclose _____ Would not disclose_____ Maybe_____

If you answered maybe, please explain why.

4) WOULD YOU DISCLOSE INFORMATION THAT MIGHT RESULT IN "A's" RELEASE FROM PRISON IF YOU KNEW THAT YOUR CLIENT "B" WOULD NOT BE IMPLICATED AND SUFFER CRIMINAL CONSEQUENCES?

Yes_____ No_____ Maybe_____

If you answered maybe, please explain why.

5) WOULD YOU DISCLOSE THIS INFORMATION IF THE CONSEQUENSES WOULD BE . . .

Disbarment: Yes___ No____

Suspension: Yes___ No____

Monetary Sanction: Yes___ No____

Public Reprimand: Yes___ No____

6) DO YOU THINK YOU SHOULD BE ABLE TO DISCLOSE THIS INFORMATION? WHY OR WHY NOT?

Yes_____ No_____ Maybe_____

7) IF ATTORNEYS WERE ALLOWED TO DISCLOSE IN CASES SUCH AS THIS, DO YOU THINK THAT WOULD MAKE PEOPLE LESS WILLING TO USE AN ATTORNEY'S SERVICES?

Yes_____ No_____ Maybe_____

*OVERALL RESULTS*

Question One: Under current ABA standards, may you disclose this information?

| Year of Study | Must Disclose | May Disclose | Must Not Disclose |
|---|---|---|---|
| 1st (115) | 30 | 17 | 68 |
| . . . . . | | | |
| 2nd (91) | 6 | 39 | 46 |
| . . . . . | | | |
| 3rd (54) | 2 | 8 | 44 |
| . . . . . | | | |
| Overall | 38 | 64 | 145 |

Question Two: Under the current ABA standards, may you disclose this information if you knew that "A" was being assaulted in prison causing him substantial bodily harm?

| Year of Study | Must Disclose | May Disclose | Must Not Disclose |
|---|---|---|---|
| 1st (115) | 39 | 26 | 50 |
| . . . . . | | | |
| 2nd (91) | 17 | 55 | 19 |
| . . . . . | | | |
| 3rd (54) | 3 | 18 | 33 |
| . . . . . | | | |
| Overall | 59 | 99 | 102 |

Question Three: Would you disclose regardless of what the rules might say?

| Year of Study | Would Disclose | Would Not Disclose | Maybe |
|---|---|---|---|
| 1st (115) | 39 | 47 | 31 |
| . . . . . | | | |
| 2nd (91) | 39 | 29 | 24 |
| . . . . . | | | |
| 3rd (54) | 25 | 12 | 16 |
| . . . . . | | | |
| Overall | 103 | 88 | 71 |

Question Four: Would you disclose information that might result in "A"'s release from prison if you knew that your client "B" would not be implicated and suffer criminal consequences?

| Year of Study | Yes | No | Maybe |
|---|---|---|---|
| 1st (115) | 70 | 32 | 12 |
| . . . . . | | | |
| 2nd (91) | 58 | 18 | 13 |
| . . . . . | | | |
| 3rd (54) | 33 | 10 | 11 |
| . . . . . | | | |
| Overall | 161 | 60 | 36 |

Question Five:

Would you disclose this information if the consequences would be disbarment?

| Year of Study | Yes | No |
|---|---|---|
| 1st (115) | 19 | 86 |
| . . . . . | | |
| 2nd (91) | 20 | 68 |
| . . . . . | | |
| 3rd (54) | 13 | 36 |
| . . . . . | | |
| Overall | 52 | 200 |

Would you disclose this information if the consequences would be suspension?

| Year of Study | Yes | No |
|---|---|---|
| 1st (115) | 46 | 59 |
| . . . . . | | |
| 2nd (91) | 37 | 49 |
| . . . . . | | |
| 3rd (54) | 18 | 30 |
| . . . . . | | |
| Overall | 101 | 138 |

Would you disclose if the consequences would be monetary sanction?

| Year of Study | Yes | No |
|---|---|---|
| 1st (115) | 65 | 39 |
| . . . . . | | |
| 2nd (91) | 47 | 38 |
| . . . . . | | |
| 3rd (54) | 28 | 20 |
| . . . . . | | |
| Overall | 130 | 97 |

Would you disclose if the consequences would be public reprimand?

| Year of Study | Yes | No |
|---|---|---|
| 1st (115) | 49 | 57 |
| . . . . . | | |
| 2nd (91) | 48 | 37 |
| . . . . . | | |
| 3rd (54) | 29 | 20 |
| . . . . . | | |
| Overall | 126 | 114 |

Question Six: Do you think you should be able to disclose this information? Why or why not?

| Year of Study | Yes | No | Maybe |
|---|---|---|---|
| 1st (115) | 65 | 26 | 17 |
| . . . . . | | | |
| 2nd (91) | 60 | 19 | 13 |
| . . . . . | | | |
| 3rd (54) | 33 | 11 | 6 |
| . . . . . | | | |
| Overall | 158 | 56 | 36 |

Question Seven: If attorneys were allowed to disclose in cases such as these, do you think that would make people less willing to use attorneys services?

| Year of Study | Yes | No | Maybe |
|---|---|---|---|
| 1st (115) | 59 | 19 | 37 |
| . . . . . | | | |
| 2nd (91) | 45 | 26 | 17 |
| . . . . . | | | |
| 3rd (54) | 17 | 16 | 16 |
| . . . . . | | | |
| Overall | 121 | 61 | 70 |

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

May 6, 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 1.6

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 1.6 - Confidentiality of Information. COPRAC supports the adoption of proposed Rule 1.6 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

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

Proposed New Rule No./ Title: 1.6

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

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

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

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

**Rule 1.6(a)**

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

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

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

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

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

> Minority Proposal for Rule 1.6(a), (b)(1).
>
> (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068(e)(1) unless the client gives informed consent or the disclosure is permitted by paragraph (b). **The information protected from disclosure by section 6068(e)(1) is referred to as "confidential information" in this Rule.**
>
> (b) A lawyer may, but is not required to, reveal confidential information of a client to the extent that the lawyer reasonably believes the disclosure is necessary:
> (1) **when the information relates to the representation of a client,** to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c);

**Rule 1.6(b)(3)**

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

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

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

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

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

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

Yes, with the exception of sub-part 1.6(a) and (b)(3), as stated above.

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

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

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

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

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

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

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

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

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel – a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

~~conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.~~

~~The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?~~

~~These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.~~

~~While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.~~

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.

3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."

In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.

4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."

Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."

(Emphasis added.)) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"

The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.

Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.

Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."

Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.

Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.

The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.6. Confidentiality of Information.**

1. OCTC remains concerned that this proposed rule might create confusion and enforcement problems as Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. (We have already expressed in this letter our concern with the definition in rule 1.0 (e)(2).) If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that subparagraph (b)(1) does not address what happens if any further changes are adopted to Business & Professions Code section 6068(e).
3. OCTC still agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC continues to disagree with the removal from subparagraph (b)(4) of the term "other law" and agrees with the Model Rules that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. In fact, other proposed rules use similar terms. (See e.g. proposed rule 1.11 (a) [Except as law may otherwise expressly permit].) There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes.

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

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has concerns about subparagraph (e). It appears subparagraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed subparagraph (e) is too broad. It covers all of proposed subparagraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed subparagraph (b)'s language is broader than current rule 3-100(B). Proposed subparagraph (e), unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals and writs have been completed. This paragraph needs clarification and it should be a violation to disobey a court order or law.
7. The Comments are more appropriate for treatises, law review articles, and ethics opinions. We are particularly concerned that the first sentence of Comment 1 implies that OCTC can only discipline under this rule and not under Business & Professions Code section 6068(e). If that is what is meant, OCTC strongly disagrees. It should also be noted that by creating a rule that covers the subject of section 6068(e) the Commission may be eliminating the good faith defense that might exist to a violation of section 6068(e). As already discussed, the good faith defense generally applies to the Business & Professions Code and not to the Rules of Professional Conduct.
8. OCTC finds the first sentence of Comment 3 too narrow and may exclude information protected by section 6068(e). OCTC would strike that first sentence and only keep the second sentence.
9. OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should or can be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
10. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that such an interpretation is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does not explain what it means by cooperation. What if OCTC subpoenas the client or the client consents?
11. OCTC is concerned that Comments 21 and 23 appear to allow a lawyer to disobey a court order to disclose information. As previously discussed, OCTC disagrees with that this position.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses "means that have *no substantial purpose other than*" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

*6. Rule 5.7 – Rule application to "law-related services"*

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

*7. Rule 2.1 – Lawyer as advisor*

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" – two vital and important concepts that are nevertheless not the same.

## IV. Rules related to confidentiality

*1. Rule 1.6 – Basic confidentiality*

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.[4] The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

[4] The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

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**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| Rule | SCCBA Comment | Current Version |
|---|---|---|
| | | |
| Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Attorney | Approve as proposed with the exception of subsection (c), where "informed consent" should be "informed written consent."<br><br>Add to Comment [8] language that would clarify that county counsel is governed by Government Code 999 et. seq. which gives them greater authority in limiting the scope of their representation in certain situations such as settlements. Specifically, the following is suggested: "A government lawyer's authority and control over decisions concerning the representation may, by statute or regulation, be expanded beyond the limits imposed by paragraphs (a) and (c). See for example, Cal. Gov. Code Sections, 825; 995; 996. This language is the same as that used by the District of Columbia in modifying the ABA Model Rule version. | The current version does not require informed "written" consent; it retains the "informed consent" standard. |
| Rule 1.4: Communication | Approve the proposed rule as written. However, comment [7] to the rule should be either deleted or should be included in the rule itself. *Rationale*: Comment [7] states "Any oral offers of settlement made to the client in a civil matter must also be communicated if they are significant." This comment expands the rule itself. A comment should not create a duty that is not specifically and clearly set forth in the rule. | The current version of the rule still only requires in the main body of the rule that written offers of settlement be communicated to the client and still retains Comment [7] as noted. |
| Rule 1.6: Confidentiality of Information | The SCCBA opposes the revisions make by the RRC in completely deleting subsections (b)(2) and (3) regarding a crime or fraud involving a substantial financial/economic | The current version keeps the rule as it is now adopted in California and does not adopt the ABA Model Rule version. |

| | | |
|---|---|---|
| | injury to another. The SCCBA recognizes that adopting the ABA Model Rule including subsection (b)(2) and (3) would create another exception to the attorney-client confidentiality. However, the SCCBA believes that the crime/fraud exception is a vital one, constrained in its scope and permissive in its application. The exception will allow attorneys in certain limited circumstances to meet the profession's obligation to protect interests greater than that of an individual client, particularly where that client is one who wishes to engage in criminal activity or commit fraud which has the potential of inflicting a substantial injury. Other jurisdictions' experience with the Model Rule shows that the exception does not unduly undermine the attorney-client relationship. Indeed, California's own experience since 2004 with the exception relating to criminal conduct that may result in substantial bodily harm or death demonstrates that these limited exceptions do not erode the important policy of protecting the communication between a client and attorney. Having an attorney-client confidentiality rule that allows a client to use an attorney to commit a future crime or fraud really only serves to shield the attorney from making the difficult decision to divulge client confidences. Attorneys' role in society and in the administration of justice is greater than providing services to an individual client who wishes to engage in a future crime or fraud. In these rare situations, attorneys should be free to make a judgment to | |

| | | |
|---|---|---|
| | take action that could prevent substantial harm by a client. To continue to prevent an attorney from making that judgment actually serves to undermine the profession as a whole and impair attorneys' ability to maintain a reputation that ensures the respect for the judicial system. No valid argument has been posited to distinguish California lawyers and the practice of law in California from attorneys in the remainder of the country such that would justify California maintaining its parochial inviolate rule of attorney-client confidentiality. Not one example has been cited from any other jurisdiction to suggest that the exceptions included in the ABA Model Rule erodes the attorney-client relationship to the detriment of clients, the legal profession, society or the judicial system. Simply because California has always had an inviolate rule is not reason enough to continue it. | |
| ~~Rule 1.8.1: Business Transactions With A Client and Acquiring Interests Adverse to a Client~~ | ~~Comment [5] should include a reference to the new formal ethics opinion interim number 05-001, which analyzes the meaning of an "attorney's interest" in applying this rule; the formal ethics opinion is consistent with the proposed change to this rule regarding modification of attorney fee agreements.~~ | ~~The current version does not incorporate any reference to the formal ethics opinion. It appears from a cursory glance that they are not referencing any formal ethics opinions in their comments to any of the rules.~~ |
| ~~Rule 1.8.3: Gifts From Clients~~ | ~~*1.8.3 (a)(2):* The following should be added to the last sentence of this section to read: "…unless the lawyer…is related to the client or the client has had independent advice from another lawyer." This change, then eliminates the need for~~ | ~~The current version remains the same as the original and does not incorporate the recommendation of the SCCBA. The exception is only if the lawyer is~~ |

# Rule 1.7 – Public Comment – File List

X-2010-417 Richard MacNaughton [1.7]

X-2010-421bb COPRAC [1.7]

X-2010-425-10j SDCBA [1.7]

X-2010-430a Glenn Alex [1.7]

X-2010-450e Bradley Paulsen [1.7]

X-2010-501a Stuart Senator [1.7]

X-2010-513-10 OCTC [1.7]

X-2010-517a Zitrin-Multiple [1.7]

## Hollins, Audrey

**From:** Richard MacNaughton [abramsrl@gmail.com]
**Sent:** Monday, May 03, 2010 4:02 PM
**To:** Hollins, Audrey
**Subject:** Conflict of Interest for L.A. City attorney
**Attachments:** 4-8-10 FBI probes David Rubin L.A. Housing Dep.pdf; 4-29-10 OurLA re Gilmore w Zwartz comment.pdf

Dear Ms. Hollis,

My question is not intended to be a personal criticism of any person who is or was L.A. City Attorney, now or in the past.

Unlike L.A. County where there is the DA and County Counsel, there is only one City Attorney for the City of Los Angeles. There are members of the City Council and other city officials (see attached about David Rubin) who engage in questionable and illegal conduct. It strikes me that the City Attorney has an inherent conflict of interest. Allow me to use a current example.

Councilman LaBonge wanted to add 138 acres of wilderness to Griffith Park. He joined with Trust for Public Land (TPL) and together they gathered endorsements and donations from many well known and wealth persons. This was fine; in fact it was admirable.

Then in February 2010, the fund raising campaign, called Save Cahuenga Peak, turned into a huge fraud. The TPL web page falsely identified the Cahuenga Peak as home of the Hollywood Sign. They draped huge letters over the Hollywood Sign saying "SAVE the PEAK" and Councilman LaBonge held news conferences beneath the Hollywood Sign, and out of sight of most if not all of Cahuenga Peak, urging people around the world to donation $12.5 Million to save the peak from development. The TPL web sign posted hundreds, perhaps thousands of comments and Tweets calling for people to save the Hollywood Sign. It was in no danger of being torn down nor of any development around it. Nonetheless TPL and Councilman LaBonge continued to promote the false idea that the Hollywood Sign was in danger.

The City Attorney, however, has provide legal advise to LaBonge and the City and to defend them when sued. The City Attorney has a serious conflict of interest in investigating and/or prosecuting his own clients. Suppose Trutanich had told LaBonge to stop the fraud and LaBonge ignored him. How could Trutanich then investigate LaBonge? That leaves the public with no one to protect their interests.

It seems to me that the structure of the City Attorneys Office conflicts with the rules on professional conduct, but the rules do not address this conflict. The 4-8-10 article on the FBI's investigation of David Rubin may reflect the inherent conflict with the City Attorneys Office in that it took the FBI to investigate corrupt behavior right under the city Attorney's nose. The problems with CRA/LA, which is part of the City, are also significant, see. OUR LA on-line article on Gilmore and CRA/LA.

I do not expect you to deal with any specifics of any case. I mention these examples to highlight the type of conflict that seems to be inherent in the City Atty Office. If my observation is correct, it seems that the state bar should have some comment in the new rules.

Richard MacNaughton

# FBI probes L.A. Housing Department's actions in apartment project for homeless seniors

April 8, 2010 | 2:29 pm

The FBI is investigating an affordable-housing deal in which Los Angeles officials channeled $26 million to a developer who they knew was under criminal investigation for alleged misuse of public funds, city officials said Thursday.

The developer, David Rubin, was indicted last fall in New York for alleged bid-rigging and fraud, charges unconnected to the L.A. project.

The $26 million went toward construction of a 92-unit apartment building near downtown L.A. for disabled homeless seniors. It has sat empty since October while its prospective tenants live in shelters or substandard housing.

The city's Housing Authority, concerned about irregularities in the deal, has refused to release money that would pay the tenants' rent. Without that rental income, the developer could be forced into default. In turn, the city could be on the hook for millions of state and federal dollars that it helped arrange for the developer, City Controller Wendy Greuel said in an interview Thursday.

The controversial deal came to light in an audit released by Greuel's office. FBI agents have requested notes and documents gathered during the audit, the controller's office said.

The agency involved in the deal is the Housing Department, which oversees compliance with rent control laws and aids construction of privately run, affordable apartments. The Housing Authority, a separate agency, manages federal Section 8 rental vouchers and city-owned housing projects.

The audit found that in 2008, Housing Department officials "blatantly disregarded information that ... one of the partners was under federal investigation."

Officials "then chose not to share this information with the city attorney or other stakeholders," Greuel said in a letter to Mayor Antonio Villaraigosa and other city leaders.

The audit does not accuse any city officials of criminal behavior, or allege that the $26 million was misspent.

Doug Guthrie, the newly appointed head of the Housing Department, said he was working to find a way to "get these people housed."

Guthrie succeeded Mercedes Marquez, who headed the agency when the deal was made.

"We are left today with a much-needed project [that] sits empty," Greuel said, calling it "a fiasco."

Officials in the housing department, she added, "appeared to act in the developer's best interest, as opposed to the best interest of the city and the taxpayers."

Rubin could not be reached for comment. His attorney, Donald Etra, was not immediately available.

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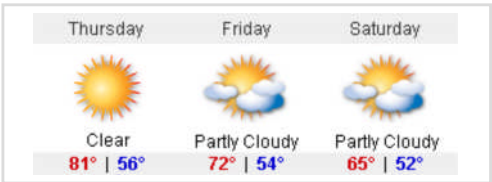


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Marc Gelman, chief executive of Enhanced Affordable, said the company had done nothing wrong, adding that it has severed ties with Rubin. Gelman blamed squabbling city agencies for keeping homeless seniors from moving in to the new building, and said he might sue the city for not releasing the rent money.

"I have an empty building that every day costs money to operate, pay the debt ... a minimum of a few thousand dollars a day," Gelman said. "And these poor homeless people, we have them coming to our office, our building, on a daily basis."

Added Rudolf Montiel, the head of the Housing Authority: "It is reprehensible that public officials would aid and abet in the misuse of federal dollars. ... Unfortunately, the tenants are the ones who are bearing the brunt of the misdeeds of this developer."

— Jessica Garrison at Los Angeles City Hall

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# Developer Tom Gilmore Owes City $5.3 Million on Old Loan and N $4 Million More

Written by Jerry Sullivan, Garment & Citizen
Thursday, 29 April 2010 16:42

Developer Tom Gilmore is seeking another loan from the city under a plan to refinance an estimated $35 million in debt with the Federal Housing Administration (FHA) -- a deal that appears to be necessary in order to make ends meet for his firm's residential and commercial properties in the Old Bank District of Downtown.

Gilmore serves as chief executive officer as well as a partner in Gilmore Associates, a pioneer of Downtown's recent trend of residential development. Gilmore Associates owns several apartment buildings with ground-floor commercial space in the Old Bank District, a neighborhood centered at 4th and Main streets. The firm also counts various nearby properties in its portfolio.

Gilmore Associates is counting on a short-term loan of $4 million from the city's Community Development Department to complete the deal to refinance its $35 million debt load. The short-term loa meet FHA requirements that Gilmore Associates pay off "unrecorded debt incurred to make significant capital impro properties, according to city officials.

Unrecorded debt is a term used to describe borrowings made without the sort of documentation standards typically mortgages or other deals secured by property or other collateral. City officials said that a payoff on the unrecorded Bank District properties would clear up Gilmore Associates' financial picture in advance of the refinancing proposal the FHA, an entity of the federal government.

City officials have not disclosed the identities of any individuals or entities in line for a payoff of unrecorded debt by under the plan.

Gilmore did not return calls seeking comment on the plan.

The costs of servicing the unrecorded debt along with payments on various other borrowings have apparently left G a financial jam.

The refinancing plan, meanwhile, is could rely in part on how FHA officials perceive the viability of renovations of ba Gilmore Associates' properties to commercial uses such as shops, restaurants and art galleries. Those planned ren believed to be the "significant capital improvements" for which the developer took on the unrecorded debt.

Any hopes tied to basement commercial space could run into difficulty based on the current state of marketplace in in general and Gilmore Associates' properties in particular. Ground-floor space is generally considered to be a prem retailers and many other commercial tenants. Basement space is typically viewed as less valuable to tenants due to from street level and other factors. The market for commercial space is feeling the effects of the economic downturn of Downtown, however, and Gilmore Associates' properties appear to have some vacant commercial space on the

Those concerns don't necessarily spell doom for the refinancing plan, which would call for Gilmore Associations to p unrecorded debt, repay the short-term loan from the Community Development Department, and settle other obligati borrowings from the city. The plan would apparently leave the FHA as the main lender to Gilmore Associates.

Such deals typically lower costs for borrowers by offering more attractive terms on interest rates and the length of th example, Gilmore Associates is currently being assessed a rate of approximately 6.5% on its loan from the city, acc and the FHA would likely charge several percentage points less.

The interest rates of Gilmore Associates' other debts likely vary, but the difference of two percentage points on a $3 consolidated under one lender could make a difference of $800,000 a year or more, depending on the length of the factors.

Gilmore Associates' financial pinch is a matter of public record because of the $5.1 million loan it obtained from the ago, which included terms that offer an insight on the developer's operations. The terms call for the developer to ma payments if and when it can afford to do so, according to city officials. The terms also require the developer to demo sufficient earnings or cash flow to make a payment for any given quarter as a prerequisite for skipping a periodic pa

Gilmore Associates has demonstrated a lack of ability to make quarterly payments on a number of occasions, inclu according to city officials, and the balance due on the loan has grown to approximately $5.3 million.

The terms of the city loan also call for interest to continue to accrue until 2015, when payment of the entire balance

The terms of the loan also put the city last in line behind various other creditors for repayment if Gilmore Associates bankruptcy or foreclosure, city officials said. That means the refinancing plan, if approved, would ensure the city get shifting the risk to the FHA and the federal government.

(READ GARMENT & CITIZEN)

**Comments (1)**

Scott Zwartz - Risk is inherent in capitalism | 76.217.22.xxx |

Risk is inherent is capitalism. When a business compounds risk by taking out unrecorded loans which the mark the risk is unacceptable and the developer needs to revise his plans. Many people could have told Gilmore in 198 that the project had unacceptable risks -- but for CRA's history of bankrolling folly. CRA money comes from the p received $217.8 M in incremental property tax revenue. But for the CRA, these tax dollars would have gone treasury. It is still tax income and private money that CRA throws around so carelessly. If Gilmore's $5.1 M balance of $5.3 M, Gilmore is clearly a bad risk. It is time for the City (CRA/LA) to stop bailing out improvident d the FBI needs to set up shop in City Hall or at CRA headquarters. Then, we might have fewer David Rubins.

Reply

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**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 14, 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 1.7

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.7, and has the following comments.

We fully support the rule as a significant improvement of the prior draft. We believe adopting a rule that is fundamentally consistent with the ABA Model will benefit firms and practitioners who are dealing with conflicts of interest across jurisdictions by providing uniformity. We believe that the proposed rule, including the concept of "material limitation," also represents an improvement over the current Rule 3-310, which proves challenging for many practitioners.

Although we understand the concerns of the dissent, we do not agree that the proposed rule will reduce client protection. We believe that the key terminology in the rule is adequately explained (indeed, the comments are extensive) to enable the practitioner to understand and apply the rule.

Therefore, although the rule does represent a significant change from the prior draft, we support the rule as drafted. Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 1.7 – Conflicts of Interest**
**[Existing CRPC Rule 3-310]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.7 but modify to delete entirely Comment 34 regarding class representation.

Rationale For Comment 1: Proposed Rule Comment 34 is too complicated a subject to be addressed in any manner other than a separate rule on class representation, which is why the ABA did not include class representation in its Model Rule 1.7.

Comment 2: Approve Proposed Rule 1.7 but modify to delete entirely the 4th sentence from the end of Proposed Rule Comment 33 regarding advance consent.

Rationale For Comment 2: Proposed Rule Comment 33 does not accurately state the status of current law.

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel—a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.

The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities—for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to <u>inform</u> the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

2. <u>Proposed Rule 1.6</u> ~~(Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.~~

Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.

3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."

In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.

4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."

Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."

(Emphasis added.)) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"

The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.

Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.

Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."

Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.

Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.

The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

June 4, 2010

Office of Professional Competence, Planning, & Development
The State Bar of California
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San Francisco, CA 94105

Bradley T. Paulsen
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ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar**
**State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice**. Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone,** costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

**lawsuit. If they are not aware of the claim, how did their name end up in the filing?** Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***"Some of our clients' homeowners are being added to suits without even being aware of it,"*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. ***"I can't tell you the number of times I've seen a defect claim that says 'defective stucco', and the house doesn't even have stucco".***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner's Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

**(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**

**(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

**and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.**

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned. There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**
Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*
Litigation/Claims cause insurance to go up.
Litigation/Claims force builders to raise their prices.
Litigation/Claims burden the judicial system and expend judicial resources.
Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.
*As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.*

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.
*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

**Rule 1.1 Competence**

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

*The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved,* ***so it goes on.***

**Rule 1.4 Communication**

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

*As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.*

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.*

**Rule 1.5 Fees For Legal Services**

Rule 1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

*In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.*

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

**Rule 1.7 Conflict of Interest: Current Clients**
Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
*The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.*

Rule 1.7 (b) (4) Each affected client gives informed written consent.
*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

*the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.*

**Rule 1.8.6 Payments Not From Client**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

**Comment (noted in the proposed new or amended rules)**

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of $10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately $500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

Bradley T. Paulsen
Concerned Citizen

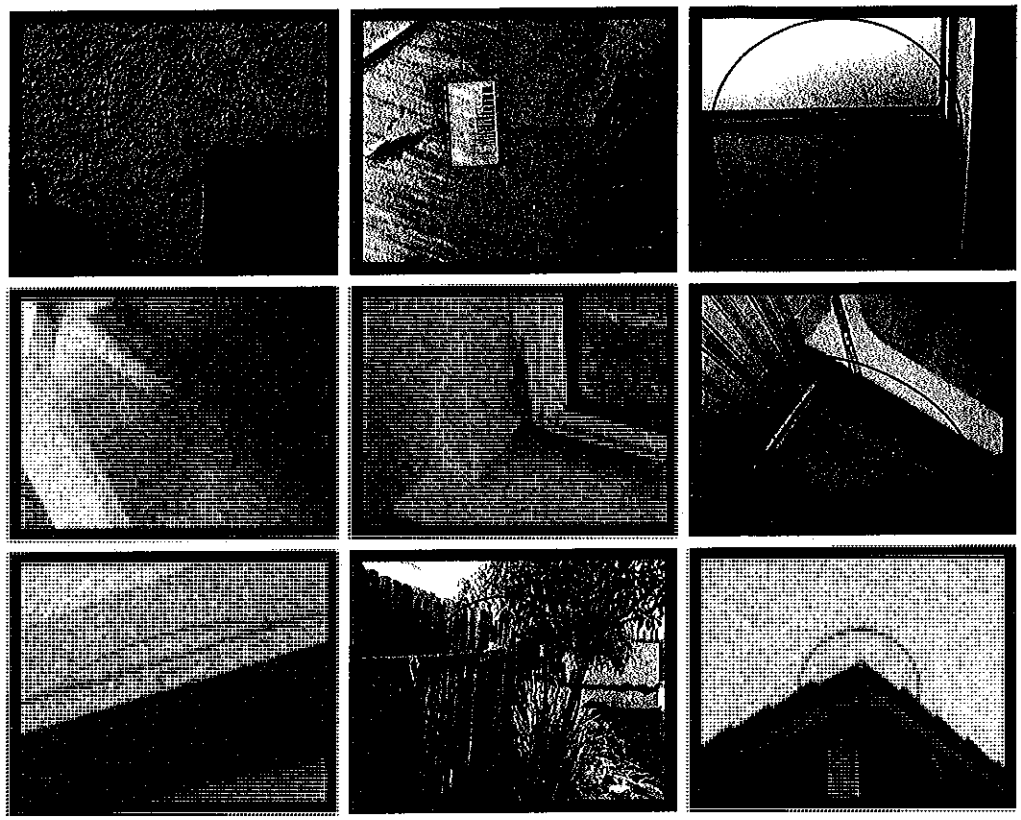
/encl

# MAK

www.maklawyers.com

MILSTEIN, ADELMAN & KREGER, LLP

# NEWSLETTER



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

## NUMEROUS [redacted] HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners. Original ownership is not required to participate. Each home will be inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:


**Anneke Stewart, Esq. extension 135 or**

**Lisa Appelbaum extension 146 or**

**2800 Donald Douglas Loop North Santa Monica, California 90405**

**Toll Free: (888) 835-8055**

**Fax: (310) 396-9635**

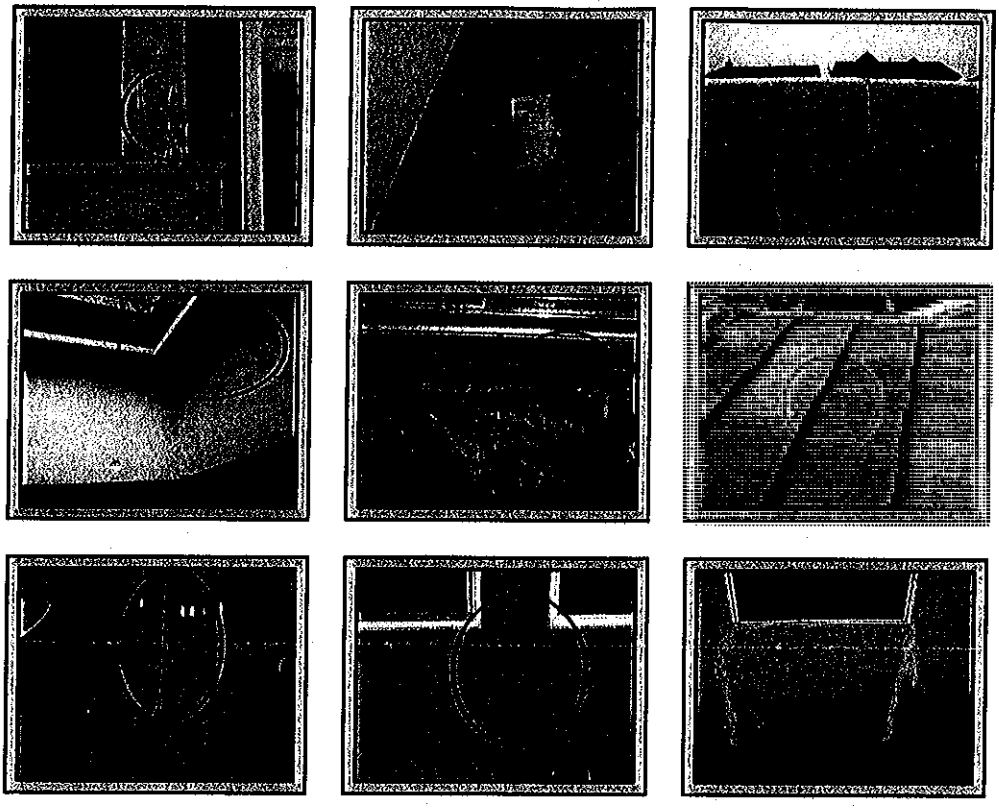

**Numerous [redacted] homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.**

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

# NEWSLETTER

MILSTEIN, ADELMAN & KREGER, LLP

January 2009



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

## HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

[redacted]

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either fax or in the postage-paid envelope we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:


David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop North

Santa Monica, California 90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635


[redacted]

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

*MILSTEIN, ADELMAN & KREGER, LLP*

[redacted]

## HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____ NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

[redacted]

[redacted]

Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sinkinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICIES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

[redacted]

June 27, 2008

**Re:** [redacted] **Construction Defects***
**Our File Reference # P 119-LMRO**

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within t[redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / RL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW
*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners. Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME [redacted] | CASE NUMBER |
|---|---|

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By:_____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

**FOR A&K USE ONLY**

GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0405

Anderson & Kriger
ATTORNEYS AT LAW

# Homeowner's Contingent Attorney Fee Agreement



*A Professional Law Corporation*

THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is: [redacted]

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

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***(Continued on reverse)***

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| [redacted] | |

Anderson & Kriger

*A Professional Law Corporation*
**Construction Defect & Community Association Law**
2155 Chicago Avenue, Suite 300
Riverside, CA 92507
**(951) 787-7146**
Fax: (951) 787-7168

# *FINAL NOTICE !*

**The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [redacted] Housing Development on behalf of many of your neighbors.** We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks** and/or **loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

**Anderson & Kriger** has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger
Rhonda Harrington
Rhonda Harrington

*This advertising communication is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

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REAL ESTATE • May. 26, 2010

# Searching For Cracks In Construction Law

**Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects**

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kreger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

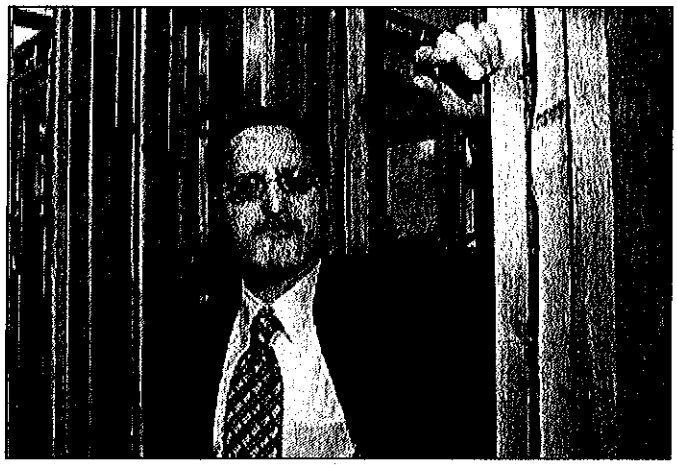
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow,* E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

jason_armstrong@dailyjournal.com



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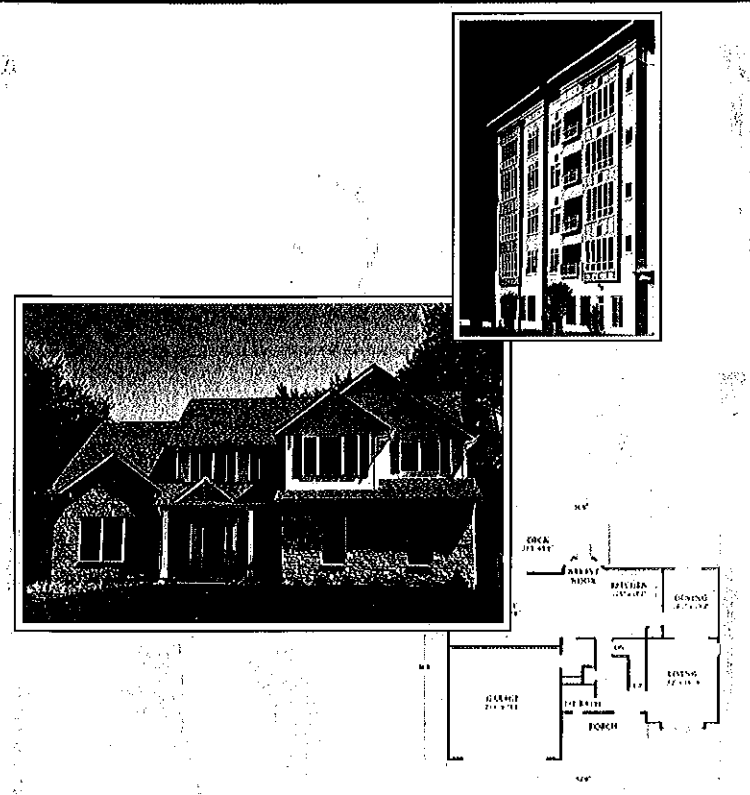
# Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association




BIA Orange County Chapter
17744 Sky Park Circle, Suite 170


Construction Quality and Sustainable Building Committee

## For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

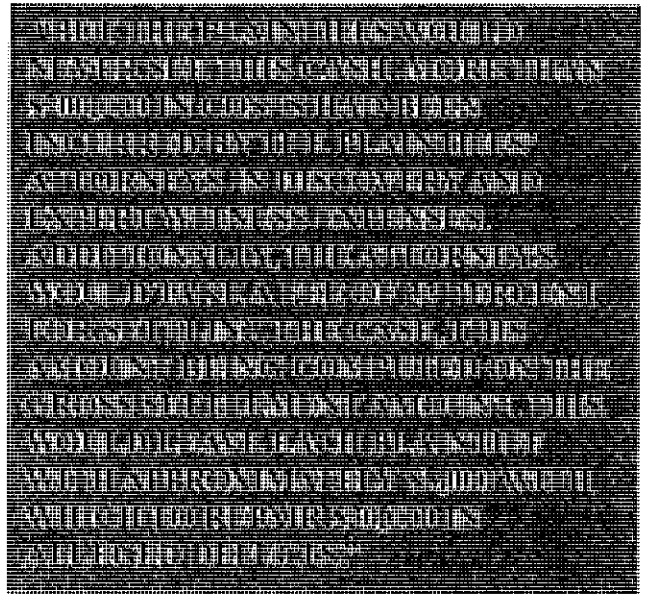
This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

## Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate $30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-fifth of the amount claimed. After attorneys' fees were deducted, the homeowners were left with only $5,000 to repair $30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.[1]



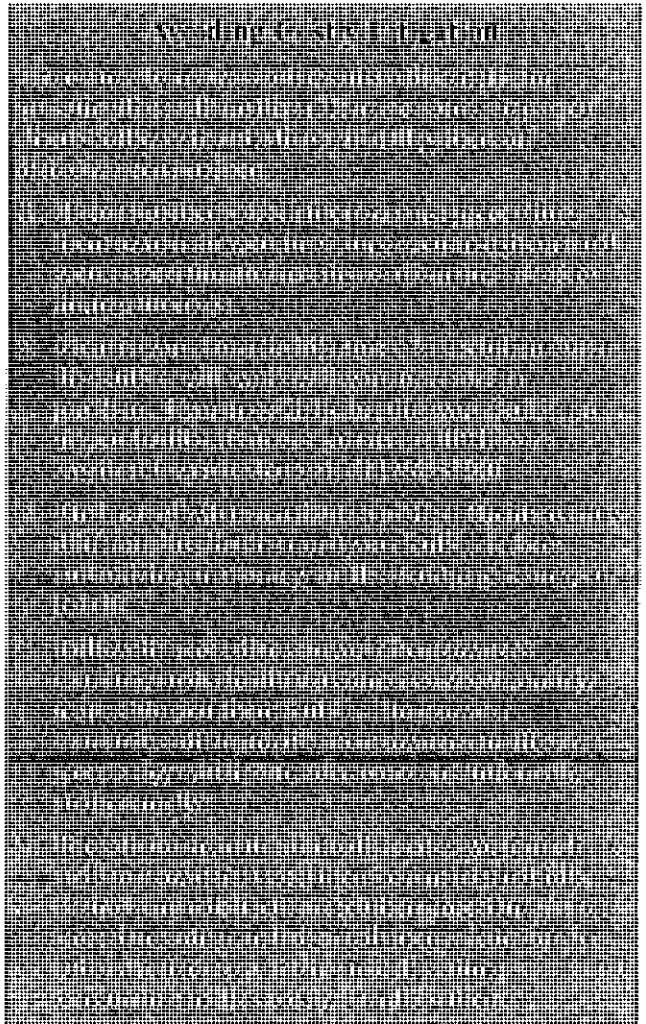
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.[2]

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

## Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.[3]

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



## Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

## When The Construction Defect Lawyers Call

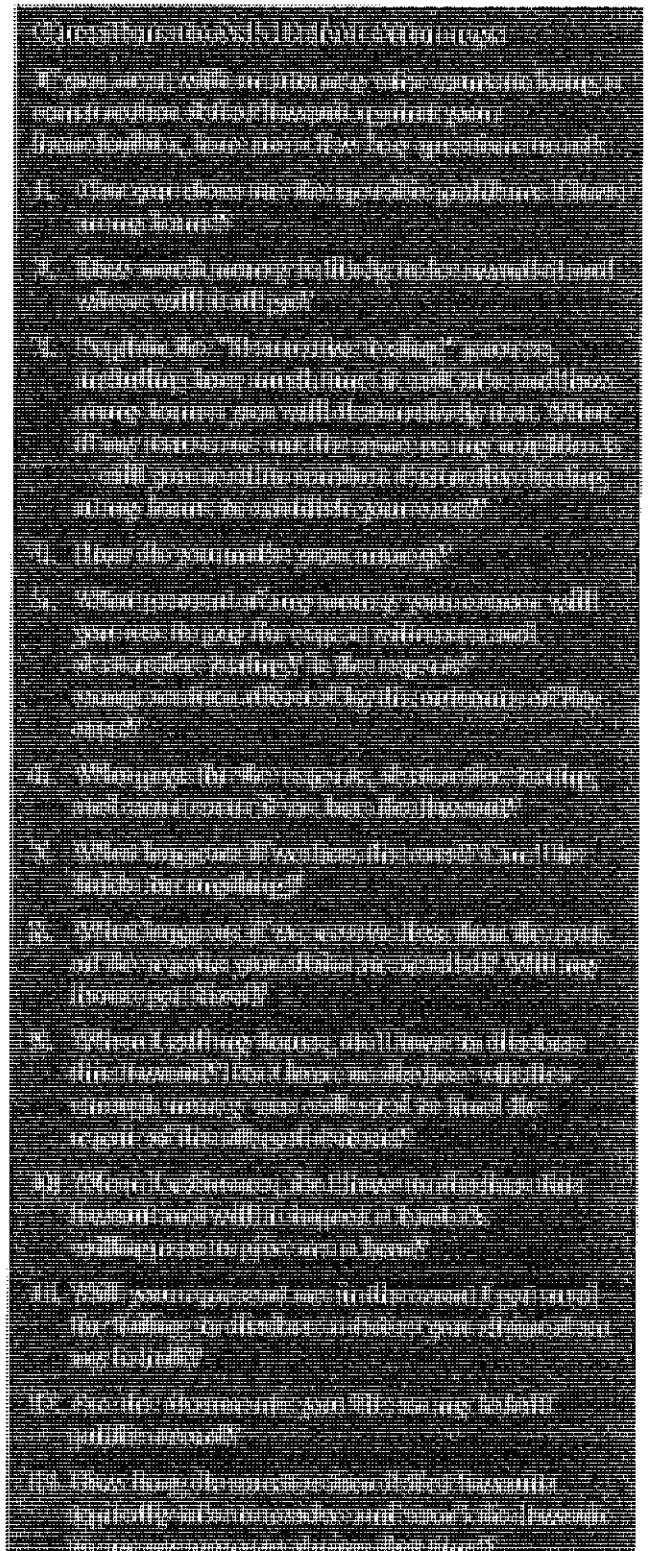
You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

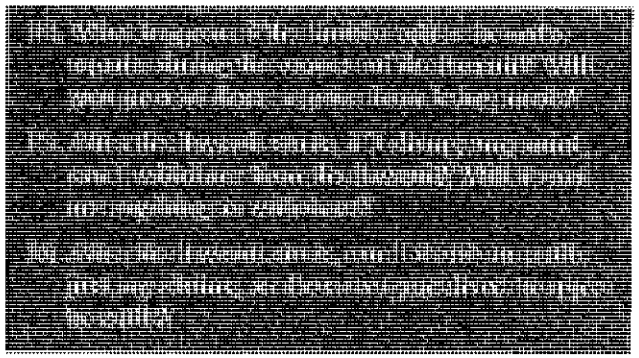
Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?





## Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.[4]

How would you feel about paying a contractor nearly $90 just to have your showerhead tightened? In one case, the trial attorneys sought $28,000 for showerhead repairs, or $90 per showerhead. The same case sought $12,000 for squeaky floors, $28,000 for bathtub repairs and $215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

## You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.[5]

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

## Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

## California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

## The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

## About Our Sponsors

**Citizens Against Lawsuit Abuse** (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

**The Trade Contractor Council of Southern California** (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

**The Associated General Contractors of California** (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

**The Building Industry Association of Southern California** (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

**The Construction Quality Committee** (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

## We'd Like To Hear From You!

Comments: _____

_____

_____

_____

Name: _____

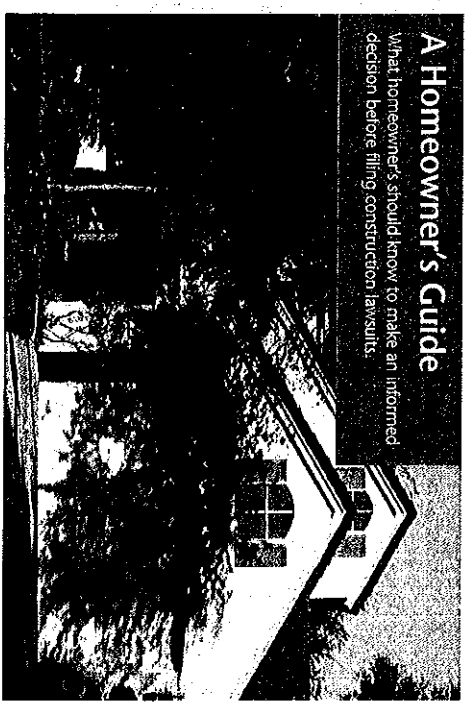
Address: _____

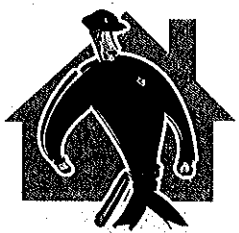
City/State/Zip: _____

Phone: _____ E-mail: _____

Your Builder/HOA/Property Mgmt. Co: _____

# Think Before You Litigate!





Neighbors Protecting

HOME VALUES

www.NeighborsProtectingHomeValues.com

# Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

# And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California, causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate -

***Neighbors Protecting Home Values***

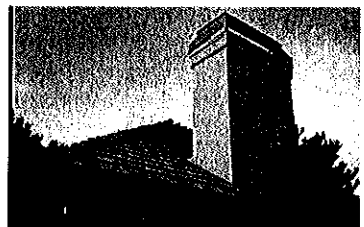
# Be an Informed Homeowner

Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

1. Contact your homebuilder first to solve your problem.
2. Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
3. Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



*Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.*

# *What Questions Should I Ask?*

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?

# Frequently Asked Questions:

### *Will a lawsuit harm my home's value or my neighborhood?*

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

*(The Business Journal / August 30, 1999)*

*Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.*

### When I sell my house, will these litigated "defects" require disclosure to potential buyers?

Under California law you are required to fill out a disclosure statement regarding your home, which includes everything regarding [illegible] and lawsuits relating to your home. The seller of the home must provide any potential buyer with a complete disclosure statement – listing all defects in the property known to the seller. The statement must be presented to the potential buyer prior to entering into any contract. Buyers usually waive the mandated cooling time for the property and discuss the potential selling price on the property. Here, the buyer may have discovered the defect first.

### Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage/home equity loan?

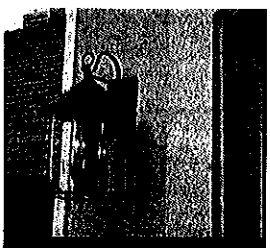
Title in California will disclose how your lender will be just as [illegible] as many lenders previously have not financed by anyone in your town due to the loss in home value as a result of the suit. [illegible] to an unnecessary lawsuit may also prevent homeowners from being able to sell or refinance a home, at least until and pending all of the applicable statutes have been met.

### How long does it take to settle a lawsuit?

[redacted]

### How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

[redacted]



*Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.*

### *Will the lawsuit affect my ability to obtain homeowners insurance?*

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

### *Shouldn't the City building codes and inspectors prevent construction defects from occurring?*

City's are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments and available for the homeowner's review. In order to protect future homebuyers city's often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.

*Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.*

### *What if I have a legitimate concern about my home?*

There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

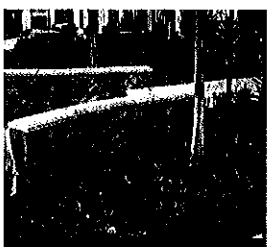
### *Will proper home maintenance prevent defects?*

Under California law homeowners are expected to maintain their homes – performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete – doing it properly the first time will save homeowners time and money in the long run.

*Withdrawal From A Lawsuit*

## *How do you withdraw from a lawsuit?*

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



*Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.*

# *THINK BEFORE YOU LITIGATE!*

Give your homebuilder a call – you will be pleasantly surprised!

For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at ***www.neighborsprotectinghomevalues.com***

*Think Before you Litigate!*

## Frequently Called Phone Numbers

My Homebuilder _____

Homebuilder's Customer Service _____

Licensed Maintenance Person _____

Gardener _____

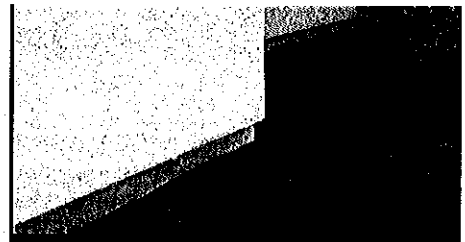
Pool Maintenance _____

City Services _____

Other _____

Other _____

Other _____



*Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.*

Neighbors Protecting
HOME VALUES

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JOHN W. SPIEGEL
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June 14, 2010

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Re: PUBLIC COMMENT ON AMENDED RULES OF PROFESSIONAL CONDUCT - Ethical Screens for Lateral Hires and "Thrust Upon" Conflicts

Dear Ms. Hollins:

These comments are submitted on behalf of Alston + Bird LLP, Duane Morris LLP, Morgan, Lewis & Bockius LLP, and Munger, Tolles & Olson LLP.

We write to urge the Board of Governors ("Board") to adopt two items not currently included in the proposed amendments to the Rules of Professional Conduct: (1) ABA Model Rule 1.10(a)(2), pertaining to the use of ethical screens for non-government lateral hires and (2) Comment 5 to ABA Model Rule 1.7, pertaining to "thrust upon" conflicts.

## 1. Ethical Screens for Lateral Hires

We respectfully submit that the question whether it is *ethically* proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited.

Proposed Rules of Prof. Conduct, Rule. 1.10 cmt. 10 (May 17, 2010). The Board is charged with proposing changes to the standards of ethical conduct governing members of the Bar, standards that "are not intended to supersede existing law relating to members in non-disciplinary contexts." Rules Prof. Conduct, rule 1-100, Discussion. Once approved by the California Supreme Court, the Rules will be binding on all Bar members and enforceable through attorney discipline, irrespective of how the case law on ethical screens develops. Bus & Prof. Code §§ 6076, 6077; *see Hawk v. Superior Court*, 42 Cal. App. 3d 108, 126 n. 17 (1974) (disciplinary rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action . . . ."). The Board should not bypass this opportunity to clarify, as an ethical matter, the circumstances in which screening a lateral hire is effective to avoid a conflict of interest.

The trend in this state and nationwide is to recognize (1) the changed circumstances in the legal industry that have necessitated the widespread use of ethical screens; (2) their benefits to clients, attorneys and law firms alike and (3) the proven effectiveness of ethical screens. Only last month, Justice Croskey, writing for the Court of Appeal, conducted the most thorough analysis of this question under California law ever and concluded that, in some circumstances, the showing that a "tainted" attorney has been effectively screened can rebut a presumption of vicarious disqualification. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 2010 WL 1346403, at * 12 (May 6, 2010).

First, as *Kirk* observed, trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. *Id.* at *13; *see, e.g., In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 586 (1991) ("In the era of large, multi-office law firms and increased attention to the business aspects of the practice of law, we must consider the ability of attorneys and their employees to change employment for personal reasons or from necessity."). The one-size-fits-all approach to protecting client confidentiality may have seemed sensible when we were an industry of small firms. In an era of large firms, however, the assumption that *all* confidential client information will *always* be disseminated instantaneously to *all* members of a firm is no longer valid. *Kirk, supra*, at *13 ("In a situation where the 'everyday reality' is no longer that all attorneys in the same law firm actually 'work together,' there would seem to be no place for a rule of law based on the premise that they do.").

Simultaneously, because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today. *See Howard v. Babcock*, 6 Cal. 4th 409, 420 (1993) (noting that attorneys are more transient today). Dismantling barriers to mobility is good not just for lawyers seeking to make a lateral move, but also for the firms that hire them. Clients, too, benefit when law firms increase efficiency and specialization through lateral hires. But any such benefits are necessarily impeded by continued adherence to the inflexible and out-dated automatic vicarious disqualification rule. In the meantime, the chief beneficiaries of the current rule are occasional litigants who act strategically

by seeking automatic disqualification of opposing counsel. This outdated automatic disqualification rule should be abandoned.

Finally, ethical screens have been shown to be effective to protect confidential client information. After conducting an exhaustive survey of the twenty-three states that permit some form of lateral screening, a committee of the ABA recently concluded that "properly established screens are effective to protect confidentiality" and that "[n]o reported disciplinary cases or lawsuits have demonstrated any significant problem with the efficacy of screens." ABA Standing Committee on Ethics and Professional Responsibility, Recommendation 109 at 11, 15 (February 16, 2009) (*available at* http://www.abanet.org/cpr/ethics/screening.html) ("ABA Report").

California's own experience with the use of ethical screens in the context of government and former government attorneys, non-attorneys and experts is consistent with these findings. *See In re Charlisse C.*, 45 Cal. 4th 145, 162 (2008); *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 902-03 (1981); *In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 596 (1991); *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 1084-85 (1994). There is no indication that the use of ethical screens in any of the foregoing contexts has proved problematic or difficult to administer. And, as *Kirk* put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." *Kirk*, *supra*, at *16. Notably, the implementation of a screen is not conclusive on the question whether confidential client information has been improperly shared; a court still must weigh the evidence and reach that determination – something that courts are well-equipped to do. *See* ABA Report at 11 (noting that courts in screening jurisdictions "have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.").

In short, "history reveals no problems with ethical screens." ABA Report at 11. This should come as no surprise because other ethical rules already preclude attorneys from misappropriating an adversary's confidential information. *See* Rules Prof. Conduct, rule 3-100 (member generally shall not reveal confidential information of a client without informed consent); rule 1-120 (member shall not knowingly assist in or induce any violation of an ethics rule); *see also* Proposed Rules Prof. Conduct, rule 4.4 (lawyer must promptly notify the sender of inadvertently transmitted confidential or privileged writings); Bus. & Prof. Code Section § 6068(e)(1) (It is the duty of an attorney "...to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."). Lawyers understand that any potential "value" of improperly using confidential information is far outweighed not just by their own ethical standards but by the potential for case-ending and career-ending sanctions to punish such misuse. At the same time, an automatic vicarious disqualification regime imposes significant burdens on the modern legal profession without clear benefits to clients, lawyers or the public. Now more than ever, members need clarity as to the ethical propriety of the use of screens. We urge the Board to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).

**2. "Thrust Upon" or "Unforeseeable" Conflicts**

We also urge the Board to adopt Comment 5 to the ABA Model Rule 1.7, regarding "thrust upon" or "unforeseeable" conflicts. Comment 5 provides guidance for attorneys who are faced with conflicts that arise during the course of a representation and that were unforeseeable at the outset.

Thrust upon conflicts often are discussed in the case of changing corporate ownership, e.g., the firm's client's adversary is acquired by another client of the firm during litigation, but they also arise in far more pedestrian, everyday occurrences. One of the instances in which we worry the most about unforeseeable conflicts is in the context of third-party discovery. For example, assume the firm represents Client A in litigation. The firm obviously has a duty to represent Client A zealously. Suppose that, during the representation of Client A, the firm discovers that Corporation B may have documents in its possession that absolve Client A of liability, but the firm also represents Corporation B in other, unrelated matters. What should the firm do? If Corporation B refuses to waive the conflict, must the firm withdraw from the representation of Client A? May it? May the firm withdraw from the representation of Corporation B? If it does so, can Corporation B disqualify the firm in its representation of Client A? (Note that it is not clear that "conflict counsel" is a viable option in this scenario: If a lawyer advises a client to obtain other, non-conflicted counsel to obtain third party discovery from its current client, such advice may, standing alone, present duty-of-loyalty issues.)

The adoption of Comment 5 would provide some guidance as to how the firm should handle this and other thrust-upon, unforeseeable conflicts by providing that the attorney *may* have the option of withdrawing from one of the representations to avoid the conflict of interest. Because Comment 5 provides that the lawyer must maintain and protect the confidences of the client from whose representation the lawyer has withdrawn, there are no confidentiality issues. The comment essentially adopts the "thrust upon defense" established by case law from other jurisdictions. Under that case law, when a conflict arises through no fault of the attorney, the attorney may withdraw from one representation so as to convert the current client into a former client and avoid compromising the duty of loyalty. *See Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio, 1999). Most courts that have considered this issue have found the "thrust upon defense" to be a fair balancing of the need to maintain inviolate the duties of confidentiality and loyalty on the one hand and, on the other, the reality that often, even with the best procedures in place, unanticipated conflicts may arise throughout the course of a representation, and that reality should not undermine lawyers' ability to represent their clients throughout a matter. *See, e.g., Installation Software Techs., Inc. v. Wise Solutions, Inc.*, 2004 U. S. Dist. LEXIS 3388, 2004 WL 524829 (N.D. Ill. Mar. 5, 2004) (denying a motion to disqualify after weighing the factors set forth in *Gould, supra*); *Carlyle Towers Condominium Assoc., Inc. v. Crossland Savings, FSB*, 944 F. Supp. 341 (D.N.J. 1996) (same); *Hawthorne Partners v. AT&T Techs., Inc.*, 1993 U.S. Dist. LEXIS 2575, 1993 WL 63003 (N.D. Ill. Mar. 2, 1993) (denying a motion to disqualify in a case involving a thrust upon conflict on the condition that the firm withdraw from one of the representations).

Under Comment 5's guidance, lawyers and law firms would be able to balance situations such as the one described above. For example, they may be able to explain to Corporation B that, unless it accedes to the discovery requests, the law firm may have to withdraw, or it could explain to Client A that pursuing the discovery might result in the client having to obtain new counsel. The "correct" course of action in these circumstances likely would depend upon many factors, but the comment would provide the lawyers (and thus the clients) with options and guidance. While there is an understandable reluctance to allow a lawyer to "drop" one client in favor of another, that concern is outweighed here by the fact that a lawyer faced with such a conflict simply has no good options absent an ability to withdraw from one representation, if necessary. Moreover, if the Rules provide the withdrawal option, that may itself influence clients not to act strategically in determining whether to grant the requested consent.

While we understand the Board's tentative desire to wait until more courts are confronted with this issue, we believe this is an area where the Board should provide leadership. As the law currently stands, lawyers have very little guidance as to an appropriate course of action in the above-described circumstance, and every instance in which such a conflict arises is dealt with on an *ad hoc* basis. But law firms and clients benefit from settled, clear rules, and, therefore, this is an area in which the Board should comment. The one court located in California that has addressed the issue has suggested that the thrust upon defense is "probably not good law in California." *See GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*, 8 F. Supp. 2d 1182, 1187-8 (N.D.Cal. 1998), *vacated by, mandamus den'd*, 192 F.3d 1304 (9th Cir. 1999). This ruling is not binding on California courts. The ruling nonetheless creates difficulty for California lawyers trying to determine the best course of action when facing a thrust upon conflict. Furthermore, the currently uncertainty affects clients. Without guidance from the Board, it is quite possible that a client could spend hundreds of thousands of dollars (or more, in lengthy, complex litigation) on legal representation only to have its counsel compromised because the attorneys are unsure of a safe course of action.

The Bar of the City of New York (where many firms that work on engagements similar to ours are located) has provided a detailed analysis of thrust-upon conflicts and has established a balancing test for its attorneys to use when faced with these unforeseeable conflicts. *See* Association of the Bar of the City of New York, Opinion 200-5 (June 2005) (advising that a lawyer faced with a thrust-upon conflict should apply a balancing test to decide whether withdrawal is appropriate, guided by the "overriding factor" of the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client"); *see also* District of Columbia, Opinion 292 (June 15, 1999).

In light of the tremendous uncertainty in this area, we submit that the adoption of Comment 5 is appropriate and necessary.

Sincerely,

Stuart N. Senator

cc: George Niespolo, Duane Morris LLP
Jonathan Gordon, Alston + Bird LLP
Brett Schuman, Morgan, Lewis & Bockius LLP

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June 15, 2010

Audrey Hollins, Director
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State Bar of California
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re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.7. [Conflict of Interest: Current Clients].**

1. OCTC believes this rule is an improvement from the original proposal, but still has significant concerns about the rule and especially its 38 comments. There are too many comments and many are too long and incorporate other rules and comments, making this rule overly complicated and confusing. This rule is simple: an attorney shall not without informed written consent represent a client when to do so will involve a conflict of interest with another current client or the lawyer's personal interests (or other fiduciary duties). The proposal and its comments, however, make complex this simple proposition.

2. The proposed rule's use of the term 'directly adverse" is vague, ambiguous, and potentially too limiting and confusing. We believe that the term "directly adverse" will be subject to a great deal of interpretation and, therefore, litigation. The use of the modifier "directly" may pose problems for the lawyer trying to comply with the rule. Lawyers may not understand the distinction between an "adverse" as opposed to "directly adverse" interest and may, therefore, fail to seek the appropriate client consent. The use of the term "directly" may also pose problems for OCTC, the State Bar Court, and the Supreme Court as they attempt to evaluate possible violations on the proposed rule. Using the term "adverse" without the modifier "directly" may be clearer, less ambiguous and more appropriate.

3. OCTC recognizes that the Commission has tried to explain the term "directly adverse" in Comments 6 and 7. (It has reserved Comment 5.) However, those Comments may not provide adequate guidance in distinguishing the difference, if any, between "adverse" and "directly adverse" interests and may, instead, add to the problems with enforcement of the rule. If the word "directly" is stricken from proposed rule 1.7, then Comments 6 and 7 should also be deleted.

4. Comment 6 defines an attorney's cross-examination of his or her own client, even if the client is not a party to the particular action, as directly adverse. OCTC understands that the cross-examination of one's own client is an example of an adverse situation, but, contrary to this Comment, it does not seem directly adverse where the cross-examination does not affect the client in the representation for which the client hired the attorney. If a client is not a party to the action, then one must examine the client's reasonable expectations, as well as the impact of such cross-examination on the client's interests and on the attorney's duty of loyalty and confidentiality to the client. Such analysis is necessary regardless of whether the modifier "directly" is included in the proposed rule.

5. OCTC recommends striking the second sentence of Comment 6 because, if a client is adversely affected by an attorney's work on matter, even if the client is not a party to the matter, it may still raise the issue of whether the attorney adhered to his or her duty of undivided loyalty and, if not, create a direct conflict of interest. OCTC recommends striking the modifier directly before adverse in Comment 7.

6. Comment 8 is too long and confusing. OCTC recommends striking sentences 2-4. Sentence 5 is placing in a Comment an expanded version of the current version of 3-310 (C). If the Commission wants to state that this rule is not intended to change the current rule, it should just state that. If it believes the language in the Comment is preferable to the language in the proposed rule, it should adopt the language in the Comment as the rule. It, however, should not

attempt to do so by a Comment.

7. Comment 9 appears unnecessary in light of proposed rule 1.9 and the language in proposed rule 1.7(a)(2). If the Commission is concerned about a conflict of interest created by an attorney's other fiduciary duties (such as when he or she is acting as trustee, executor or corporate director), it should include in 1.7(a)(2) after the words "representation of one or more clients" words such as "or the attorney's duties as a fiduciary to others."

8. OCTC believes Comment 10 is unnecessary in light of proposed rule 1.7(a)(2). Comment 12 is unnecessary in light of proposed rule 1.8.10. Comment 13 is unnecessary in light of proposed rule 1.8.6. Comment 34 seems unnecessary in light of proposed rule 1.13(a). Comment 38 seems unnecessary in light of proposed rules 6.3 and 6.4.

9. Comments 14-17A could be reduced and the language tightened. Comments 23-25 are too long and confusing. The same is true for Comments 26-27, 29-29A and 32-33. Many of these comments seem unnecessary or duplicative of other comments. They should be reduced and tightened up

10. Comment 19 is confusing and could send the wrong signal to attorneys that they may fail to make the disclosure necessary to obtain consent. If the attorney cannot make the disclosure necessary to obtain consent, the attorney should not represent the client. Further, if the drafters reduce and tighten the language in Comments [14]-[17A], then the reference to Comments [14] – [17A] in Comment 19 could be stricken.

11. OCTC recommends striking the first sentence of Comment 20, but supports the rest of the Comment. Comment 1 lists the duties the conflict rules are concerned with. It could be understood to suggest that, if one concern exists and another does not, there may or may not be a conflict. It should be amended to explain whether any one of these factors require finding a conflict. In addition, it cites several conflict rules, including 1.8. This could be confusing because technically there is no rule 1.8, but several separate rules under the 1.8 category. (See rules 1.8.1 through 1.8.11.)

12. With respect to Comment 30, OCTC believes this is an improvement and concurs that rule 1.4 requires the attorney to advise the clients of the potential adverse consequences of joint representation. However, Comment 30 does not specifically require this in order to have informed consent.

13. Comment 22 is too long and confusing. It discusses advanced waivers. There are no reported disciplinary cases on advanced waivers. Some civil courts have held that an attorney may have an advanced conflict waiver, but those have been in very limited situations. OCTC is concerned that clients, particularly unsophisticated clients, may not fully understand the ramifications of a conflict that has not yet arisen. Under these circumstances, an advanced waiver could easily be abused. Furthermore, even the attorney cannot fully understand or be able to adequately explain the ramifications of a potential conflict. For these reasons, OCTC recommends that advanced conflict waivers be prohibited.

UNIVERSITY OF CALIFORNIA
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*FACULTY*

June 15, 2010

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**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### *1. Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

were not as carefully vetted.

Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense, puzzling, or otherwise lacking. We believe more study of the verbiage of these comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.

2. *Rule 1.8.1 – Doing business with a client*

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.

Z&F

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June 6, 2008

Harry Sondheim, Chair
Paul Vapnek, Vice-Chair
Mark Tuft, Vice-Chair
Kevin E. Mohr, Counsel
Randall Difuntorum, Counsel

Special Commission for the Revision
of the Rules of Professional Conduct

Jeffrey L. Bleich
Munger, Tolles & Olson
560 Mission St., 27th Floor
San Francisco, CA 94105

President, State Bar of California

William N. Hebert
Calvo & Clark LLP
1 Lombard St 2nd Floor
San Francisco, CA, 94111

State Bar Board Liaison to Commission

**BY E-MAIL & U.S. MAIL**

Re: Comment on Rules 1.7 and 1.8.1

Dear Commission, Chair Sondheim, and President Bleich:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics at a law school in California. Future undersigneds will be forwarded to you when they are available. We are providing you with identification for each professor of Legal Ethics, including their law schools and other significant identifying information. The information is for identification purposes only.

**INTRODUCTION**:

First, ethical precepts concerning loyalty and conflicts of interest are, along with those addressing confidentiality, perhaps the most significant of all rules being reviewed by the Commission. It is essential to adhere to the basic principle that the rules of professional conduct are designed to *protect clients and the public*. Any variation from this course, any effort by our profession at putting self-interest or self-protection first, must fail. Not only would such a course be a disservice to the consumers of legal services, but it will likely result in demeaning the very profession we all desire to improve.

Second, the black-letter rules serve not only as rules of discipline but as *guidance* to the tens of thousands of responsible lawyers who look to these rules for benchmarks that govern their behavior. The Commission must clearly recognize that not most of California's lawyers do not have the level of sophistication that members of the Commission, or the State Bar Board of Governors, bring to the table. The State Bar would be abrogating an important portion of its

responsibility unless it makes it clear that these rules shall serve as guideposts to the average practitioner.

Third and finally, just as the rules must speak to the average lawyer, they must serve to protect the *average client*. So long as the Rules of Professional Conduct apply to all lawyers in all circumstances of legal representation, it would be inappropriate, perhaps even extremely so, to focus analysis on big, sophisticated institutional clients. California, our nation's most populous state, is filled with 35,000,000 ordinary people, the majority of whom will need legal services in their lifetime. One rule must work for our entire constituency.

With this perspective, we are concerned that the modifications to the ethics rules relating to conflicts of interest too often benefit lawyers more than clients, institutions – including large law firms – more than individuals. While it is true that our global village is expanding rapidly, this is no reason to abandon basic tenets of loyalty and fiduciary duty that are part of the foundations of our legal system.

We articulate below four specific areas of concern:

**1. Rule 1.7 would allow a lawyer to be adverse to that lawyer's own client, and must be modified.**

(A) Rule 1.7(a) – the crux of the problem:

Perhaps the most shocking change in the conflicts rules is current 1.7(a), which, closely read, would allow lawyers or law firms to be adverse to, and even sue, their own clients.[1] This would substantially and significantly abrogate the basic notion of loyalty, one of the most essential duties of a lawyer.

*Not a single jurisdiction in the United States now allows a lawyer or law firm to be directly adverse to that individual or firm's own client.* There is no excuse, in our view, for California to move in this direction. The effort to move closer to the ABA numbering system would best be paralleled by an effort to move the conflicts rule closer to the ABA model.

Rule 1.7(a) is, fortunately, easily fixed. The three phrases concerning "matters," italicized in the footnote, must be removed. What then remains is a simple, straightforward statement of the duty of loyalty.

(B) Rule 1.7(c):

Once Rule 1.7(a) has been amended, Rule 1.7(c) becomes superfluous. Rule 1.7(c) is an amended restatement of current rule 3-310(C)(3). It is superfluous if Rule 1.7 is changed as

[1] To make this clear, consider that the current draft of Rule 1.7(a) says "A lawyer shall not accept or continue representation of a client *in a matter* in which the lawyer's representation of that client *in that matter* will be directly adverse to another client the lawyer currently represents *in another matter* without informed written consent from each client. That means that if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X *without consent*, even though B is directly adverse to the lawyer's client A.

suggested to avoid eliminating the concept of loyalty. Two points should be noted, however. First, this restatement of current Rule 3-310(C)(3) is considerably narrower than the current rule. It removes language that now reads "*whose interest in the ... matter* is adverse," adds the word "direct" to the word adverse, and puts the "matters" in chronological order, thus narrowing the rule's application.[2]

(C) Rule 1.7(b):

Unlike Rule 1.7(c), this section is neither superfluous nor changed from the current rule, now embodied in Rule 3-310(C)(1) and (2). However, the rule section, which retains the concepts of actual and potential conflicts of interest, could easily be combined in one statement rather than two, by saying "potentially or actually conflict."

**2. The Commission's position on "advance waivers" is untenable and must be removed.**

A. Inadequate disclosure:

Comment 33 to Rule 1.7 inappropriately allows clients to consent to blanket advance waivers of conflicts of interest even where adequate disclosure, as required by the Commission's own definition, cannot possibly be met. These waivers are far broader than what should be permitted.

The Commission has adopted the strong current State Bar standards on disclosure and informed consent: "Disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances...." "Informed written consent" is consent after this disclosure.

Comment 33, however, allows a broad exception to informed written consent "where the lawyer cannot provide all the information and explanation Comment 30 [on informed consent] ordinarily requires." The Commission would make it permissible to substitute the following for disclosure: "an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve *future facts and circumstances that to a degree cannot be known* when the consent is requested." The waiver may also "permit the lawyers to be *adverse to the client on any matter in the future*...."[3]

B. Case law and "factors":

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[2] The rule originally was to have a parallel rule, 3-310(C)(4), an omission that was inadvertent and recognized by the first constitution of this Commission in its report to the State Bar and ultimately the Supreme Court. Not only is this (C)(4) provision not set forth, though the Supreme Court's holding in *Flatt v. Superior Court* (1998) 9 Cal.4th 275 captures much of that non-existent rule's essence, but the existing (C)(3) has been unnecessarily narrowed. Although the suggested change to 1.7(a) would moot this issue, the direction espoused by the Commission in this regard is troubling.

[3] The sentence in Comment 33 stating that "[a]n advance consent normally will comnply with this Rule if it is limited to a particular type of conflict with which the client already is familiar" is puzzling in light of the Comment's previous language acknowledging that disclosure will be inadequate – unless the Commission intends that the client is already "familiar" with conflicts that "cannot be known" at the time of consent.

Advance waivers under narrow circumstances have been permitted in California. Thus, where a law firm agrees to represent two parties, one of which is a principal client and the other a former non-client, it is appropriate to have the former non-client consent that if a conflict of interest occurs, the law firm may remain as counsel for the original client.[4]

Comment 33, however, travels leaps and bounds beyond case law. It would essentially allow law firms to represent whomever they wish in the future regardless of their past representations. As is the case with the current draft of Rule 1.7(a), these advance waivers destroy the concept of loyalty.

Comment 33 states that two factors to be considered in determining the adequacy of a waiver are "the use of an adequate ethics screen" and the advice of independent counsel. In this respect, the Commission's comment reads like an appellate court decision that the Commission is attempting to legislate, rather than leaving such standards to our courts. Screening is very limited under California case law, so to allow an "adequate ethics screen" to be a factor in considering the adequacy of a waiver is either to allow only that narrow definition permitted by case law or to legislate a change in what an acceptable screen is by this comment to the rule.

The reference to consulting independent counsel sounds beneficial to the client at first blush. However, it is important to remember that no amount of consultation with independent counsel will overcome the *lack of adequate disclosure*. Independent counsel – here, potentially, including in-house general counsel, who may feel under internal pressures from the client/employer – will be forced into the position of opining on a conflicts waiver without adequate information to make that determination. It is the adequacy of disclosure that governs here, not who is reviewing an *inadequate* disclosure.

**3. The Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients.**

A. The current and proposed rules.

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

[4] This is the holding of *Zador v. Kwan* (1995) 31 Cal. App. 4th 1285.

The current draft of Rule 1.8.1 simply eliminates these requirements. It does so by making several changes in current Rule 3-300, including muddying the distinction in the comments section between business transactions and adverse pecuniary interests. However, two other changes in the rule stand out (see below).

B. Modifications of fee contracts excluded.

Unlike the current rule, Comments 5 and 6 to the present draft specifically exclude fee contract modifications. The proposed language from Comment 5 adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 6 acknowledges that lawyers do have "other fiduciary principles [that] might apply." Further, the comment states that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.[5]

C. Inappropriate use of independent counsel.

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule states that if the client is already represented by independent counsel, there need be no notice. However, this – read together with Comments 14 and 15 of the proposed rule, and with the failure of the proposed rule to parallel ABA Model Rule 1.8(A)(3) – substantially diminishes client protection.

Comments 14 and 15 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Unlike ABA 1.8(A)(3), the proposed California rule does not require that the contracting lawyer disclose the "transaction *and the lawyer's role in the transaction*, including whether the lawyer is representing the client in the transaction." Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.

**4. Rule 1.7(d) does not afford adequate client protection as drafted.**

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[5] Further, its first citation, to *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, is to an extraordinarily unusual case in which a lawyer represented, then ceased representing, then represented anew, the same client. The case is oft-debated among legal scholars as to its implications on fiduciary duty and is extremely unlikely to provide practical guidance for the average attorney.

A. The issue of client consent must be addressed.

Originally, Rule 1.7(b), the current rule that parallels proposed 1.7(b), required the informed consent of clients, not merely disclosure. In 1992, the consent requirement was eliminated because the Commission considered that the broad language of the subparts of the rule made consent in every case impractical and unnecessary. The problem remains, however, that consent in some and perhaps most of these cases very much continues to be necessary. The Commission has done nothing to address this problem.

Rule 1.7(d) cuts too broad a swath to allow mere disclosure without consent to suffice. On the other hand, we recognize that there is some validity to the position that requiring informed consent in each and every application of the rule may be impractical and perhaps unnecessary. For example, under Rule 1.7(d)(1), a lawyer's child or current business partner could be a witness against the client. Such a key relationship does not require the client's consent under this rule. On the other hand, under (d)(3) and (d)(4), if the lawyer knows of a casual business associate who owns stock in one of the companies involved in the transaction, informed consent is less significant.

There are a variety of ways to solve this problem. One solution to the issue of consent lies in close adherence to the ABA rule, which sets forth a cleaner delineation of responsibility. Others involve reasonable standards, such as "materiality," that could be used to set forth what 1.7(d) situations require consent. Whatever solutions are to be used, the issue of consent – completely unaddressed by the Commission – should be squarely met and determined.

B. Inadequate parallel language in (d)(3) and (d)(4).

Section 1.7(d)(3) makes reference to "personal relationship" but the word "personal" is inexplicably left out of 1.7(d)(4). It should be included. Furthermore, while (d)(3) refers to the conflict that arises when the *lawyer's* friends or associates are "affected substantially," this language should include the *client* being affected substantially. That is, "the lawyer has ... a ... relationship with another ... that the lawyer knows or reasonably should know would be affected substantially by the matter, *or could substantially affect the client in the matter*." (Italicized language added.)

This letter is not intended to be exhaustive. For example, careful scrutiny should be given to the comments on non-consentable conflicts and class action conflicts. The purpose of this letter is to highlight the matters of greatest concern to the signers. Further information about the signers and this letter may be obtained by contacting Richard Zitrin per the contact information set forth in the letterhead.

Respectfully yours,

Michele Benedetto
*Associate Professor of Law, Golden Gate University, San Francisco*

Steven Berenson
*Associate Professor, Thomas Jefferson School of Law, San Diego*

*Continued on next page*

Peter Keane
*Dean Emeritus and Professor of Law, Golden Gate University School of Law*

Carol M. Langford
*Adjunct Professor of Law, University of San Francisco and University of California Hastings College of the Law, co-author Legal Ethics in the Practice of Law (ethics textbook) and Legal Ethics: Rules, Statutes and Comparisons (2008 edition)*

David McGowan
*Professor of Law, University of San Diego School of Law*

Rex R. Perschbacher
*Dean and Daniel J. Dykstra Chair in Law, University of California at Davis School of Law*

Deborah Rhode
*Ernest W. McFarland Professor of Law, Stanford University; Director, Stanford Law School's Keck Center on Legal Ethics and the Legal Profession; Founding Director of Stanford University's Center on Ethics; former President of the Association of American Law Schools; author of over 20 books on the legal profession*

Robert Seibel
*Professor of Law, California Western School of Law, San Diego; Member, Cal. Western Committee for Skills Training for Ethical and Preventive Practice and Career Satisfaction; past President and founding member of the Clinical Legal Education Association (CLEA)*

John Cary Sims
*Professor of Law, University of the Pacific McGeorge School of Law*

James Towery
*Adjunct Professor of Professional Responsibility, Santa Clara Law School and Lincoln Law School, San Jose; Former President, State Bar of California; Chair, ABA 's Standing Committee on Client Protection; former chair of the State Bar Discipline Committee and Risk Management; partner and ethics counsel, Hoge Fenton, San Jose*

Janet Weinstein
*Professor of Law, California Western School of Law; Member, Committee for Skills Training for Ethical and Preventive Practice and Career Satisfaction*

Fred Zacharias (as to sections 1, 3 and 4 only)
*Herzog Research Professor of Law, University of San Diego School of Law*

Richard Zitrin
*Adjunct Professor of Law, UC Hastings College of the Law; Founding Director, University of San Francisco School of Law Center for Applied Legal Ethics (now*

*Continued on next page*

*Center for Law and Ethics); senior author Legal Ethics in the Practice of Law (ethics textbook) and Legal Ethics: Rules, Statutes and Comparisons (2008 ed.)*

AND:

Lawrence J. Fox, Philadelphia. *I. Grant Irey Adjunct Professor, Pennsylvania Law School; Lecturer on Law, Harvard Law School; partner and former managing partner, Drinker Biddle & Reath, Phila.; Recipient, ABA Michael Franck Award for "outstanding contributions to the field of Professional Responsibility," 2007; Member, ABA Ethics 2000 Commission, Former Chair ABA Ethics Committee; Author, Legal Tender, ABA Publications; Member Recipient, ABA Pro Bono Publico Award, 2005*

Monroe Freedman, Garden City, NY. *Professor of Law and former Dean, Hofstra University Law School; Visiting Professor, Georgetown University Law School, 2007-2009; Recipient, ABA Michael Franck Award for "outstanding contributions to the field of Professional Responsibility," 1998; author, Understanding Legal Ethics (3d ed., 2004) (with Abbe Smith)*

Mark Harrison, Phoenix, Arizona. *Adjunct Professor of Law teaching legal ethics, University of Arizona and Arizona State University Past President, State Bar of Arizona, 1975-6; Former Chair, ABA Joint Commission to Evaluate the Code of Judicial Conduct, 2003-7; Recipient, ABA Michael Franck Award for "outstanding contributions to the field of Professional Responsibility," 1996*

Burnele V. Powell, Columbia, South Carolina. *Miles and Ann Loadholt Professor of Law and Immediate Past Dean of the University of South Carolina School of Law; Former Dean and Professor of Law at the University of Missouri--Kansas City School of Law and Professor of Law at the University of North Carolina; past Chair, ABA Center for Responsibility Coordinating Council; liaison to MJP commission from ABA CPR Coordinating Council*

Seth Rosner, Saratoga Springs, NY. *ABA Board of Governors,1997 to 2000; Board liaison to Commission on the Rules of Professional Conduct (Ethics 2000 Commission); Board liaison to Commission on Multidisciplinary Practice; former Chair, ABA Professionalism Committee, ABA Lawyer Competence Committee, General Practice Sections of the ABA and the New York State Bar; past Chair, ABA Center for Responsibility Coordinating Council; Adjunct Professor of Law at N.Y.U. Law School,1961-1989; has represented seven different entities in the ABA House of Delegates; two terms on the ABA Ethics Committee; founding Director and past President of the Association of Professional Responsibility Lawyers; founding member and Chairman emeritus of the Board of Governors of the Josephson Institute of Ethics*

# Rule 1.8.1 – Public Comment – File List

X-2010-421b COPRAC [1.8.1]

X-2010-425-11k SDCBA [1.8.1]

X-2010-488c Andrew Dilworth-Bill Balin [1.8.1]

X-2010-513-11 OCTC [1.8.1]

X-2010-517b Zitrin-Multiple [1.8.1]

- June 2008 Zitrin Letter re 1.7 & 1.8.1

X-2010-529d SCCBA [1.8.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 5, 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 1.8.1

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 1.8.1. COPRAC supports the Rule as drafted. We have one comment on Comment [6]. That comment provides that:

> [6] An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

The first sentence of Comment [6] does not make it entirely clear that the rule is not applicable to a deposit or advance. The second sentence of Comment [6] makes this point more directly as to contingent fee agreements. Accordingly, if the RRC intends that this Rule not apply to an advance or deposit, then perhaps a more accurate expression of that would be to frame the statement as the RRC has done in the second sentence, that is, to say, "This Rule is not intended to apply to an advance to or deposit with a lawyer of a sum to be applied to fees or costs incurred in the future."

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 1.8.1 – Business Transactions with or a Client or Acquiring Interest Adverse to a Client**
**[Existing CRPC Rule 3-300]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.8.1with the following modification: 1.8.1(a) – change the provision in the text of the proposed rule as marked in bold: "The transaction or acquisition and its terms are fair and reasonable to the client **at the time of the transaction or acquisition** and are fully disclosed ...

Rationale for Comment 1: This change would address the situation in which an asset becomes valuable later (e.g., stock in a start up company) and the regulator is tempted to assess the fairness of the transaction after-the-fact (e.g. when the start up company has become successful). Typically, the lawyer in this situation looks greedy, but in fact did not overreach because the risk-adjusted value of the asset was small at the time of the transaction.

Comment 2: Approve Proposed Rule 1.8.1 with the following modification:
Add a sentence at the end of Proposed Rule Comment 4 that states: "However, the rule may apply if the lawyer has, or should have, any reason to believe the client is investing, in part, because of the client's confidence in the lawyer's judgment."

Rationale for Comment 2: The last eight lines of Proposed Rule Comment 4 address the situation in which a lawyer and the client both enter an investment together, for example

in a limited partnership. The comment assumes that when the lawyer also invests, the lawyer and client will both be making independent financial assessments and there will be no risk of undue influence. That's not entirely true, since the client may be relying too much on the lawyer's judgment. The lawyer's situation and risk tolerance simply may be different.

Comment 3: Approve Proposed Rule 1.8.1 with the following modification: Delete the words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6 of Proposed Rule Comment 5.

Rationale for Comment 3: Comment 5 slips in the notion that modifications of a retainer agreement don't fit under this rule, on the theory that 1.5 covers retainer agreements. There's a big difference, however, between the initial and modified retainer, because by the time of modification the client will have become more dependent on the lawyer and the lawyer has the upper hand if he threatens to resign. All Rule 1.5 does is require the total fees to be reasonable; it doesn't require the lawyer to make sure clients sign only wise modifications.

Comment 4: Approve Proposed Rule 1.8.1 with the following modification: Delete the first two sentences (including the citation to Seltzer) of Proposed Rule 1.8.1 Comment 6.

Rationale for Comment 4: Proposed Rule 1.8.1 Comment 6, in oversimplified fashion, states that the negotiation of a retainer agreement is an arms-length transaction. While courts have sometimes said that, they have also said the opposite. The issue actually is very complicated. (I know, because I've written a 70 page article on the subject: *The Preemployment Ethical Role of Lawyers; Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007)).

Comment 5. Approve Proposed Rule 1.8.1 with the following modifications: Add the following sentence at the end of Proposed Rule 1.8.1 Comment 8: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."

Rationale for Comment 5: Proposed Rule 1.8.1 Comment 8 says the issue of "whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances." The addition protects the dumb client against claims of objective reasonableness.

Comment 6. Approve Proposed Rule 1.8.1 with the following modifications: Delete everything in the first sentence of Proposed Rule 1.8.1 Comment 9 after the words "paragraph (a)", the subsequent citation, and the word "It" at the beginning of the second sentence.

Rationale for Comment 6: Proposed Rule 1.8.1 Comment 9 overstates the holding of Beery v. State Bar when it asserts "The requirement for full disclosure in writing in paragraph (a) requires a lawyer to provide the client with the same advice regarding the

transaction or acquisition that the lawyer would provide to the client in a transaction with a third party." Actually, in the third-party transaction, a client sometimes can reasonably rely on the lawyer to act for him; the lawyer need not make all of the disclosures that are necessary in a personal transaction (in which the rules assume the client needs protections against the lawyer.)

Comment 7: Approve Proposed Rule 1.8.1 with the following modification: In Proposed Rule 1.8.1 Comment 9, line 12, right before the last word of the line (i.e. "and"), insert the words "at the time of the transaction or acquisition".

Rationale for Comment 7: The reason is explained in Comment 1 above, in connection with the suggested change to the text of the proposed rule.

Comment 8: Approve Proposed Rule 1.8.1 with the following modification: Insert "1.7(b) and" before "1.7(d)".

Rationale for Comment 8: Proposed Rule 1.8.1 Comment 10, line 5 says, in connection with the lawyer who represents both the client and himself in a transaction, "The lawyer must also comply with Rule 1.7(d).

Comment 9: Approve Proposed Rule 1.8.1 with the following modification: Proposed Rule 1.8.1 Comment 11, line 8, after "The lawyer must", insert ", before the transaction or acquisition is completed,".

Rationale for Comment 9: Modification is needed for clarification.

Comment 10: Approve Proposed Rule 1.8.1 with the following modification: Proposed Rule 1.8.1 Comment 11, second to the last line, change "1.7(d)" to "1.7"

Rationale for Comment 10: Same reason as stated in Rationale for Comment 9 above.

Comment 11: Approve Proposed Rule 1.8.1 with the following modification: Delete Proposed Rule 1.8.1 Comment 13.

Rationale for Comment 11: Proposed Rule 1.8.1 Comment 13 misses the mark. The only situation in which "the lawyer's interest will preclude the lawyer from obtaining the client's consent" is when the lawyer doesn't want the client to engage in the transaction but must offer the deal for some reason. But the remedy of Comment 13 is that no transaction is possible, even if the transaction is a good deal for the client.

Comment 12: Approve Proposed Rule 1.8.1 with the following modification: Delete the sentence starting "Under such circumstances . . ." through the semi-colon of Proposed Rule 1.8.1 Comment 15.

Rationale for Comment 12: Proposed 1.8.1 Comment 15, line 5 says that when the client gets an independent lawyer, the lawyer is not required to provide legal advice. Can we be sure that the lawyer in this situation will never have continuing fiduciary duties?

Comment 13: Approve Proposed Rule 1.8.1 with the following modification: Add the following abbreviated Comment 16 to Proposed Rule 1.8.1: "The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client."

Rationale for Comment 13: ABA rule 1.8.1 has a comment on imputation. The Proposed Rule 1.8.1 does not. It should.

# BALIN & KOTLER, LLP
Attorneys at Law

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June 14, 2010

**Via Facsimile: (415) 538-2171 and U.S. Mail**

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

Re: **Public Comment on Proposed Rule of Professional Conduct 1.8.1, comments [5] and [6] and Proposed Rule 1.5 (Modification of Fee Agreements)**

Dear Ms. Hollins and Members of the Rules Revision Commission:

Drew Dilworth and ,.the Vice-Chair and Chairperson of the Bar Association of San Francisco's Legal Ethics Committee, respectively, are submitting the following comments on certain portions of proposed Rules 1.8.1 and 1.5. We are submitting these comments in our individual capacities, Drew and I believe that rule 1.8.1, Comments [5] and [6], together with proposed Rule 1.5, leave a gap that allows an attorney to add language to an existing contract that materially, adversely affects the rights of the client without compelling the attorney to make the appropriate disclosures and to obtain the requisite written consent.

Rule 1.8.1 governs a lawyer's business transactions with a client. Comment [5] to the proposed Rule specifically excludes the original agreement by which a client hires a lawyer as well as any "modification of such an agreement." Comment [6] states that the Rule "is not intended to apply to an agreement with a client for a contingent fee in a civil case." However, we can envision at least two scenarios in which a change in the fee agreement will not give the attorney "an ownership, possessory, security or other pecuniary interest adverse to the client" yet would materially impact the client's rights with a concomitant advantage to the attorney. The first instance is where the attorney, in mid-representation, asks the client to change a contingent fee agreement to an hourly fee agreement, or vice versa. The second instance is where the attorney asks the client to modify the fee agreement by adding a clause making all disputes subject to binding private arbitration.

In the first instance, the attorney arguably is not obtaining an interest that falls within one

of the denominated categories; it is not an ownership, possessory, security or other pecuniary interest, yet the change may very well be adverse to the client. For example, where a lawyer representing a client in a contingency fee case comes to believe that the potential recovery is not as great or as likely as the lawyer once thought, the lawyer may go to the client and seek to change the agreement to an hourly fee arrangement. Similarly, a lawyer representing a client in an hourly fee case may come to believe that a much larger recovery is likely than originally anticipated, and that a contingent fee would be likely to greatly exceed the expected hourly fee. Additionally, there may be instances where the attorney has already received an hourly fee and then seeks to change the agreement to a contingent fee without crediting the client with the hourly fees already received against any contingent recovery. In each case, the lawyer stands to gain at the expense of the client, yet, because the change does not fall within one of the enumerated categories of suspect interests, the lawyer would not have to comply with the rule.

In the second instance, the lawyer may suspect or have reason to believe that a dispute with the client, either over fees or over the lawyer's performance, or both, is more likely than originally contemplated at the outset of the representation, and that the lawyer's chances of prevailing in such a dispute would be greater before an arbitrator than before a jury. In such a case the lawyer would be asking the client to waive substantial legal rights, such as a jury trial and the right to appeal, without having to comply with the requirements of Rule 1.8.1.

We believe that such modifications are governed by the lawyer's already existing fiduciary duty to the client, and that an approach that limits the Rule, or its comments, to those instances where the attorney actually obtains an interest in a piece of property or other asset of the client is too narrow. We note that comment [5] to Rule 1.8.1 references Rule 1.5. Rule 1.5, subdivision (f), states that a lawyer cannot materially modify an agreement with a client in a way that is adverse to the client's interests without seeing that the client is either represented by another lawyer or is advised in writing to seek the advice of another attorney. However, Rule 1.5 does not require that the change in the fee agreement be fair to the client, or that the changes are fully explained to the client in a manner the client can understand. Moreover, under Rule 1.5, the lawyer discharges his duty once the client is advised in writing to seek the advice of another attorney. There is no requirement that the client actually receive such advice.

Accordingly, we are concerned that Rule 1.5, subdivision (f) does not provide sufficient protections for clients under the scenarios outlined above, while the application of Rule 1.8.1 to such scenarios is specifically precluded. We also note that there are no comments to Rule 1.5 that address subdivision (f). We therefore recommend changing or adding a comment to Rule 1.8.1 that applies the Rule to modifications in a fee agreement that are adverse to the client's interests. While we view the protections of Rule 1.5 as insufficient to protect the interests of clients in the situations outlined above, we urge the Commission, at a minimum, to add a comment to Rule 1.5 that clearly applies the Rule to situations in which an attorney materially alters an existing fee agreement to the detriment of the client, such as in the instances we have outlined.

We do not purport to have exhaustively mined the field of possible modifications to fee agreements, whereby an attorney could obtain an advantage greater than that originally bestowed upon him or her in the original agreement. However, we think the scenarios we have identified show that the potential for mischief is significant enough that greater protections ought to be provided to clients in situations where an attorney may want to modify an existing agreement in a manner that is detrimental to the client but does not fall within the protections of Rule 1.8.1 as presently drafted.

We thank the Commission for this opportunity to comment on these proposed Rules, and we urge the Commission to give further consideration to these. Rules.

Very truly yours,

William M. Balin
Andrew Dilworth

**Rule 1.8.1. Business Transactions with a Client and Acquiring Interests Adverse to the Client.**

1. There are too many comments and many are too long and incorporate other rules and comments. They seem more appropriate for treatises, law review articles, and ethics opinions.
2. While OCTC believes modifications would normally apply to this rule (see OCTC's written Comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, already provided in OCTC's August 26, 2008 comments to the rules), it supports the compromise adopted that states in most cases modifications will be governed by proposed rule 1.5(f).
3. The first sentence of Comment 6 seems unnecessary. Comment 6's last sentence should make clear that a contingent fee could fall within this rule if the lawyer obtains a proprietary interest in the client's property. For example, if an attorney represents a client in a civil lawsuit over the shares of a company and if the agreement states that if successful the lawyer obtains a percentage of the shares and not just a percentage of the worth of the shares the attorney's agreement should come within proposed rule 1.8.1. The Commission rejected ABA rule 1.8(i) because they believed proposed rule 1.8.1 was sufficient. Thus, when we are discussing an actual interest in the subject of the representation, and not just monetary percentages, rule 1.8.1 should apply, even for contingency agreements.
4. The last sentence of Comment 9 should be stricken as it is legally incorrect. It states "Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised." If the Commission is stating or implying that in a disciplinary proceeding the attorney does not have the burden of showing that the transaction or acquisition and its terms were fair and reasonable or just and that the client was fully advised, the Commission is wrong. It is well established that the attorney in a disciplinary proceeding has the burden of showing that the transaction is fair and reasonable and was fully known and understood by the client. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314; *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372-373; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146-147; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 165; *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 484, 489; *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, 394-395.)
5. Comments 10-14 could be shortened and tightened.

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

~~were not as carefully vetted.~~

~~Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense, puzzling, or otherwise lacking. We believe more study of the verbiage of these comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.~~

2. *Rule 1.8.1 – Doing business with a client*

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.

The phrase relating to modifications of fee contracts in Comment ¶ 5 must be stricken.

C. Inappropriate use of independent counsel

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule – with limiting language that is absent from the ABA rule, MR 1.8(a)(2) – states that if the client is already represented by independent counsel, there need be no notice. This, read together with Comments 13 and 14 of the proposed rule, substantially diminishes client protection.

Comments 13 and 14 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction. Moreover, under the ABA's Comment, ¶ 4, written disclosure is still required from one of the involved lawyers. This is not true of the current California comments.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA rule language in MR 1.8(a)(2) and Comment ¶ 4 should replace the ill-advised Commission language.

~~3. *Rule 1.0.1(e) – Definition of informed consent*~~

~~While the definition of "informed consent" contained in Rule 1.0.1(e) conforms to the ABA Model Rule, it is something of a retrenchment of the broader – and more client-protective – existing California definition currently contained in the conflicts of interest rule. At least in this one case, the Commission has chosen ABA congruence over better California language more protective of clients' interests.~~

~~The existing definition of informed consent in the case of conflicts of interest is embodied in current CRPC 3-310(A), which combines disclosure and consent:~~

> ~~(1)"Disclosure" means informing the client or former client of the *relevant circumstances and of the actual and reasonably foreseeable adverse consequences* to the client or former client; (Emphasis added.)~~
>
> ~~(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure....~~

~~The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1(e), in the redlined language below:~~

> ~~'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained adequate information and explanation about the relevant circumstances and the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.~~

~~This will provide a more clearly informed consent to clients not only as to conflicts of interest, as the current rule now stands, but in all informed-consent situations.~~

Z&F

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June 6, 2008

Harry Sondheim, Chair
Paul Vapnek, Vice-Chair
Mark Tuft, Vice-Chair
Kevin E. Mohr, Counsel
Randall Difuntorum, Counsel

Special Commission for the Revision
of the Rules of Professional Conduct

Jeffrey L. Bleich
Munger, Tolles & Olson
560 Mission St., 27th Floor
San Francisco, CA 94105

President, State Bar of California

William N. Hebert
Calvo & Clark LLP
1 Lombard St 2nd Floor
San Francisco, CA, 94111

State Bar Board Liaison to Commission

**BY E-MAIL & U.S. MAIL**

Re: Comment on Rules 1.7 and 1.8.1

Dear Commission, Chair Sondheim, and President Bleich:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics at a law school in California. Future undersigneds will be forwarded to you when they are available. We are providing you with identification for each professor of Legal Ethics, including their law schools and other significant identifying information. The information is for identification purposes only.

**INTRODUCTION**:

First, ethical precepts concerning loyalty and conflicts of interest are, along with those addressing confidentiality, perhaps the most significant of all rules being reviewed by the Commission. It is essential to adhere to the basic principle that the rules of professional conduct are designed to *protect clients and the public*. Any variation from this course, any effort by our profession at putting self-interest or self-protection first, must fail. Not only would such a course be a disservice to the consumers of legal services, but it will likely result in demeaning the very profession we all desire to improve.

Second, the black-letter rules serve not only as rules of discipline but as *guidance* to the tens of thousands of responsible lawyers who look to these rules for benchmarks that govern their behavior. The Commission must clearly recognize that not most of California's lawyers do not have the level of sophistication that members of the Commission, or the State Bar Board of Governors, bring to the table. The State Bar would be abrogating an important portion of its

responsibility unless it makes it clear that these rules shall serve as guideposts to the average practitioner.

Third and finally, just as the rules must speak to the average lawyer, they must serve to protect the *average client*. So long as the Rules of Professional Conduct apply to all lawyers in all circumstances of legal representation, it would be inappropriate, perhaps even extremely so, to focus analysis on big, sophisticated institutional clients. California, our nation's most populous state, is filled with 35,000,000 ordinary people, the majority of whom will need legal services in their lifetime. One rule must work for our entire constituency.

With this perspective, we are concerned that the modifications to the ethics rules relating to conflicts of interest too often benefit lawyers more than clients, institutions – including large law firms – more than individuals. While it is true that our global village is expanding rapidly, this is no reason to abandon basic tenets of loyalty and fiduciary duty that are part of the foundations of our legal system.

We articulate below four specific areas of concern:

**1. Rule 1.7 would allow a lawyer to be adverse to that lawyer's own client, and must be modified.**

(A) Rule 1.7(a) – the crux of the problem:

Perhaps the most shocking change in the conflicts rules is current 1.7(a), which, closely read, would allow lawyers or law firms to be adverse to, and even sue, their own clients.[1] This would substantially and significantly abrogate the basic notion of loyalty, one of the most essential duties of a lawyer.

*Not a single jurisdiction in the United States now allows a lawyer or law firm to be directly adverse to that individual or firm's own client.* There is no excuse, in our view, for California to move in this direction. The effort to move closer to the ABA numbering system would best be paralleled by an effort to move the conflicts rule closer to the ABA model.

Rule 1.7(a) is, fortunately, easily fixed. The three phrases concerning "matters," italicized in the footnote, must be removed. What then remains is a simple, straightforward statement of the duty of loyalty.

(B) Rule 1.7(c):

Once Rule 1.7(a) has been amended, Rule 1.7(c) becomes superfluous. Rule 1.7(c) is an amended restatement of current rule 3-310(C)(3). It is superfluous if Rule 1.7 is changed as

[1] To make this clear, consider that the current draft of Rule 1.7(a) says "A lawyer shall not accept or continue representation of a client *in a matter* in which the lawyer's representation of that client *in that matter* will be directly adverse to another client the lawyer currently represents *in another matter* without informed written consent from each client. That means that if a lawyer represents A in A v. B, the lawyer may undertake representation of B in B v. X *without consent*, even though B is directly adverse to the lawyer's client A.

suggested to avoid eliminating the concept of loyalty. Two points should be noted, however. First, this restatement of current Rule 3-310(C)(3) is considerably narrower than the current rule. It removes language that now reads "*whose interest in the ... matter* is adverse," adds the word "direct" to the word adverse, and puts the "matters" in chronological order, thus narrowing the rule's application.[2]

(C) Rule 1.7(b):

Unlike Rule 1.7(c), this section is neither superfluous nor changed from the current rule, now embodied in Rule 3-310(C)(1) and (2). However, the rule section, which retains the concepts of actual and potential conflicts of interest, could easily be combined in one statement rather than two, by saying "potentially or actually conflict."

**2. The Commission's position on "advance waivers" is untenable and must be removed.**

A. Inadequate disclosure:

Comment 33 to Rule 1.7 inappropriately allows clients to consent to blanket advance waivers of conflicts of interest even where adequate disclosure, as required by the Commission's own definition, cannot possibly be met. These waivers are far broader than what should be permitted.

The Commission has adopted the strong current State Bar standards on disclosure and informed consent: "Disclosure means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences of those circumstances...." "Informed written consent" is consent after this disclosure.

Comment 33, however, allows a broad exception to informed written consent "where the lawyer cannot provide all the information and explanation Comment 30 [on informed consent] ordinarily requires." The Commission would make it permissible to substitute the following for disclosure: "an explanation that the lawyer is requesting the client to consent to a possible future conflict that would involve *future facts and circumstances that to a degree cannot be known* when the consent is requested." The waiver may also "permit the lawyers to be *adverse to the client on any matter in the future*...."[3]

B. Case law and "factors":

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[2] The rule originally was to have a parallel rule, 3-310(C)(4), an omission that was inadvertent and recognized by the first constitution of this Commission in its report to the State Bar and ultimately the Supreme Court. Not only is this (C)(4) provision not set forth, though the Supreme Court's holding in *Flatt v. Superior Court* (1998) 9 Cal.4th 275 captures much of that non-existent rule's essence, but the existing (C)(3) has been unnecessarily narrowed. Although the suggested change to 1.7(a) would moot this issue, the direction espoused by the Commission in this regard is troubling.

[3] The sentence in Comment 33 stating that "[a]n advance consent normally will comnply with this Rule if it is limited to a particular type of conflict with which the client already is familiar" is puzzling in light of the Comment's previous language acknowledging that disclosure will be inadequate – unless the Commission intends that the client is already "familiar" with conflicts that "cannot be known" at the time of consent.

Advance waivers under narrow circumstances have been permitted in California. Thus, where a law firm agrees to represent two parties, one of which is a principal client and the other a former non-client, it is appropriate to have the former non-client consent that if a conflict of interest occurs, the law firm may remain as counsel for the original client.[4]

Comment 33, however, travels leaps and bounds beyond case law. It would essentially allow law firms to represent whomever they wish in the future regardless of their past representations. As is the case with the current draft of Rule 1.7(a), these advance waivers destroy the concept of loyalty.

Comment 33 states that two factors to be considered in determining the adequacy of a waiver are "the use of an adequate ethics screen" and the advice of independent counsel. In this respect, the Commission's comment reads like an appellate court decision that the Commission is attempting to legislate, rather than leaving such standards to our courts. Screening is very limited under California case law, so to allow an "adequate ethics screen" to be a factor in considering the adequacy of a waiver is either to allow only that narrow definition permitted by case law or to legislate a change in what an acceptable screen is by this comment to the rule.

The reference to consulting independent counsel sounds beneficial to the client at first blush. However, it is important to remember that no amount of consultation with independent counsel will overcome the *lack of adequate disclosure*. Independent counsel – here, potentially, including in-house general counsel, who may feel under internal pressures from the client/employer – will be forced into the position of opining on a conflicts waiver without adequate information to make that determination. It is the adequacy of disclosure that governs here, not who is reviewing an *inadequate* disclosure.

**3. The Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients.**

A. The current and proposed rules.

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

[4] This is the holding of *Zador v. Kwan* (1995) 31 Cal. App. 4th 1285.

The current draft of Rule 1.8.1 simply eliminates these requirements. It does so by making several changes in current Rule 3-300, including muddying the distinction in the comments section between business transactions and adverse pecuniary interests. However, two other changes in the rule stand out (see below).

B. Modifications of fee contracts excluded.

Unlike the current rule, Comments 5 and 6 to the present draft specifically exclude fee contract modifications. The proposed language from Comment 5 adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client *or to the modification of such an agreement*."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 6 acknowledges that lawyers do have "other fiduciary principles [that] might apply." Further, the comment states that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.[5]

C. Inappropriate use of independent counsel.

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule states that if the client is already represented by independent counsel, there need be no notice. However, this – read together with Comments 14 and 15 of the proposed rule, and with the failure of the proposed rule to parallel ABA Model Rule 1.8(A)(3) – substantially diminishes client protection.

Comments 14 and 15 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Unlike ABA 1.8(A)(3), the proposed California rule does not require that the contracting lawyer disclose the "transaction *and the lawyer's role in the transaction*, including whether the lawyer is representing the client in the transaction." Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.

**4. Rule 1.7(d) does not afford adequate client protection as drafted.**

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[5] Further, its first citation, to *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, is to an extraordinarily unusual case in which a lawyer represented, then ceased representing, then represented anew, the same client. The case is oft-debated among legal scholars as to its implications on fiduciary duty and is extremely unlikely to provide practical guidance for the average attorney.

A. The issue of client consent must be addressed.

Originally, Rule 1.7(b), the current rule that parallels proposed 1.7(b), required the informed consent of clients, not merely disclosure. In 1992, the consent requirement was eliminated because the Commission considered that the broad language of the subparts of the rule made consent in every case impractical and unnecessary. The problem remains, however, that consent in some and perhaps most of these cases very much continues to be necessary. The Commission has done nothing to address this problem.

Rule 1.7(d) cuts too broad a swath to allow mere disclosure without consent to suffice. On the other hand, we recognize that there is some validity to the position that requiring informed consent in each and every application of the rule may be impractical and perhaps unnecessary. For example, under Rule 1.7(d)(1), a lawyer's child or current business partner could be a witness against the client. Such a key relationship does not require the client's consent under this rule. On the other hand, under (d)(3) and (d)(4), if the lawyer knows of a casual business associate who owns stock in one of the companies involved in the transaction, informed consent is less significant.

There are a variety of ways to solve this problem. One solution to the issue of consent lies in close adherence to the ABA rule, which sets forth a cleaner delineation of responsibility. Others involve reasonable standards, such as "materiality," that could be used to set forth what 1.7(d) situations require consent. Whatever solutions are to be used, the issue of consent – completely unaddressed by the Commission – should be squarely met and determined.

B. Inadequate parallel language in (d)(3) and (d)(4).

Section 1.7(d)(3) makes reference to "personal relationship" but the word "personal" is inexplicably left out of 1.7(d)(4). It should be included. Furthermore, while (d)(3) refers to the conflict that arises when the *lawyer's* friends or associates are "affected substantially," this language should include the *client* being affected substantially. That is, "the lawyer has ... a ... relationship with another ... that the lawyer knows or reasonably should know would be affected substantially by the matter, *or could substantially affect the client in the matter*." (Italicized language added.)

This letter is not intended to be exhaustive. For example, careful scrutiny should be given to the comments on non-consentable conflicts and class action conflicts. The purpose of this letter is to highlight the matters of greatest concern to the signers. Further information about the signers and this letter may be obtained by contacting Richard Zitrin per the contact information set forth in the letterhead.

Respectfully yours,

Michele Benedetto
*Associate Professor of Law, Golden Gate University, San Francisco*

Steven Berenson
*Associate Professor, Thomas Jefferson School of Law, San Diego*

*Continued on next page*

Peter Keane
*Dean Emeritus and Professor of Law, Golden Gate University School of Law*

Carol M. Langford
*Adjunct Professor of Law, University of San Francisco and University of California Hastings College of the Law, co-author Legal Ethics in the Practice of Law (ethics textbook) and Legal Ethics: Rules, Statutes and Comparisons (2008 edition)*

David McGowan
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Deborah Rhode
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Robert Seibel
*Professor of Law, California Western School of Law, San Diego; Member, Cal. Western Committee for Skills Training for Ethical and Preventive Practice and Career Satisfaction; past President and founding member of the Clinical Legal Education Association (CLEA)*

John Cary Sims
*Professor of Law, University of the Pacific McGeorge School of Law*

James Towery
*Adjunct Professor of Professional Responsibility, Santa Clara Law School and Lincoln Law School, San Jose; Former President, State Bar of California; Chair, ABA 's Standing Committee on Client Protection; former chair of the State Bar Discipline Committee and Risk Management; partner and ethics counsel, Hoge Fenton, San Jose*

Janet Weinstein
*Professor of Law, California Western School of Law; Member, Committee for Skills Training for Ethical and Preventive Practice and Career Satisfaction*

Fred Zacharias (as to sections 1, 3 and 4 only)
*Herzog Research Professor of Law, University of San Diego School of Law*

Richard Zitrin
*Adjunct Professor of Law, UC Hastings College of the Law; Founding Director, University of San Francisco School of Law Center for Applied Legal Ethics (now*

*Continued on next page*

*Center for Law and Ethics); senior author Legal Ethics in the Practice of Law (ethics textbook) and Legal Ethics: Rules, Statutes and Comparisons (2008 ed.)*

AND:

Lawrence J. Fox, Philadelphia. *I. Grant Irey Adjunct Professor, Pennsylvania Law School; Lecturer on Law, Harvard Law School; partner and former managing partner, Drinker Biddle & Reath, Phila.; Recipient, ABA Michael Franck Award for "outstanding contributions to the field of Professional Responsibility," 2007; Member, ABA Ethics 2000 Commission, Former Chair ABA Ethics Committee; Author, Legal Tender, ABA Publications; Member Recipient, ABA Pro Bono Publico Award, 2005*

Monroe Freedman, Garden City, NY. *Professor of Law and former Dean, Hofstra University Law School; Visiting Professor, Georgetown University Law School, 2007-2009; Recipient, ABA Michael Franck Award for "outstanding contributions to the field of Professional Responsibility," 1998; author, Understanding Legal Ethics (3d ed., 2004) (with Abbe Smith)*

Mark Harrison, Phoenix, Arizona. *Adjunct Professor of Law teaching legal ethics, University of Arizona and Arizona State University Past President, State Bar of Arizona, 1975-6; Former Chair, ABA Joint Commission to Evaluate the Code of Judicial Conduct, 2003-7; Recipient, ABA Michael Franck Award for "outstanding contributions to the field of Professional Responsibility," 1996*

Burnele V. Powell, Columbia, South Carolina. *Miles and Ann Loadholt Professor of Law and Immediate Past Dean of the University of South Carolina School of Law; Former Dean and Professor of Law at the University of Missouri--Kansas City School of Law and Professor of Law at the University of North Carolina; past Chair, ABA Center for Responsibility Coordinating Council; liaison to MJP commission from ABA CPR Coordinating Council*

Seth Rosner, Saratoga Springs, NY. *ABA Board of Governors,1997 to 2000; Board liaison to Commission on the Rules of Professional Conduct (Ethics 2000 Commission); Board liaison to Commission on Multidisciplinary Practice; former Chair, ABA Professionalism Committee, ABA Lawyer Competence Committee, General Practice Sections of the ABA and the New York State Bar; past Chair, ABA Center for Responsibility Coordinating Council; Adjunct Professor of Law at N.Y.U. Law School,1961-1989; has represented seven different entities in the ABA House of Delegates; two terms on the ABA Ethics Committee; founding Director and past President of the Association of Professional Responsibility Lawyers; founding member and Chairman emeritus of the Board of Governors of the Josephson Institute of Ethics*

# Rule 1.8.2 – Public Comment – File List

X-2010-425-12l SDCBA [1.8.2]

X-2010-513-12 OCTC [1.8.2]

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**State Bar Board of Governors District Nine Representative**
Wells B. Lyman

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
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| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
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| | |
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| Rule 3.8 | Special Responsibilities of a Prosecutor |
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| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of Delegates of California Bar Associations District Nine Representative**
James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

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

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

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

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

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

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

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

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

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

**CONCLUSIONS (pick one):**

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

[ ] We approve the new rule with modifications.*

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

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
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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.8.2. Use of Current Client's Confidential Information.**

1. OCTC supports the rule and especially the use of informed written consent. Comment 1, however, seems unnecessarily long. The examples could either be stricken or tightened.

# Rule 1.8.3 – Public Comment – File List

X-2010-421kk COPRAC [1.8.3]

X-2010-425-13m SDCBA [1.8.3]

X-2010-513-13 OCTC [1.8.3]

X-2010-529e SCCBA [1.8.3]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 1.8.3

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.3 - Gifts from Clients. COPRAC supports the adoption of proposed Rule 1.8.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
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Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

## Hollins, Audrey

**From:** Ross G. Simmons [ross@rblaw.com]
**Sent:** Friday, November 16, 2007 11:43 AM
**To:** Hollins, Audrey
**Cc:** McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
**Subject:** SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
**THE SIMMONS FIRM, ALC**
Suite 390 The Promontory
11440 West Bernardo Court
San Diego, CA 92127-1655
v - (858) 676-1668 x304
f - (858) 676-1839
ross@rblaw.com
www.rblaw.com

U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

**MEMORANDUM**

Date: November 16, 2007

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

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

Re: "2nd" PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 1.8.3 Gifts From Client [4-400]**

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

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

* * * * *

Comment 1:

We propose that the proposed rule be modified to track closer to its ABA Model Rule counterpart, with the exception that the term "induce," which is currently applicable at CRPC Rule 4-400, replace the term "solicit" which otherwise is used at MR 1.8(c). We have preserved the prior Comment of the commission, but have provided additional language consistent with our proposal.

Clean and highlighted versions of our proposal are attached.

Rationale for Comment:

**1. There is Merit in Unification Absent Reason for Differentiation**

Generally, based on the highlighted version, it is our view that by merely replacing the word "solicit" with the word "induce," use of the phrasing and structure of Model Rule 1.8(c) does not differ in materials respect from Rule 1.8.3, proposed by the Commission.

**2. Broader Interpretational Guidance**

We view the proposed rule as appropriate and practical in the abstract, but unduly vague in the particulars. As a result, we would prefer greater instruction related to the terms

"substantial" and "modest," in distinguishing between gifts that are permissible and those that are not. This affects proposed Rule 1.8.3(a)(1) & (2), and Comments [1] & [2].

We acknowledge that in taking issue with the term "substantial," we are calling into question a term used in existing CRPC 4-400 and ABA MR 1.8(c), and to a lesser degree in view of its outright prohibition, Restatement of the Law Governing Lawyers §127(2)(b) ("insubsubstantial"). It is our hope that by aligning the structure of proposed Rule 1.8.3 with MR 1.8(c), that the authority of ABA Model Rules jurisdictions will be persuasively applied in California, to provide a larger pool of precedent upon which interpretation of the Rule may draw, and hence assist in providing much-needed guidance in the application of those terms.

Consistent with this strategy, note that we have similarly borrowed the term "general standards of fairness" from ABA MR. 1.8(c), in an attempt to provide practitioners with at least a modicum of guidance relative to a standard of review.

### 3. Attempt to Induce

We disagree with the addition of the phrase "attempt to induce," and therefore have removed it from our proposal.

Admittedly, addition of the "attempt to induce" adds a broader sweep to proposed Rule 1.8.3 than its predecessor, toward curbing the potential for undue influence exercised by a lawyer as it relates to his or her client. However, it's subjectivity—it is not being dependent upon actual receipt of the gift—makes application of the phrase hopelessly unpredictable. There is, for instance, utterly no differentiation made between an intentional "attempt to induce" as opposed to a negligent "attempt to induce," which is to say that whether or not there was an "attempt to induce" or not could vary dramatically if viewed from the attorney-donor, the client-donee, or an interested third-party seeking to invade the attorney-client relationship. It is a phrase that makes both compliance and enforcement little more than conjecture. Too, nothing in the Commission's work indicates that existing Rule 4-400 has been deficient in its application to date so as to warrant the sort of modification proposed.

Finally, to the extent attempted misconduct is to be subject to discipline, as a general proposition, it would seem to make sense to do that in broad strokes as does ABA MR 8.4(a), rather than piecemeal as this phrase would seem to invite California's body of authority to do.

### 4. General Standards of Fairness

Exempt relationships have been moved to Comment 4. This permits our proposed version of the rule to track closer to ABA MR 1.8(c), for the reasons discussed above. Too, we do not believe that we undermine the Commission's intent by relocating other examples of excluded relationships to Comment 4, which has been added to explicitly highlight by example the term "close, familial relationship."

**Rule 1.8.3 [4-400] Gifts From Client**

A lawyer shall not induce a client to make a substantial gift, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

**Comment**

[1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients, provided the transaction meets general standards of fairness. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce a substantial gift from a client except where the lawyer is related to the client. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.

[3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

[4] The term "close, familial relationship," apart from those expressly set out in the Rule, is intended to extend to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable).

[5] In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit."

**Rule 1.8.3 [4-400] Gifts From Client**

~~(a)~~ A lawyer shall not~~:~~

~~(1) induce or attempt to~~ induce a client to make a substantial gift, including a testamentary gift, ~~to the lawyer~~ or ~~a person related to the lawyer, or~~

~~(2)~~ prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift~~,~~

unless the lawyer or other recipient of the gift is related to the client.

~~(b)~~ For purposes of this ~~Rule~~paragraph, related persons include a spouse, ~~registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse,~~child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

**Comment**

[1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients, provided the transaction meets general standards of fairness. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce ~~or attempt to induce~~ a substantial gift from a client except where the lawyer is related to the client ~~as set forth in paragraph (a)~~. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.

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[5] In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit."

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.8.3. Gifts From a Client.**

1. The first sentence of Comment 1 seems unnecessary in light of the clear language of the rule.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

> This e-mail may contain confidential and privileged material for the
sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| | | |
|---|---|---|
| | ~~take action that could prevent substantial harm by a client. To continue to prevent an attorney from making that judgment actually serves to undermine the profession as a whole and impair attorneys' ability to maintain a reputation that ensures the respect for the judicial system. No valid argument has been posited to distinguish California lawyers and the practice of law in California from attorneys in the remainder of the country such that would justify California maintaining its parochial inviolate rule of attorney-client confidentiality. Not one example has been cited from any other jurisdiction to suggest that the exceptions included in the ABA Model Rule erodes the attorney-client relationship to the detriment of clients, the legal profession, society or the judicial system. Simply because California has always had an inviolate rule is not reason enough to continue it.~~ | |
| ~~Rule 1.8.1: Business Transactions With A Client and Acquiring Interests Adverse to a Client~~ | ~~Comment [5] should include a reference to the new formal ethics opinion interim number 05-001, which analyzes the meaning of an "attorney's interest" in applying this rule; the formal ethics opinion is consistent with the proposed change to this rule regarding modification of attorney fee agreements.~~ | ~~The current version does not incorporate any reference to the formal ethics opinion. It appears from a cursory glance that they are not referencing any formal ethics opinions in their comments to any of the rules.~~ |
| Rule 1.8.3: Gifts From Clients | *1.8.3 (a)(2):* The following should be added to the last sentence of this section to read: "…unless the lawyer…is related to the client or the client has had independent advice from another lawyer." This change, then eliminates the need for | The current version remains the same as the original and does not incorporate the recommendation of the SCCBA. The exception is only if the lawyer is |

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| | Comment [2] as currently drafted. Comment [2] with the recommended change in the substance of the rule, should read as follows: "It is the intent of this rule that it be applied consistent with PC 21350 et seq." | related to the client. |
| Rule 1.8.11: Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9 [This was Rule 1.10; now there is no Rule 1.10] | [NOTE: Since the SCCBA comment on this, a California 2nd Appellate District Court opinion was published that comports with the SCCBA recommendation: *Kirk v. First American Title*, April 7, 2010. ] The RRC proposal is to adopt the ABA Model Rule. However, the ABA Model Rule used by the RRC is the model rule pre-February 2009. On February 16, 2009, the ABA amended Model Rule 1.10 to add provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening. The SCCBA recommends that the 2009 amended version of Model Rule 1.10 be adopted. The amended version recognizes the reality of modern day law practice, which involves the mobility of attorneys, the lateral movement of attorneys among firms and the practical reality that if certain parameters can be met, attorneys can be screened effectively and timely so that a conflict of interest is not created for the attorney's new firm or legal organization. | In the released 69 rules, the State Bar Board of Governors rejected the RRC recommendation to adopt a version of the ABA Model Rule 1.10. The current release does not include any Rule 1.10. Instead, they have added Rule 1.8.11 which imputes all conflicts by one lawyer to the firm. There is no screening at all provided for in the current version. The current version of Rule 1.8.11 reads very simply as follows: "While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them." |
| Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral | Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the "negotiating employment" stage. The rule should apply to the interviewing stage though requiring the judges' approval for an interview is not necessary. The following language should be added at the conclusion of | The current version partially addresses the concerns raised in the SCCBA recommendation. The language has been changed from "negotiating employment" to "discussions regarding prospective employment." |

# Rule 1.8.5 – Public Comment – File List

X-2010-425-14n SDCBA [1.8.5]

X-2010-513-14 OCTC [1.8.5]

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

## Hollins, Audrey

**From:** Ross G. Simmons [ross@rblaw.com]
**Sent:** Friday, November 16, 2007 11:43 AM
**To:** Hollins, Audrey
**Cc:** McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
**Subject:** SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
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U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

**MEMORANDUM**

Date: November 16, 2007

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

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

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 1.8.5** Payment of Personal or Business Expenses Incurred by or for a Client [4-210]

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

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

* * * * *

Comment 1:

The modified rule is approved as proposed.

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.8.5. Payment of Personal or Business Expenses by or for a Client**.

1. Comment 3 should be in the rule and not a comment.

# Rule 1.8.6 – Public Comment – File List

X-2010-421e COPRAC [1.8.6]

X-2010-425-15o SDCBA [1.8.6]

X-2010-450f Bradley Paulsen [1.8.6]

X-2010-513-15 OCTC [1.8.6]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

May 6, 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 1.8.6

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.6 - Payments Not From Client. COPRAC supports the adoption of proposed Rule 1.8.6 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

LEC Rule Volunteer Name(s): Jack Leer

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

Proposed New Rule No./ Title: Rule 1.8.6

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

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

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

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

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

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

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

*attorney actually accepts compensation.*

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

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

**CONCLUSIONS (pick one):**

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

[ ] We approve the new rule with modifications.*

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

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

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

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

June 4, 2010

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

Bradley T. Paulsen
4945 Pinnacle St.
Riverside, CA 92509
(707) 673-6982

ATTN: Audrey Hollins

**RE: Public Comment on Rules of Professional Conduct of the State Bar**
**State Bar Assigned Commission & Board of Governors Proposed Draft**

Dear Ms. Hollins, Commission, and Board of Governors:

First, I would like to thank the California State Bar, Commission, and Board of Governors for proposing a comprehensive public comment program pertaining to the Rules of Professional Conduct. The State Bar is one of the most powerful, if not the most powerful, governing boards in the State of California. Everything in the State is affected by the performance, discipline, integrity, interpretation of law, and ethical values of attorneys. I appreciate your attention to my comments regarding my public comment on some of the proposed rules as noted below.

I would like to give some of the reasons why I am so passionate about the State Bar's request for public comment.

I have worked in the construction industry since 1973 and have experienced many excellent attorney performances, but what compelled me to write this public comment are the atrocities some attorney groups are imposing on everyone in the State of California. I can only speak for the areas of law that have involved and impacted me; therefore, I am reviewing the proposed new and amended rules based on the needs for discipline or procedures from this point of view. I implore that you scrutinize these areas of concern considering my front line experience with the issues.

Please note that my letter/public review demonstrates there is no rational or legal point of view for an attorney to solicit the public with flyers, door to door, mail or phone, except for their own monetary gain. The attorneys confuse the consumer (homeowner) by not candidly

disclosing many of the issues that will directly affect him/her and the value of his/her home, for years to come (see attached copy of flyers).

I also refer to the Senate Bill SB 800 and the Civil Code in the bill. Currently, there are soliciting attorneys targeting the neighborhoods throughout the State of California with misleading flyers and information targeting the builders in the State of California. **It is like the Wild West, where there is no sheriff in town to uphold the law and the soliciting attorney groups are taking over for profit with blatant disrespect for administration of civil justice**. Under Title 7 (Civil Code §907) (a) refers to an SB 800 Claim document having the same force and affect as a notice of commencement of a legal proceeding. The problem is that the regulations and procedures are not being enforced by the judicial system. An SB 800 Claim is not a legal action, yet the judicial system is not governing the soliciting attorneys appropriately to ensure the public or the builders are protected from their manipulation of the laws, instead the system is allowing these groups to proceed with no regard to the procedures that were previously laid out. In this **NO Law Zone,** costs are born by all parties, except the Soliciting Attorney Groups. **You can see why so many of the builders, subcontractors, insurance companies and unknowing families need the State Bar of California's help in this matter.**

Examples: The Soliciting Attorney Groups do not notify the homeowners that they will have to disclose their home to future buyers, lenders, and insurance companies, that their home is involved in an SB 800 Claim or lawsuit for what the attorney groups' claim are construction defects. The Soliciting Attorney Groups fail to disclose that the builder is willing to take care of their warranty items as outlined in their contract and the SB 800 process. The SB 800 laws listed under Chapter 2: Actionable Defects (Civil Code Section 896) and (Civil Code §910), Homeowners Notice of Claim of violation of functionality standards make "Functionality Standards" the basis for a cause of action dealing with the construction of a home brought by the homeowner. This would only apply if the builder is aware of the request and/or failing to comply. The SB 800 Senate Bill laws are entitled "The Right To Repair Law or Fix It Law".

All builders take a tremendous pride in the communities/homes they build and their warranties they provide. Civil Code §900 – Fit & Finish One –Year Warranty is not one of the 45 "Functionality Standards", and is not a basis for any action seeking recovery of damages arising out of, or related to, deficiencies. The Soliciting Attorney Groups solicit and create SB 800 Claims, whereby they submit "Fit & Finish" items, manufacturer warranty items, lack of maintenance items, and occupant abuse items as the complete or majority of the claim items submitted. In many cases, they do not even view the items, but rather submit a pre-printed list of items to start their claim. **It is common to hear homeowners, in a filed action, state they are not aware of being involved in an SB 800 Claim or**

**lawsuit. If they are not aware of the claim, how did their name end up in the filing?** Some of the homeowners state that they only sent back a questionnaire. Others were so perplexed, that they requested documentation proving they are listed in the claim or lawsuit. Per the Daily Journal article dated May 26, 2010, ***"Some of our clients' homeowners are being added to suits without even being aware of it,"*** said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. ***"I can't tell you the number of times I've seen a defect claim that says 'defective stucco', and the house doesn't even have stucco".***

The Soliciting Attorney Groups are not keeping current with the claims they file. Opposing council must demand that homes be dismissed that have been foreclosed on or a change in ownership. The Soliciting Attorney Groups are only interested in the quantity of homes and the end result settlement opportunity. Many of the Soliciting Attorney Groups are not familiar with a Builder being involved with the community that they have targeted, so they aggressively go to the Claimants/Litigants to tell them not to communicate or follow the warranty procedures that have been agreed to in the purchase agreement with the Builder, even if the builder is ready to service the home. **This is a form of highway robbery for a Soliciting Attorney Group to instruct a homeowner to not follow his/her contract with the Builder.**

Per Civil Code §910, Homeowner's Notice of Claim of Violation of Functionality Standards Section 910 states that; **Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following pre-litigation procedures:**

**(a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant's claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant's name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**

**(b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

**and, if a homeowner seeks to do so, that request shall not satisfy the notice requirements of this section.**

In reference to Section 910, the Soliciting Attorney Groups are instructing homeowners to not communicate with the builder or allow them to service warranty items requested. **This is in direct violation of Civil Code §910 (b).** The Soliciting Attorney Groups lure the individuals in by stating to the homeowner they will get a check. These deceiving tactics are blatantly noted in the solicitation flyers without any acknowledgement from the courts or California State Bar. The Soliciting Attorney Groups fly under the radar so that is one reason why this Public Comment is so desperately needed and appreciated.

The main issues retrieved from the information noted above and in this Public Comment are to assist in amending the Rules of Professional Conduct and find a way to enforce the Rules of Professional Conduct of the State Bar of California, especially pertaining to disregard to following Civil Code, twisting the Law/Civil Code, extrapolation tactics and direct misconduct pertaining to ethics. This occurs in the Soliciting Attorney Groups' programs. **Soliciting should be banned. There should be random reviews of attorney claim/case performance to ensure attorneys are complying with the law and the Rules of Professional Conduct.** This problem has created extreme costs and red tape, which may affect you, your children, grandchildren, and the citizens of the State of California, if it has not already done so.

I appreciate the hard work and dedication of the California State Bar, the Commission, Board of Governors, and the Supreme Court, especially with the limited funds in the State budget. If no action is taken to avert this continued blatant disregard for public concern, the State budget will become even further in debt. The above noted tactics have begun to impact many California families financially such that they have moved from California in order to survive the financial burdens imposed upon them by the frivolous spending of tax dollars for attorney fees. In addition, many businesses have chosen to relocate out of state and new ones refuse to start a business in California due to the litigious environment. We need these tax dollars and job creation in order to get California back on track. Do not scare these businesses away.

The State Bar of California must help its citizens. You are the only entity that can make a change.

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**
Rule 1.0 (a) (1) & (2) to Protect the public and protect the interest of clients. *The Soliciting Attorney Groups noted above are not disclosing issues that will affect the public, but rather adversely affect the client.*

Some issues per ConAm Economic Research Study from November 11, 1996 that will directly affect the public and clients are as follows:

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*
Litigation/Claims cause insurance to go up.
Litigation/Claims force builders to raise their prices.
Litigation/Claims burden the judicial system and expend judicial resources.
Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

Note, the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.
*As noted above, the Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.*

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.
*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

Question: How is the Board of Governors summoned or requested to review and/or discipline members as provided by law? The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups. As I will say over and over again, the opportunity for Public Comment is so important.

**Rule 1.1 Competence**

Rule 1.1 (a) A lawyer shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

*The Soliciting Attorney Groups repeatedly and knowingly fail to follow the Civil Code §910 and other areas as outlined above in this public comment. They are reckless in their actions, since they have not been disciplined and only intend on driving up the costs for the builders to settle, in lieu of, going to court. Some mediators and arbitrators do not take into account the attorneys willful failure to follow Civil Code and Ethics. The State Bar is not involved,* ***so it goes on.***

**Rule 1.4 Communication**

Rule 1.4 (a) (2) reasonably consult with the client about the means by which to accomplish the clients objectives in the representation.

*As explained above, many homeowners do not even realize they are involved in a Claim/Lawsuit, nor do they know why. The soliciting attorney supplies the propaganda literature that certain problems are prevalent in the community without even investigating or observing the home first for the sole purpose of making a monetary settlement for the attorney group. The Soliciting Attorney Groups leave the homeowners wondering if they really do have a problem, then they tell the homeowners not to talk with their builder, because the builder will take care of warranty items for their customers. This is not accomplishing the clients' objectives, because they don't know what the objectives are. In many cases, the client only assumes that they may receive a settlement check. The Soliciting Attorney Groups use this tactic to enlist the client and gain his/her attention.*

Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

*The Soliciting Attorney Groups only follow the course of a witch hunt to find a construction defect to build their settlement demand and do not inform the homeowners that the builder will take care of any warranty deficiencies. The builder will perform the work, in most cases, immediately; while the Soliciting Attorney Group takes months and sometimes years to settle, leaving little or no work being performed to the home. The homeowner may receive a small settlement check years after the fact, which by this time, if something was in need of repair would most certainly have deteriorated or escalated to further repair necessary. These tactics are disgusting and gives the complete legal profession a negative reputation.*

**Rule 1.5 Fees For Legal Services**

Rule 1.5 (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee or an unconscionable or illegal in-house expense.

*In reviewing court records on open and closed cases/SB 800 Claims, you will notice the amounts of money the Soliciting Attorney Groups are demanding. These demands by the Soliciting Attorney Groups PROVE that they are acting in an unconscionable manner. You will notice they use the rule to "aim high and then settle for as much as you can get", instead of representing a client on a legitimate claim (Functionality Standard) request by the client, using realistic numbers for cost, etc.*

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.
*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

**Rule 1.7 Conflict of Interest: Current Clients**
Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
*The Soliciting Attorney Groups serve the SB 800 Claims and lawsuits for their personal interest of monetary gain through the settlement of the numbers of homes that they can claim to have defects. The use of extrapolation is rampant and the actual concerns or needs of the individual client are foregone. As noted earlier, many clients have stated they did not even know of the SB 800 Claim or lawsuit, so their interest is not taken into consideration. Many homeowners have personally told me that they had an item they wanted serviced which was not even listed. The reason for this is that the Soliciting Attorney Groups are only concerned with the quantity of claimants they can name in the filing. As you are fully aware, the money is in the numbers. In some cases, they do an inspection on a few homes and may not even discover any issues with the home, yet they still list the owner as a Claimant. As you are aware, the SB 800 process is the "Right To Repair", but the same attorney groups tell the homeowners not to talk to the builders or let them do any work.*

Rule 1.7 (b) (4) Each affected client gives informed written consent.
*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

*the Soliciting Attorney Groups. See attached Soliciting Attorney Group "Homeowner Profile Sheet". Through this deception, the homeowner is added to a SB 800 Claim or lawsuit.*

**Rule 1.8.6 Payments Not From Client**

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) The client gives informed written consent at or before the time the lawyer has entered in the agreement for, charge, or accepted compensation from on other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

**Comment (noted in the proposed new or amended rules)**

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client, except where the lawyer also represents the payer in the same matter.

I personally experienced a Soliciting Attorney Groups' client who was involved in a construction defect mass action lawsuit who had a severe mold problem in the home from a slow leak at the ceiling. The client was a single mother with two small children who worked as a nurse. The builder learned of the mold (severe mold covering 100 to 200 sq ft) and told the homeowner they would service/repair the mold and leak item. The builder offered to have the crew there within a day to get started and would put the mother and children in a hotel during the repairs. The Soliciting Attorney Group, an extremely aggressive firm, told the homeowner not to talk with the builder or allow them to service the home. The minimum range of builder's repair cost for this severe mold and leak would be in the neighborhood of $10,000.00 to correct. I was told by a homeowner in the neighborhood that the case settled for approximately $500.00 per home to the homeowners. This single mom was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Groups to deceive the homeowner with a small settlement amount. The catalyst for the claim was the fees the Soliciting Attorney Group stood to gain.

Again, random review and/or inspections are needed from the State Bar on attorney actions and processes used in lawsuits and SB 800 Claims.

I hope this public comment, along with all other public comments, will benefit and assist the State Bar of California with the amendments of the Rules of Professional Conduct. Please feel free to contact me if you have any questions, etc. I am extremely passionate about the failure of the system to protect the public.

Thank you for your time in these important matters.

Sincerely,

Bradley T. Paulsen
Concerned Citizen

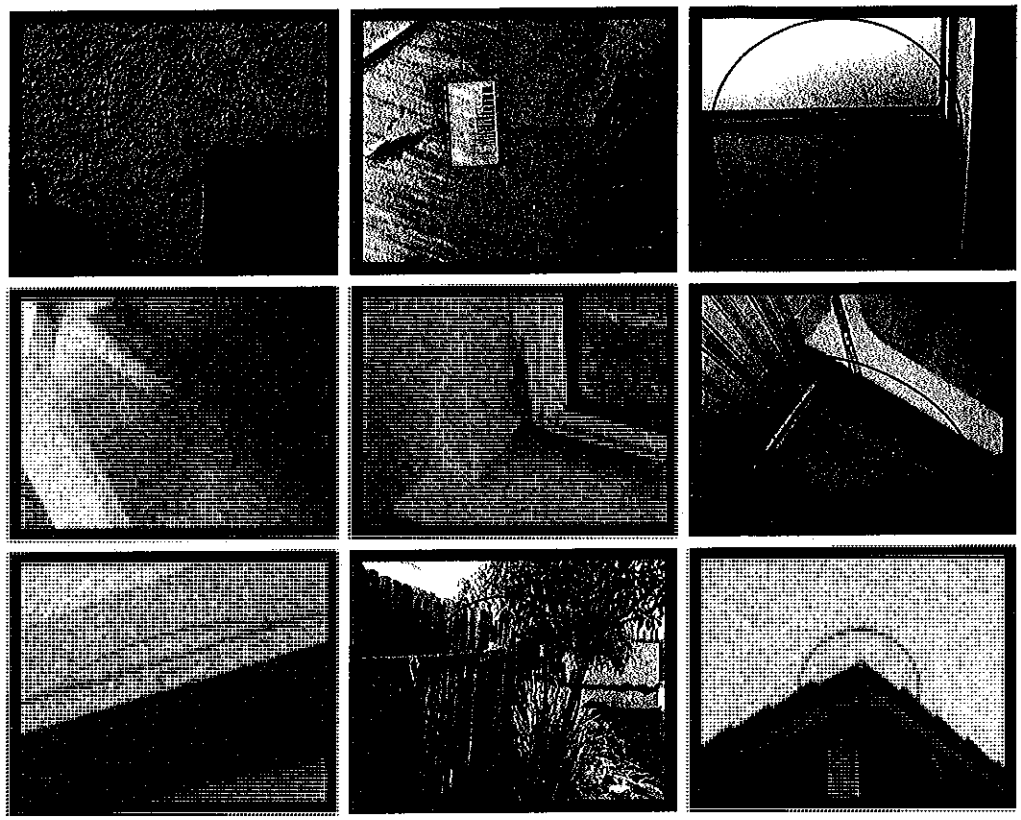
/encl

# MAK

www.maklawyers.com

MILSTEIN, ADELMAN & KREGER, LLP

# NEWSLETTER



THE ABOVE PICTURES ARE A RANDOM SAMPLE OF VISUAL INSPECTION PHOTOGRAPHS TAKEN BY OUR EXPERTS FROM SIMILAR COMMUNITIES.

## NUMEROUS [redacted] HOMEOWNERS IN YOUR CORONA COMMUNITY HAVE FILED A LAWSUIT AGAINST THE BUILDER FOR CONSTRUCTION DEFECTS! YOU CAN STILL JOIN TOO!

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners. Original ownership is not required to participate. Each home will be inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:


**Anneke Stewart, Esq. extension 135 or**

**Lisa Appelbaum extension 146 or**

**2800 Donald Douglas Loop North Santa Monica, California 90405**

**Toll Free: (888) 835-8055**

**Fax: (310) 396-9635**

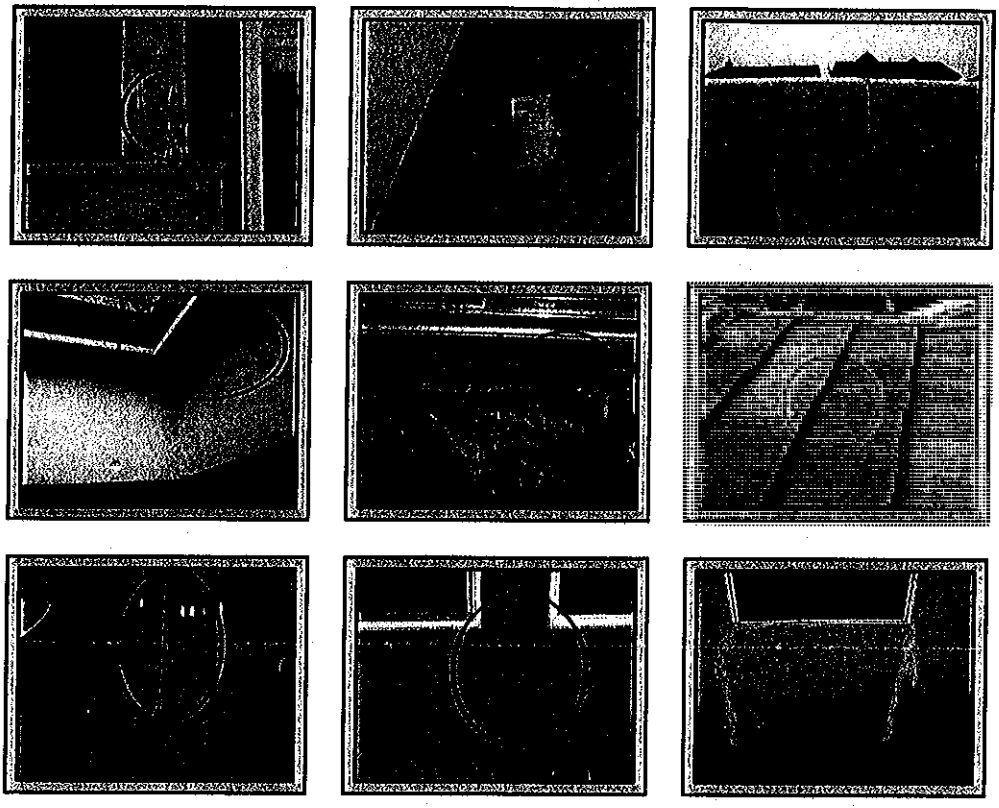

**Numerous [redacted] homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged Stucco, Mold & Mildew Growth, Roof Installation & Resulting Leaks / Water Damage & Separation of Roof Eaves, Poorly Framed Windows & Doors, Carpet Installation, Peeling / Cracking Paint, Poor Priming (Cracks in Exterior Wood Trim), Moisture Intrusion through Foundation, Plumbing Deficiencies, Electrical Installations, Heating & Cooling System Deficiencies, Door Jamb Separation, Insect Intrusion, Cabinet & Drawer Problems, Cracking Concrete & Slabs, Tile & Grout Installation / Cracking, Fence & Gate Damage, Landscape, Grading & Drainage Problems & Others.**

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

# NEWSLETTER

MILSTEIN, ADELMAN & KREGER, LLP

January 2009



These pictures are from your development. They are a sample of photos of the particular types of defects homeowners from your community have reported or are experiencing.

## HOMEOWNERS IN YOUR MORENO VALLEY COMMUNITY FILE LAW SUIT FOR CONSTRUCTION DEFECTS AGAINST THE BUILDER OF THEIR HOMES,

[redacted]

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

Enclosed please find a profile sheet for your completion and prompt return by either fax or in the postage-paid envelope we have provided. Whether or not you choose to participate in the litigation, the information you provide will be very helpful to your Moreno Valley community and their efforts in this action.

For additional information, please fill out and return the postage-paid reply card enclosed or contact:


David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop North

Santa Monica, California 90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635


[redacted]

*This newsletter is intended to comply with California Rules of Professional Conduct, Rule 1-400.*

*MILSTEIN, ADELMAN & KREGER, LLP*

[redacted]

## HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____ OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME? _____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____ NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

[redacted]

[redacted]

Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sinkinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICIES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

[redacted]

June 27, 2008

**Re:** [redacted] **Construction Defects***
**Our File Reference # P 119-LMRO**

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within t[redacted] Residential Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / RL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW
*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners. Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME [redacted] | CASE NUMBER |
|---|---|

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By:_____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

**FOR A&K USE ONLY**

GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0405

Anderson & Kriger
ATTORNEYS AT LAW

# Homeowner's Contingent Attorney Fee Agreement



*A Professional Law Corporation*

THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is: [redacted]

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

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***(Continued on reverse)***

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| [redacted] | |

Anderson & Kriger

*A Professional Law Corporation*
**Construction Defect & Community Association Law**
2155 Chicago Avenue, Suite 300
Riverside, CA 92507
**(951) 787-7146**
Fax: (951) 787-7168

# *FINAL NOTICE !*

**The Riverside law firm of Anderson & Kriger is currently proceeding with a lawsuit in the [redacted] Housing Development on behalf of many of your neighbors.** We have been given a final opportunity to revise the complaint, adding additional homes. This is your opportunity to join the ongoing lawsuit.

Some of the problems that your neighbors are experiencing include:

- **Roof leaks** and/or **loose, slipping or cracked tiles**
- **Stucco and/or drywall cracks**
- **Inadequate paint**
- **Water ponding in front or back yards**
- **Dust, wind and/or water coming in through and around windows**
- **Plumbing problems.**

Take a moment and look around your home for indications that you are experiencing some of these problems. If you are noticing staining around your windows, or on your ceilings, or more problems, please call us, we can help.

**Anderson & Kriger** has been helping homeowners obtain compensation for defective homes for 20 years. We have a local office in downtown Riverside to serve your needs with individual attention to you and your home. We will arrange for an expert to inspect your home and will handle all legal aspects of your case with no money out of your pocket.

This case is being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to join your neighbors in their ongoing lawsuit, please sign and return the enclosed Contingency Fee Agreement or feel free to contact our Riverside office at (951) 787-7146 for additional information.

Thank you,
Anderson and Kriger
Rhonda Harrington
Rhonda Harrington

*This advertising communication is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

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REAL ESTATE • May. 26, 2010

# Searching For Cracks In Construction Law

**Truce Breaks Down Between Developers, Builders and Lawyers Over Fixes to Housing Defects**

By Jason W. Armstrong

Daily Journal Staff Writer

Seven years ago, California homebuilders won extra liability protection when tiles started slipping off roofs and cracks began snaking across stucco walls.

Senate Bill 800, known as the "Right to Repair Law," gave builders the chance to fix defects in their products before being sued if they complied with a lengthy list of pre-litigation filings and procedures.

Now, builders are urging lawmakers to re-tool SB 800 cracking down on what developer lawyers said is a recent increase in plaintiff attorneys filing defect lawsuits without giving their clients sufficient opportunity to make repairs.

The problem, according to the builder attorneys, is that plaintiff lawyers are looking for cracks in the law by seizing on instances in which companies didn't file "every single piece of paperwork" correctly under SB 800, such as notices of the law's provisions on a property's title. They also accuse consumer attorneys of sidestepping the law by soliciting class-action clients through mass mailings, instead of working with developers through the statute.

"In the past two years, we've seen a strong increase in [instances] in which the plaintiff's law firm made no attempt to go through the process or notify the builder, and instead went straight to the lawsuit," said Alan H. Packer, a partner with Newmeyer & Dillion in Walnut Creek, which represents several major builders, including Irvine-based Standard Pacific Corp.

Plaintiff attorneys, Packer said, "are trying to leave through the exit before they come in the entrance. All builders want is to see what needs to be fixed before they get sued."

Packer, who is a member of the California Building Industry Association's legal action committee, said the trade group has been "actively evaluating a variety of approaches" on reforming SB 800. He declined to elaborate.

Several lawyers who count on construction defect suits as their bread and butter denied wrongdoing in their filing strategies. Those include Kenneth S. Kasdan, a name partner with construction-defect firm Kasdan Simonds Riley & Vaughan, who said SB 800 has not driven builders to do complete, timely repairs, and that lawsuits are crucial to get real results. Kasdan's firm, which has offices in Irvine, Palmdale, Concord and Arizona, filed 164 defect cases involving 7,500 California homes that fall under SB 800.

In some cases, the homeowner sued because he or she did not accept the company's repair, Kasdan said. In other instances, his firm brought suit because the builder didn't fulfill SB 800 guidelines.

"You have to go through very specific steps. If the builder doesn't comply with those, the homeowner can

go directly to a lawsuit," Kasdan said.

State lawmakers passed SB 800, or Civil Code Sect. 895, in 2002. Also known as the "Fix-It Law," the statute, which applied to any home built after Jan. 1, 2003, was a compromise between developers and builders and plaintiff attorneys to more quickly resolve construction-defect claims while cutting back on the number of lawsuits. Less litigation and quicker fixes, the legislators reasoned, would help builders get insurance and lead to more housing being built at a time when limited new supplies were causing home prices to escalate. The law also narrowed the definition of defects to those affecting the "functionality" of a home.

The raft of "pre-litigation procedures" builders must follow to stave off suits includes responding within 14 days to a homeowner complaint. If the owner has an attorney, the builder must include that person on all subsequent communications. Also, the company must record a notice of SB 800's pre-litigation procedures on the property title, and must conduct inspections of the property within 14 days of being notified about the problem.

Within 30 days of the inspection, the builder can make a written offer to repair the defect and compensate the homeowner for damages. If it makes an offer, the developer also must include a written proposal to mediate the dispute if the homeowner chooses that route.

Homeowners have 10 years to file suit in most instances if the builder doesn't make a repair offer, flouts any of the pre-litigation processes or doesn't fix the problem correctly.

As the decade-long statute of limitations to file cases begins to wind down for homes not covered under SB 800, plaintiffs' lawyers are increasingly filing suits in developments where the law does apply, and builder lawyers accuse them of sidestepping the legal process.

"Some of our clients' homeowners are being added to suits without even being aware of it," said Kathleen F. Carpenter, who chairs San Francisco-based Cooper, White & Cooper's building industry and risk management practice group. "I can't tell you the number of times I've seen a defect claim that says, 'defective stucco,' and the house doesn't even have stucco."

Carpenter, who was part of the negotiating team of lawyers who drafted SB 800, also said plaintiff's attorneys are "carpet bombing" neighborhoods with lawsuit solicitation letters to "strike fear into homeowners that something is wrong with their houses."

In a notice distributed this month, which was obtained by the Daily Journal, Santa Monica-based Milstein, Adelman & Kreger asked residents of several streets in the 1,170-home master-planned Fairway Canyon development in Beaumont to contact the firm about joining a suit targeting a litany of alleged problems, including drywall damage, leaking windows, mold and cracking stucco. The mailer said previous builder repairs would not "prevent homeowners from participating" in the suit.

Such notices are legally sound, said Milsten Adelman name partner Mark Milstein.

"As long as ethical rules are followed, you can send those out," he said.

Milstein, who also was part of the legal team that worked on SB 800, said builders often do not adequately respond to homeowner complaints.

"A number of builders have been trying to do repairs as part of the process," Milstein said. "We're finding, in most instances, [companies] are not repairing to SB 800 standards."

Packer said his builder clients are not getting a chance to make repairs before being sued.

"There is something fundamentally wrong with how this litigation is going forward," he said.

Builders battling construction defect cases have had mixed results.

In a recent Placer County case, lawyers for Folsom-based Elliott Homes persuaded a judge to stay a defect case against the developer, which plaintiffs filed after Elliott Homes neglected to record certain documents on the property's title under SB 800, so the builder could take steps to comply with the law.

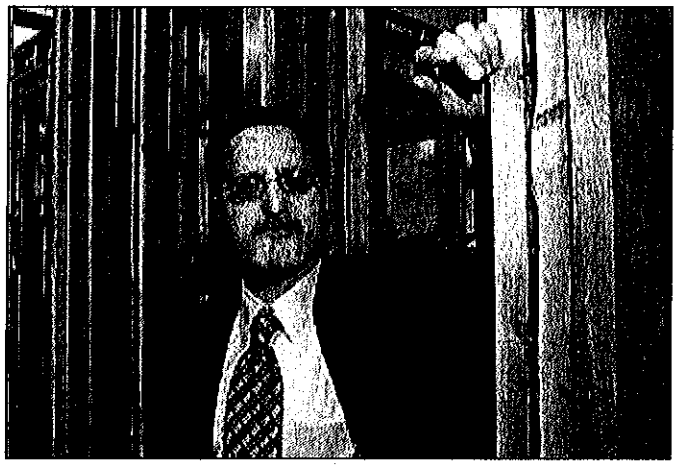
In a separate Sacramento County case, another judge earlier this year let a similar suit proceed because documents weren't recorded as specified by the statute.

"This is still new legislation, and how it will be interpreted is still being played out," said Richard H. Glucksman, a name partner with Chapman Glucksman Dean Roeb & Barger in Los Angeles, who represents homebuilders and general contractors in construction-defect litigation.

In one of the few published decisions involving SB 800, Standard Pacific Homes in August 2009 persuaded an appellate court to grant a writ of mandate staying a case in which a group of homeowners accused the company of building a defective San Bernardino County development. In the case, the 4th District Court of Appeal said the homeowners could not simply accuse Standard Pacific of not following certain code sections of SB 800 it was their burden to prove the builder didn't comply. *Standard Pacific Corp. v. Garlow,* E046844.

The justices tossed the case back to the trial court, which stayed it in December. The case is pending.

jason_armstrong@dailyjournal.com



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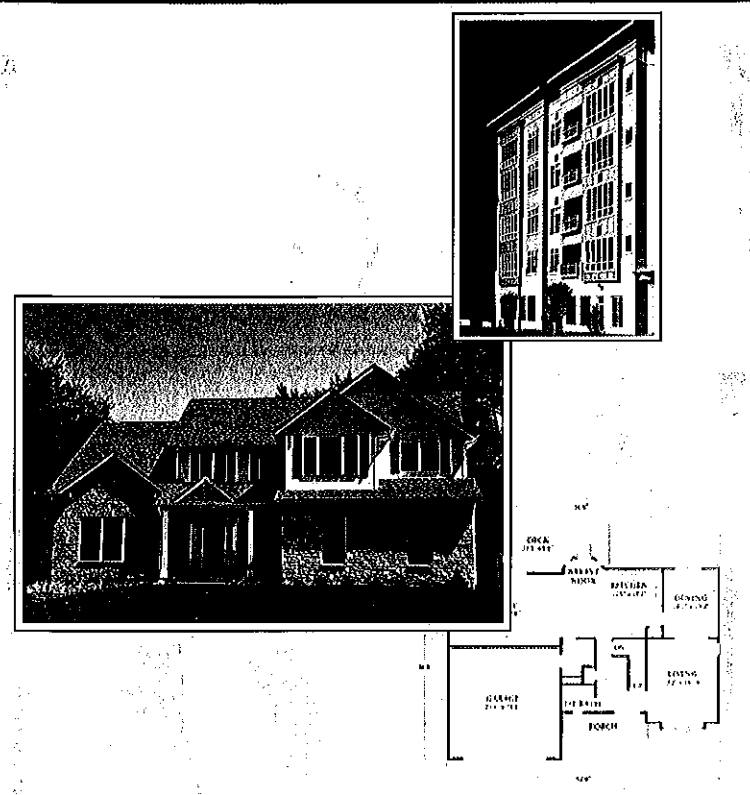
# Protecting Your Home's Equity

Vital information for homeowners from Citizens Against Lawsuit Abuse and the Construction Quality Committee of the Building Industry Association




BIA Orange County Chapter
17744 Sky Park Circle, Suite 170


Construction Quality and Sustainable Building Committee

## For Most Of Us, Our Home's Equity Is Our Greatest Asset. It Needs Protection.

As builders of the American dream, homebuilders take great pride in their work. California homes are built to some of the most rigorous standards in the nation. Homebuilders believe in the quality of their products and stand behind them with customer service staff dedicated to helping homebuyers with problems that may arise after they move in.

For many California homeowners, lawsuits alleging construction defects have led to the loss of their homes' equity, or the inability to access that equity. In this brochure, we will share with you studies that show how construction litigation might jeopardize your home investment and often does not even lead to repairs. And, we will show you positive alternatives to litigation, such as working with your builder to resolve any problems you may have.

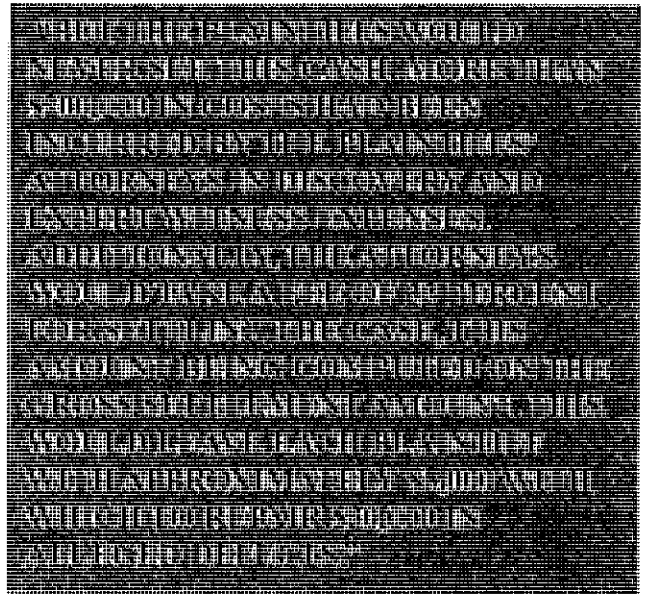
This brochure is provided to you by Citizens Against Lawsuit Abuse, which is dedicated to stopping irresponsible lawsuits that assert unfounded claims, or seek unsubstantiated damages, and by members of the Building Industry Association (BIA), who are dedicated to building quality homes and providing quality customer service both to original and future home purchasers.

## Litigation Reduces Home Values

The average litigated construction dispute in California generally takes two to five years to resolve. As the dispute drags on, it runs up costs and drives down housing values.

An article in the Santa Clarita Valley Signal entitled "A Tale of Two Tract Home Owners" illustrates why. It tells the story of a family that wanted to sell their small home and buy a larger one in order to accommodate the growth of their family. However, because they had joined a construction defect lawsuit months earlier, they were told by their realtor that they would have to disclose the approximate $30,000 in defects their attorney was claiming on their behalf and provide a buyer with a credit in that amount! The homeowners reluctantly decided to put their purchase plans on hold.

Two years later, the lawsuit finally settled for one-fifth of the amount claimed. After attorneys' fees were deducted, the homeowners were left with only $5,000 to repair $30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.[1]



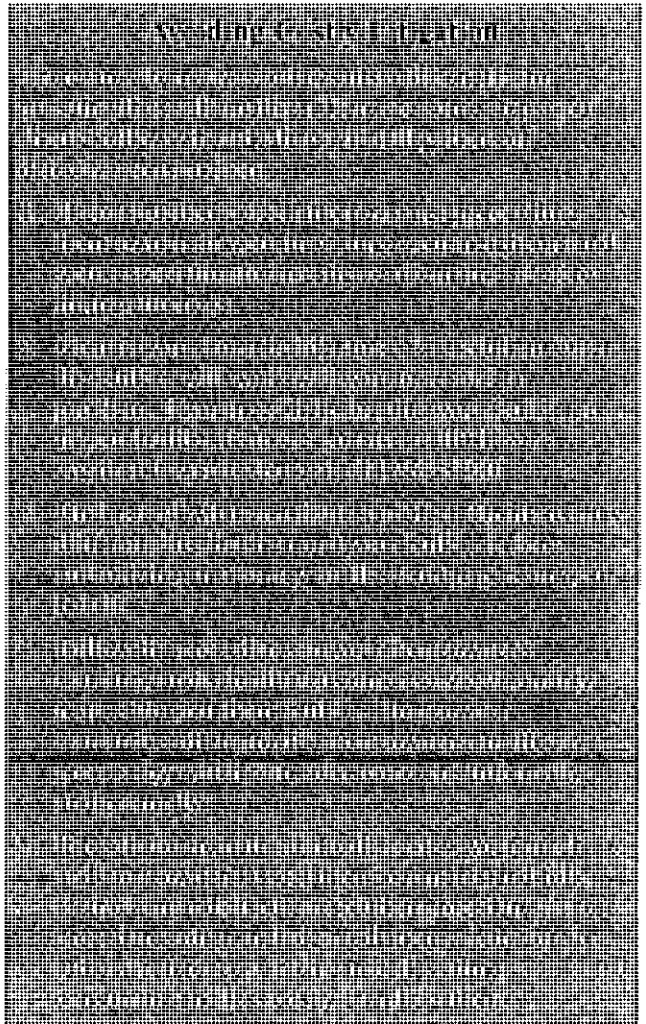
Similarly, a study of litigated and non-litigated properties by ConAm Research of San Diego showed that the value of condominium units in litigated projects dropped more than 10 percent, when compared to units in non-litigated projects. The study also found that homes in non-litigated projects were able to resell more quickly.[2]

Why? California law requires disclosure in real estate transactions. When you put your home up for sale, your realtor will be required to disclose that your home is, or was, involved in a construction defect lawsuit and identify any items that you claimed are defective in your home. Lenders often are reluctant to make home loans on projects that are, or have been, involved in litigation. And what prospective buyer would choose a home involved in a defect lawsuit over one free from litigation? Worst of all, what if the prospective buyer asks to see your repairs and you have to tell them that few, if any, of the supposedly-necessary repairs were ever made?

## Litigation Can Hurt Your Ability To Refinance

What if you need to refinance while your lawsuit is slowly creeping through the judicial system? According to ConAm Research, most lenders simply will not refinance loans on properties involved in defect litigation.[3]

The reason is simple. Homeowners involved in such litigation must notify lenders of their defect allegations and the costs being claimed to repair them. In some cases, attorneys have even claimed that repair costs exceed a home's purchase price. In others, homeowners must state that their home is worth less than its potential market value – maybe even less than the amount still owed on the house.



## Litigation Increases The Cost Of Housing

Why is California's housing market so expensive? While there are many factors, California's housing prices can be attributed, in part, to the onslaught of construction defect litigation over the last decade.

Litigation is costly. It increases the costs of construction. It causes insurance premiums to go up. It forces builders to raise their prices. It burdens the judicial system and expends judicial resources. It reduces competition in the marketplace as smaller builders are forced out of business. Ultimately, these costs are passed onto the consumer in the form of higher home prices. Homeowners should therefore ask themselves: "Is construction defect litigation really the answer?"

## When The Construction Defect Lawyers Call

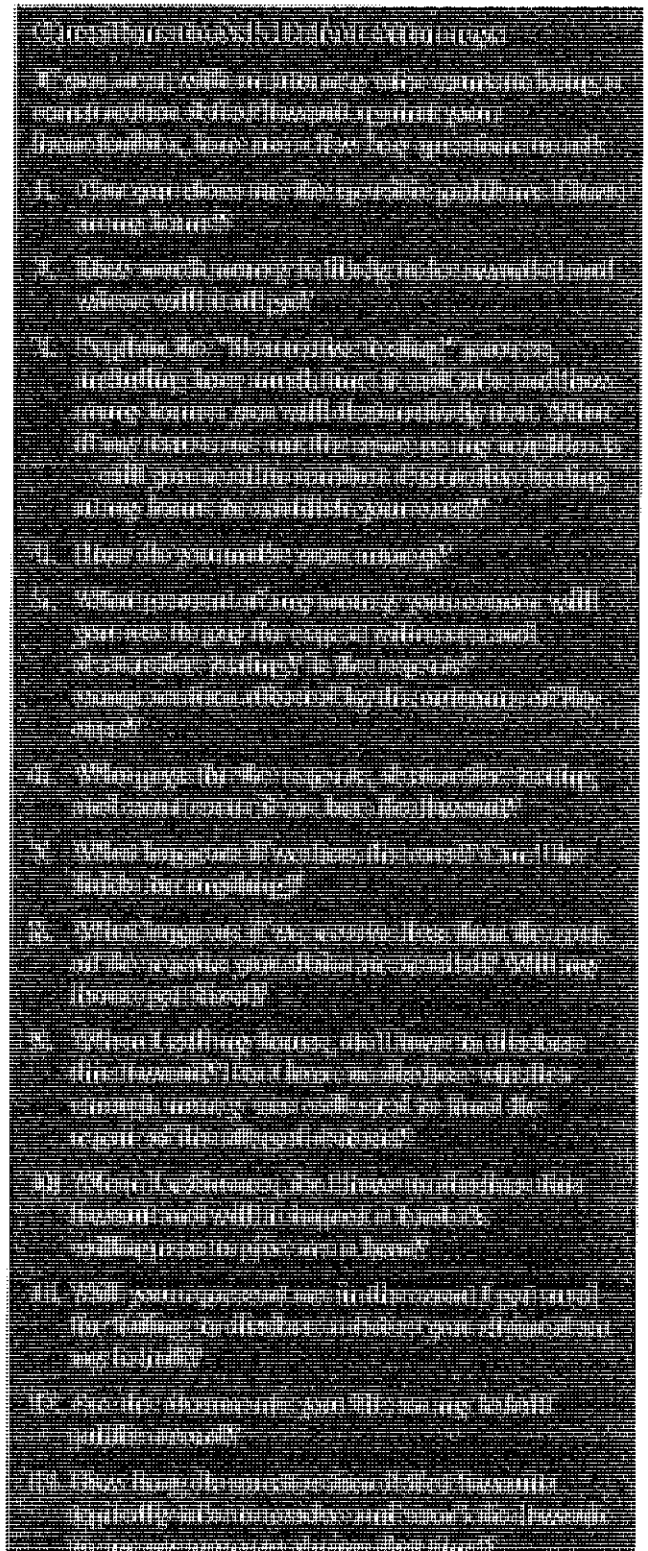
You received this brochure because, at some point, a construction defect lawyer may approach you about joining a lawsuit – even if there is no real problem with your home, or tract.

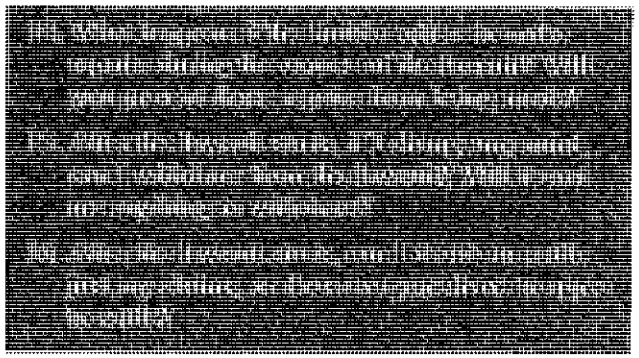
Why are you being targeted? Defect litigation is big business, and law firms market aggressively in neighborhoods throughout the state looking for that business. Lawyers will tell you that it is less expensive to settle a lawsuit than it is to defend one. Some may flash big dollar signs at you in an effort to put a lawsuit together. And, if you are a homeowners association board member, they may even scare you into believing you will be sued by your fellow homeowners if the association does not file a lawsuit.

But the big dollars they promise aren't always a reality once a lawsuit is settled, or tried.

When money is awarded after a trial or settlement, much if not most of it goes to pay for lawyers' fees, expert witnesses and the "destructive testing" they do on your home. Often, only a small portion of the funds recovered remains to be spent on home repairs, and, generally, those funds are much less than the real cost of any repairs that actually need to be made.

If this matter can be resolved easily and quickly by contacting your builder – which is often the case – isn't that in your best interests and the best interests of your homeowners association?





## Outrageous Estimates & Destructive Testing

The Orange County Business Journal reported that many construction defect attorneys and their expert witnesses run up legal bills and grossly inflate repair estimates to attempt to force settlements.[4]

How would you feel about paying a contractor nearly $90 just to have your showerhead tightened? In one case, the trial attorneys sought $28,000 for showerhead repairs, or $90 per showerhead. The same case sought $12,000 for squeaky floors, $28,000 for bathtub repairs and $215,000 for chipped sinks.

Trial attorneys often attempt to "prove" "defects" through destructive testing. This may include cutting holes in walls, pulling off roof tiles or ripping up flooring, just to look for "defects" that you did not know previously existed and that have not caused any damage to your home. They may even shoot high-pressure water directly against a window for a prolonged period to see if it leaks. That hardly duplicates any natural condition your home is likely to be exposed to! Worse, destructive testing is a dusty, invasive and noisy process that can leave your walls, custom paint colors and faux finishes not looking the same again.

## You May Lose And Have To Pay For The Lawsuit

What happens if you don't win the case? You don't recover any money, of course, but that doesn't mean you're off the hook.

You and your homeowners' association may be left responsible for paying all the lawyer and expert witness fees and the costs of their testing, as well as court costs. For example, a group of 19 homeowners in Orange County was ordered by the court to pay

$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.[5]

You also may meet with resistance if you change your mind and want to be dismissed from the lawsuit after it is filed. For many attorneys, the profit they make from construction defect lawsuits often depends on the number of homeowners they are able to sign up. Too few homeowners may mean that the cost to prosecute the lawsuit exceeds the amount of profit the attorneys stand to make. Not surprisingly, trial attorneys, therefore, often resist dismissing homeowners from a lawsuit. Some homeowners have even reported being charged litigation costs by their lawyers before being allowed to get out of the case. And even then, they had to wait months to be dismissed.

You may also lose control of your right to have repairs made to your own home. Homeowners have reported that some attorneys require that any settlement be approved by at least a majority of the homeowners in the case. If this happens, you may not be able to accept an advantageous settlement because some of your neighbors object. Other attorneys may not allow you to settle because, if repairs are made, the attorneys will have trouble getting paid.

## Repairs: Too Little and Too Late

In the unfortunate event of a legitimate construction issue, are you willing to live in your home for the years it can take to conclude a lawsuit before repairs are made?

You have an alternative! You can work with your builder and have the problem corrected quickly – perhaps even years before repairs could be made if you chose to litigate.

Most builders will gladly make legitimately needed repairs to your home. By avoiding litigation, you get what you want: to have the problem repaired quickly, completely and with the least amount of inconvenience.

## California's New Construction Law: Facilitated Repairs

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

Under the new law, if a homeowner is unable to resolve a construction defect claim informally through such things as customer service, or the warranty process, the homeowner must follow a series of mandatory pre-litigation procedures before filing a lawsuit against a builder. These procedures are referred to in the homeowner's purchase documents and CC&R's and are designed to ensure that legitimate repairs are made without requiring a lawsuit. In addition, if these procedures fail to solve the problem, the new law allows for the use of alternative dispute resolution such as arbitration, or judicial reference, which generally is less costly and faster than a court trial.

## The Alternative: Cooperative, Mutually Beneficial, Private Resolution

The Building Industry Association wants to help you enjoy the American dream of homeownership and encourages you to use alternatives other than litigation to preserve that dream.

The best immediate solution to avoiding the hassles and cost of litigation is to work directly with your builder. If you find yourself, or your association, being approached by defect attorneys, we advise you to consider the alternatives. Go to your homeowners' association board meeting and ask that they pursue alternatives before signing on with attorneys. Contact your builder. In the unlikely event that your homebuilder is unresponsive, or if you have difficulty tracking down your homebuilder, call Citizens Against Lawsuit Abuse at 714-259-8400 and they will help you locate the correct customer service representative. If this fails to solve the problem, consider utilizing the claim and dispute resolution procedures specified in your purchase documents, such as mediation, arbitration, or judicial reference.

Together, we can find resolution and preventative measures to avoid, or reduce, construction disputes.

## About Our Sponsors

**Citizens Against Lawsuit Abuse** (CALA) is a non-profit legal watchdog group whose mission is to educate consumers on the costs of lawsuit abuse and serve as a watchdog group over those special interests who seek to abuse the system for financial gain at the expense of consumers.

**The Trade Contractor Council of Southern California** (TCC) was created by the Building Industry Association to provide a forum for trade contractors to focus on issues that affect their business, and to promote quality construction.

**The Associated General Contractors of California** (AGC) is committed to improving the profitability of its members through excellent services in: Safety and Health; Education and Training; Employee and Labor Relations; Government Relations/Legislation; and the commitment to skill, integrity, and responsibility.

**The Building Industry Association of Southern California** (BIA/SC) is a non-profit trade association that serves the 1,800 companies that comprise its membership, and their 250,000 employees. As a regional voice of the building industry, BIA/SC works closely with its chapters, councils and members to make sure housing supply keeps pace with the rapidly growing job market and population.

**The Construction Quality Committee** (CQC) advocates for solutions to construction disputes through education on and advocacy of quality construction practices and customer service.

## We'd Like To Hear From You!

Comments: _____

_____

_____

_____

Name: _____

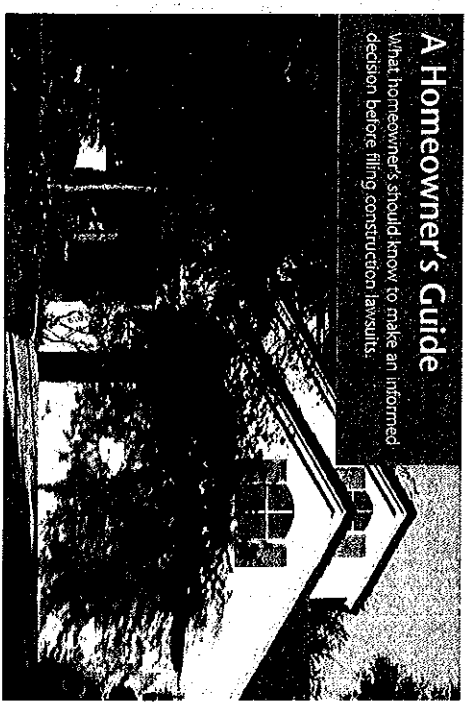
Address: _____

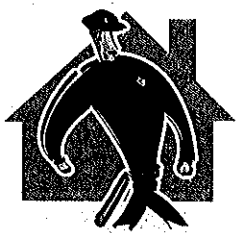
City/State/Zip: _____

Phone: _____ E-mail: _____

Your Builder/HOA/Property Mgmt. Co: _____

# Think Before You Litigate!





Neighbors Protecting

HOME VALUES

www.NeighborsProtectingHomeValues.com

# Think Before You Litigate!

Unnecessary construction lawsuits can label your home as defective - lowering the value of your home, your neighborhood and ultimately reducing your personal assets.

# And Make An Informed Decision

"The average litigated construction dispute in California may take two to five years to be resolved. As they drag on, they run up costs and run down housing values." - *(Citizens Against Lawsuit Abuse)*

Homebuilders are responsible for building communities and building dreams - they take their job very seriously. The safety and well being of you and your family is paramount to the development of the entire community as well as each and every home. Homebuilders recognize your home is one of your greatest assets and stand behind the quality of their product. If you have any questions or concerns at anytime we encourage you to contact your homebuilder. A capable customer service staff is available to assist you. Your homebuilder is dedicated to helping homeowners with construction related issues.

Unnecessary construction lawsuits have been a growing problem throughout California, causing homeowner's to lose their greatest source of equity. Your homebuilder is dedicated to assisting you in identifying legitimate problems and making necessary repairs. This brochure will assist you in identifying how participation in unnecessary lawsuits may jeopardize one of your greatest investments, provide information regarding the right questions to ask and how to remove yourself from a lawsuit.

When you find your neighborhood being solicited by an aggressive law firm looking for business, we encourage you to use this handbook to assist you in making an informed decision.

Think before you litigate -

***Neighbors Protecting Home Values***

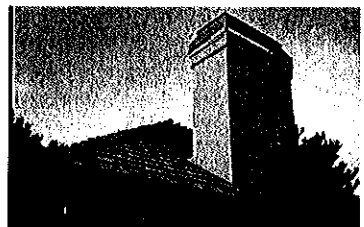
# Be an Informed Homeowner

Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

When attorneys are approaching your neighborhood looking for participants in lawsuits make an informed decision:

1. Contact your homebuilder first to solve your problem.
2. Personally speak with your neighbors and/or homeowner association to discuss alternatives to litigation – such as meeting with your homebuilder.
3. Assess your situation and make sure proper maintenance has been performed on your home and any problems are truly construction related.



*Homeowners should visually inspect their roof and chimney(s) from the ground twice a year to identify anything that might cause leaks or problems. To prevent unnecessary damage such as broken roof tiles we encourage you to work with a licensed, bonded and insured contractor.*

# *What Questions Should I Ask?*

When an attorney approaches you about bringing a lawsuit against your homebuilder make an informed decision and begin by asking the right questions.

- What are the specific problems in my home and how much will it cost to repair them?
- Can you show me the problems in my home?
- Why shouldn't I call my homebuilder first?
- How much do you anticipate the award being for the lawsuit?
- Who pays for the experts, testing and court costs if we lose the lawsuit?
- If we win the case and an award is received where does the money go?
- How are you paid?
- How long does it take to complete a lawsuit?
- When I sell my house do I have to disclose the lawsuit and whether or not repairs were made to my home?
- If we win, will there be enough money to repair my home?

# Frequently Asked Questions:

### *Will a lawsuit harm my home's value or my neighborhood?*

An unnecessary lawsuit concerning the construction of your home could lower the value of your home and the ability to sell your home in the future. "When a subdivision is in litigation against its builder, the property value for the entire neighborhood drops significantly. In fact, the adverse impact on property values can even affect homeowners who decline to participate in the litigation."

*(The Business Journal / August 30, 1999)*

*Don't forget to clean out and inspect your home's gutters and down spouts twice a year to make sure they operate as intended.*

### When I sell my house, will these litigated "defects" require disclosure to potential buyers?

Under California law you are required to fill out a disclosure statement regarding your home, which includes everything regarding [illegible] and lawsuits relating to your home. The seller of the home must provide any potential buyer with a complete disclosure statement – listing all defects in the property known to the seller. The statement must be presented to the potential buyer prior to entering into any contract. Buyers usually waive the mandated cooling time for the property and discuss the potential selling price on the property. Here, the buyer may have discovered the defect first.

### Will litigation affect my ability to buy another house or get another mortgage loan? What about refinancing my home or obtaining a second mortgage/home equity loan?

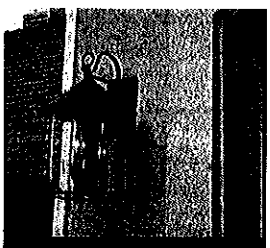
Title in California will disclose how your lender will be just as [illegible] as many lenders previously have not financed by anyone in your town due to the loss in home value as a result of the suit. [illegible] to an unnecessary lawsuit may also prevent homeowners from being able to sell or refinance a home, at least until and pending all of the applicable statutes have been met.

### How long does it take to settle a lawsuit?

[redacted]

### How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?

[redacted]



*Be sure and check the condition of siding, paint, masonry, stucco or EIFS and wood trim twice a year to maintain its good looks and confirm adequate weather protection.*

### *Will the lawsuit affect my ability to obtain homeowners insurance?*

Most likely – if your home is labeled as defective it will be much more costly to insure, expect your premium rates to skyrocket in the future. In fact, homeowners insurance may not be available at all, rendering your house nearly impossible to sell.

### *Shouldn't the City building codes and inspectors prevent construction defects from occurring?*

City's are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments and available for the homeowner's review. In order to protect future homebuyers city's often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.

*Although interior caulking around windows is not a required or necessary feature, many homeowners choose to include it. If caulking is included in your home's construction around windows, doors and other areas it should be inspected once a year to make sure water, air, dust and insects are kept out.*

### *What if I have a legitimate concern about my home?*

There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

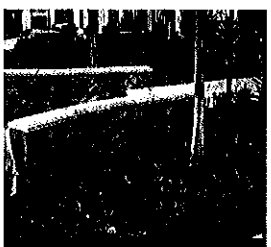
### *Will proper home maintenance prevent defects?*

Under California law homeowners are expected to maintain their homes – performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete – doing it properly the first time will save homeowners time and money in the long run.

*Withdrawal From A Lawsuit*

## *How do you withdraw from a lawsuit?*

If you and/or your neighborhood have filed a lawsuit and you would like to decline and/or withdraw participation send a letter to the lawyers organizing the lawsuit stating "I understand that you filed a lawsuit on my behalf against my homebuilder. I have decided not to pursue the lawsuit. Please dismiss me from the case now and send me something in writing confirming that I have been dismissed."



*Maintain the original grading, drainage and landscaping of your home to reduce the possibility of water or foundation damage.*

# *THINK BEFORE YOU LITIGATE!*

Give your homebuilder a call – you will be pleasantly surprised!

For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at ***www.neighborsprotectinghomevalues.com***

*Think Before you Litigate!*

## Frequently Called Phone Numbers

My Homebuilder _____

Homebuilder's Customer Service _____

Licensed Maintenance Person _____

Gardener _____

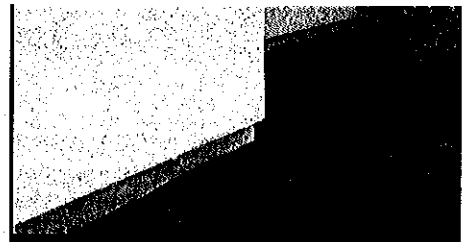
Pool Maintenance _____

City Services _____

Other _____

Other _____

Other _____



*Twice a year homeowners should inspect the foundation, basement or crawl space to identify any leaks or problems. The "weep screed" or lip at the base of the home's exterior walls should not be blocked by cement, soil, etc. - it is a necessary part of your home construction and facilitates proper drainage.*

Neighbors Protecting
HOME VALUES

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

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

1. OCTC supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client and even with such designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.
2. Comments 1 and 2 could be tightened. Comment 3 should be in the rule.

# Rule 1.8.7 – Public Comment – File List

X-2010-421aa COPRAC [1.8.7]

X-2010-425-16p SDCBA [1.8.7]

X-2010-513-16 OCTC [1.8.7]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

June 14, 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 1.8.7

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.7 and supports its adoption with the following suggested clarifications.

The last sentence of Comment [4] contains certain awkward language that may be corrected by replacing "…this Rule does not prevent the lawyer from assisting the jointly-represented clients *from agreeing* at any time *to* a procedure" with "…this Rule does not prevent the lawyer from assisting the jointly-represented clients *in reaching an agreement* at any time *on* a procedure…."

In addition, Comment [5] states: "A lawyer's obligation to make a written disclosure and obtain written consent *is satisfied* when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent." COPRAC believes it would be more accurate to change "is satisfied" to "may be satisfied." This is because, read in isolation, the Comment as currently phrased would improperly suggest that disclosure and consent in court before a licensed court reporter on the record is the *only* way to satisfy the disclosure and consent requirements of this proposed Rule.

We also recommend deleting the portion of the Comment that states: "before a licensed court reporter that transcribes the disclosure and consent" as unnecessary and inconsistent with practices in some courts which use audio tapes instead of court reporters for the record.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

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

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
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- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

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Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

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[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

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We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.8.7. Aggregate Settlements.**

1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments somewhat confusing, especially Comment 4, which is not in the ABA Model Rules. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement that should be stated in the rule, not a comment.
2. OCTC thanks the commission for defining aggregate package deals in criminal cases in comment 1. Again, there are too many comments and they are too long. The ABA has only one comment on this subject, while these proposed rules have five comments. Comment 2 seems unnecessary in light of proposed rule 1.4. Comment 3 is too long and could be tightened.

# Rule 1.8.8 – Public Comment – File List

X-2010-421oo COPRAC [1.8.8]

X-2010-513-17 OCTC [1.8.8]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 1.8.8

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.8–Limiting Liability to Client. COPRAC supports the adoption of proposed Rule 1.8.8 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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

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**SUMMARY**

We summarize our main concerns as follows:

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**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.8.8. Limiting Liability to Client.**

1. OCTC would recommend that this rule also require that the potential malpractice settlement be fair and reasonable. A leading treatise on legal ethics has criticized the ABA's model rules limiting liability because it does not require the terms of the agreement to be fair, although the treatise notes that this may be because that is already required by the ABA's version of rule 3-300 (ABA rule 1.8(a)). (See Hazard & Hodge, "The Law of Lawyering, 3rd Edition § 12.19.)
2. Comments 1 and 2 seem more appropriate for treatises, law review articles, and ethics opinions.

# Rule 1.8.9 – Public Comment – File List

X-2010-425-17q SDCBA [1.8.9]

X-2010-513-18 OCTC [1.8.9]

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

## Hollins, Audrey

**From:** Ross G. Simmons [ross@rblaw.com]
**Sent:** Friday, November 16, 2007 11:43 AM
**To:** Hollins, Audrey
**Cc:** McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
**Subject:** SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
**THE SIMMONS FIRM, ALC**
Suite 390 The Promontory
11440 West Bernardo Court
San Diego, CA 92127-1655
v - (858) 676-1668 x304
f - (858) 676-1839
ross@rblaw.com
www.rblaw.com

U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

**MEMORANDUM**

Date: November 16, 2007

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

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

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 1.8.12** Purchasing Property at Foreclosure Sale Subject to Judicial Review [4-300]

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

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

* * * * *

Comment 1:

The modified rule is approved as proposed.

Rationale For Comment 1:

Rule 4-300 conflicted with Probate Code sections 9880-9885 which provided that a lawyer could participate in a probate proceeding sale. This revision aligns both statutes.

**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

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.8.9. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review.**

1. OCTC opposes the change in this rule. Current rule 4-300 prohibits all such transactions, but subparagraph (c) of the proposed rule permits lawyers to directly or indirectly purchase property as specifically authorized by Probate Code sections 9880 through 9885. However, it is not clear that Probate Code section 9881 was intended to permit the personal representative's attorney to purchase property of the estate personally. OCTC believes the Supreme Court can and should exercise its inherent authority to demand more than the legislature has required. In our view, there are important ethical and policy reasons for maintaining current rule 4-300's complete prohibition upon a member's direct or indirect purchase of property at a foreclosure or other sale subject to judicial review. If such purchases were conditionally permitted, it is likely, as in the case of alleged violations of current rule 3-300, that the State Bar would receive an increased number of complaints against attorney who have allegedly failed to comply with some or all of the conditions or requirements for the purchase. OCTC has serious concerns about permitting a member to either directly or indirectly purchase estate property pursuant to Probate Code sections 9880 – 9885. Among our concerns are: 1) whether the transaction is truly fair and in the best interest of the client; 2) its impact on the public's confidence in the profession; 3) whether such transactions undermine or may undermine the attorney's duty of undivided loyalty to the client; 4) whether the attorney is looking for a deal rather than representing his or her client's best interest; and 5) the appearance of or actual overreaching by the attorney against potentially unsophisticated and/or grieving parties or family members. (For a fuller discussion of OCTC's position it refers the Commission to OCTC's July 20, 2006 Response to Commission Inquiry Regarding Rule 4-300 of the Rules of Professional Conduct.)
2. If the Commission strikes subparagraph (c) then Comment 1 should be stricken.

# Rule 1.8.10 – Public Comment – File List

X-2010-405 Stephen Kent Rose [1.8.10]

X-2010-406 Pascal Anastasi [1.8.10]

X-2010-411 Janis Eggleston [1.8.10]

X-2010-416a Robert Rogers [1.8.10]

X-2010-421a COPRAC [1.8.10]

X-2010-503e HALT [1.8.10]

X-2010-513-19 OCTC [1.8.10]

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Stephen Kent Rose

*** City** Sausalito

*** State** California

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

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.8.10 Sexual Relations With Client [3-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

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

Our sex lives are none of your business. Given that anybody who asks for or receives any legal information is potentially a client this would seriously limit either sex or conversation. Why don't the people who have free time to draft rules know these things?

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Pascal Anastasi, Esq.

*** City** Rio Del Mar

*** State** California

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

---

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Rule 1.8.10 Sexual Relations With Client [3-120]

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---

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

I have been an licensed attorney since 1986 (no disciplinary actions) and I agree with most of the proposed changes to the Code of Ethics. But they are "rules". I see two two proposals that I take issue with.

"Sex with clients is just plain wrong"...why?

What do you mean "wrong". You mean you are offended? Do you mean you would not do it? Neither have I. So what does that mean? Why is it "wrong" in every situation? Please explain.

The existing rule and prohibition has legitimacy because it is effective when circumstances exist that are likely to cause adverse effects in the representation of the attorney's client. That makes perfect sense. That is what rules are for...protecting the clients. The prohibitions pertain in situations when sex is: 1. required as a condition of a representation; 2. obtained by coercion,

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

I have been an licensed attorney since 1986 (no disciplinary actions) and I agree with most of the proposed changes to the Code of Ethics. But they are "rules". I see two two proposals that I take issue with.

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A complete ban on all sex in every situation no matter what? Why? Is all sex in every situation harmful to the representation of that client? Honestly, I suspect the answer is "no". For example, a client wants to form a corporation. The attorney forms the corporation and a dinner meeting turns into a situation involving..."sex". Oh my God! Now the State Bar is going to discipline, suspend or disbar the member? Are you serious? This sounds absolutely stupid. I may not approve. You may not approve, but really, has any harm been incurred?

By the way, what is sex? Are you planning to define that too?

What about a client and the attorney who go hunting, camping, fishing, vacationing, wine tasting...oh my God, another personal relationship is formed. Maybe no kissing or "sex" occurred, but a special personal bond was created. Maybe even an unbreakable, great friendship was formed. I admit, I do have many of those. Is that inappropriate contact too?

Why not ban that special relationship too? Disbar the lawyer. Same ridiculous logic. Make the ban "complete"; no relationship of any kind. Next stop, check emails for excessive "friendliness".

Wake up!

The ABA claims as the slogan, "Defending Liberty, Pursuing Justice". They obviously have a peculiar definition of "Liberty". Does the California State Bar recognize true "Liberty"? What is your definition?

Please adopt rules that have a legitimate purpose, not just a "politically correct" or other "holier than thou" purpose.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Janis E. Eggleston

*** City** Berkeley,

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) janiseggleston@comcast.net

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

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

Rule 1.8.10 Sexual Relations With Client [3-120]

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

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

---

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

Rule 1.8.10 is ambigous in that it does not identify whether lawyers will be prevented from having sexual relations with a client after the representation has concluded. Given that our duty of loyality and confidentiality continue to exist after the conclusion of the representation, those same continuing duties might apply to sexual relations. The rule should clarify if, or under what terms, sexual relations with clients could exist after the representation has concluded.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Robert K. Rogers, Jr.

*** City** Annapolis

*** State** Maryland

*** Email address** (You will receive a copy of your comment submission.) rkrogers1854@hotmail.com

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.8.10 Sexual Relations With Client [3-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

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

I believe the current rule adequately covers the areas of real concern regarding sexual relations with clients. I disagree with government (i.e. State Bar) involvement in personal morals and social norms, and I believe the proposed rule crosses that line. The current rule prohibits conduct that is coercive and addresses the potential for the relationship to interfere with the attorney's ability to perform to the best of his or her ability. That is as far as it should go. This would prohibit a relationship from developing in, for example, a situation in which the attorney and client are involved in real estate or other purely financial transactions or disputes. I see nothing wrong, generally, in two people developing a personal relationship that arises out of a professional one, and I think that the State Bar should limit itself to situations in which there is a real danger that the attorney/client relationship will be harmed. This proposed rule is too broad in its scope, and too confining in its proscription.

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 5, 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 1.8.10

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.10. COPRAC supports the proposed rule and offers the following comments.

Comment [2] uses the term "adversely affected" which language derived from a prior draft of Rule 1.7. Now that the current draft of Rule 1.7 uses the "materially limited" test, the phrase "adversely affected" should be replaced with "materially limited." This would be consistent with the ABA Model Rule. Also in Comment [2], the reference to 1.7(d) should be changed as the current version of 1.7 no longer has a subsection (d).

Comment [3] contains a reference to Rule 1.13. COPRAC does not see the point of this reference, and believes that it could be confusing. Accordingly, we propose to delete it.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

HALT *Simple · Affordable · Accountable · Justice for All*

June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,

Theresa Meehan Rudy
Executive Director

1612 K STREET, NW • SUITE 510 • WASHINGTON, DC 20006
(202) 887-8255 • FAX (202) 887-9699 • www.halt.org

June 15, 2010

**Comments by**
**HALT—*an Organization of Americans for Legal Reform***
**on**
**Proposed California Rules of Professional Conduct**

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

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consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

**Rule 1.4 Communication.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

**Rule 1.4.1 Disclosure of Professional Liability Insurance.** HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Propose Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

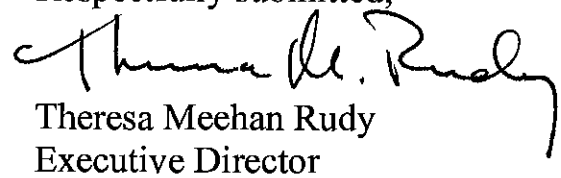
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

**Rule 1.8.10 Sexual Relations With Client.** There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy
Executive Director
HALT, Inc.—
*an Organization of Americans for Legal Reform*
1612 K Street NW
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Washington, DC 20006

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.8.10. Sexual Relation with Client.**

1. Comment 1 is too long and seems more appropriate for a treatise, law review, or ethics opinion. The Commission, however, might want to advise the attorneys in a Comment of Business & Professions Code section 6106.9, which also covers sexual relations between attorneys and clients.

# Rule 1.8.11 – Public Comment – File List

X-2010-421nn COPRAC [1.8.11]

X-2010-425-18r SDCBA [1.8.11][13]

X-2010-513-20 OCTC [1.8.11]

X-2010-529f SCCBA [1.8.11]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 1.8.11

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 1.8.11–Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9. COPRAC supports the adoption of proposed Rule 1.8.11 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of Delegates of California Bar Associations District Nine Representative**
James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

●1333 Seventh Avenue, San Diego, CA 92101 | P (619) 231-0781 | F (619) 233-4586 | [illegible]

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

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

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

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

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

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

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

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

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

**CONCLUSIONS (pick one):**

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

[ ] We approve the new rule with modifications.*

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

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

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

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.8.11. Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9.**

1. Except for the last sentence of Comment 1, the Comment should be stricken.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

> This e-mail may contain confidential and privileged material for the
sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| | | |
|---|---|---|
| | ~~Comment [2] as currently drafted. Comment [2] with the recommended change in the substance of the rule, should read as follows: "It is the intent of this rule that it be applied consistent with PC 21350 et seq."~~ | ~~related to the client.~~ |
| Rule 1.8.11: Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9 [This was Rule 1.10; now there is no Rule 1.10] | [NOTE: Since the SCCBA comment on this, a California 2nd Appellate District Court opinion was published that comports with the SCCBA recommendation: *Kirk v. First American Title*, April 7, 2010. ] The RRC proposal is to adopt the ABA Model Rule. However, the ABA Model Rule used by the RRC is the model rule pre-February 2009. On February 16, 2009, the ABA amended Model Rule 1.10 to add provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening. The SCCBA recommends that the 2009 amended version of Model Rule 1.10 be adopted. The amended version recognizes the reality of modern day law practice, which involves the mobility of attorneys, the lateral movement of attorneys among firms and the practical reality that if certain parameters can be met, attorneys can be screened effectively and timely so that a conflict of interest is not created for the attorney's new firm or legal organization. | In the released 69 rules, the State Bar Board of Governors rejected the RRC recommendation to adopt a version of the ABA Model Rule 1.10. The current release does not include any Rule 1.10. Instead, they have added Rule 1.8.11 which imputes all conflicts by one lawyer to the firm. There is no screening at all provided for in the current version. The current version of Rule 1.8.11 reads very simply as follows: "While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them." |
| ~~Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third Party Neutral~~ | ~~Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the "negotiating employment" stage. The rule should apply to the interviewing stage though requiring the judges' approval for an interview is not necessary. The following language should be added at the conclusion of~~ | ~~The current version partially addresses the concerns raised in the SCCBA recommendation. The language has been changed from "negotiating employment" to "discussions regarding prospective employment."~~ |

# Rule 1.9 – Public Comment – File List

X-2010-425-19s SDCBA [1.9]

X-2010-513-21 OCTC [1.9]

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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Bonnie M. Dumanis

**Conference of Delegates of California Bar Associations District Nine Representative**
James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

1333 Seventh Avenue, San Diego, CA 92101 | P (619) 231-0781 | F (619) 233-3949 | ...@sdcba.org

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): **[sic]**

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

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

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

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

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

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

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

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

**CONCLUSIONS (pick one):**

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

[ ] We approve the new rule with modifications.*

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

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[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.9. Duties to Former Clients.**

1. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules, neither the subparagraph nor proposed rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether it is material. Further, it creates uncertainty for lawyers and makes it more difficult to prosecute a violation. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2) and thanks them for making that change.
2. OCTC is concerned with the use of the term "knowingly" in subparagraph (b). This appears to sanction a lack of conflict procedures regarding an attorney's former clients at another firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." Although negligence is not a basis for discipline, gross negligence or recklessness is. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the conflict is the result of excusable negligence or gross negligence. Further, by using the term "knowingly" the Commission may inadvertently also affect disqualification rulings in civil and criminal cases.
3. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit…or when the information has become generally known" in subparagraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not "generally known."
4. Paragraph (c)(2) applies some exceptions to revealing information of former clients "with respect to current clients." Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language "or when the information is generally known." Although this proposed language is also in the Model Rules version, OCTC is not sure when subparagraph (c)(1) applies or when subparagraph(c)(2) applies.
5. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states that the substantial relationship test applies in disqualification cases, but "might not be necessary" in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney's former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the

presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to established State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: "Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.) " (Id at 747.)

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

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

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

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

Having such a presumption is not unusual in discipline cases. As previously discussed, under rule 3-300 (proposed rule 1.8.1) the attorney has the burden of showing that the transaction is fair and reasonable and fully known and understood by the client. While the primary purpose of the presumption under proposed rule 1.9 is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra,* Cal.App.4th at 328; *In re I Successor Corp* (Bkrtcy S.D.N.Y. 2005) 312 B.R. 640, 656.)

Any concern about tangential matters being covered by this presumption is already addressed in the presumption. There is a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra,* 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases or civil cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the conflict rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its holding is equally applicable in discipline and civil cases. Further, as previously discussed, the presumption is already in the disciplinary case law. OCTC requests that that portion of Comment 5 implying that the presumption does not apply to discipline cases be stricken.

6. If the Commission adopts OCTC's position that knowingly should be stricken from subparagraph (b) then Comments 8-9 should be stricken.

7. Again, there are too many comments and they are more appropriate for treatises, law review articles, and ethics opinions, especially comments 1-4 and 7. Comment 10 belongs in proposed rule 1.6, not this rule. The first sentence of Comment 11 is unnecessary. Comment 11 refers to subparagraph (c) of proposed rule 1.9. OCTC is concerned that, like in proposed subparagraph (c) itself, what is meant by "generally known information" and this Comment appears inconsistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. OCTC opposes any change to the requirement that precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

8. As previously discussed regarding other conflict rules, OCTC opposes advanced waivers. (See OCTC's discussion to rule 1.7.) It recommends that the second sentence of this Comment be stricken. The commission should also consider whether the rest of the Comment is necessary in light of the rules cited in the Comment.

# Rule 1.10 – Public Comment – File List

X-2010-421ee COPRAC [1.10]

X-2010-501b Stuart Senator [1.10]

X-2010-513-22 OCTC [1.10]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

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June 14, 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 1.10

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 1.10, as revised on May 17, 2010, and has the following concerns.

COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly urges the adoption of paragraph 1.10(a)(2) of the Model Rule. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.

In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline.

Accordingly, COPRAC urges the adoption of paragraph 1.10(a)(2) of the Model Rule to permit screening.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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June 14, 2010

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180 Howard Street
San Francisco, CA 94105

Re: PUBLIC COMMENT ON AMENDED RULES OF PROFESSIONAL CONDUCT - Ethical Screens for Lateral Hires and "Thrust Upon" Conflicts

Dear Ms. Hollins:

These comments are submitted on behalf of Alston + Bird LLP, Duane Morris LLP, Morgan, Lewis & Bockius LLP, and Munger, Tolles & Olson LLP.

We write to urge the Board of Governors ("Board") to adopt two items not currently included in the proposed amendments to the Rules of Professional Conduct: (1) ABA Model Rule 1.10(a)(2), pertaining to the use of ethical screens for non-government lateral hires and (2) Comment 5 to ABA Model Rule 1.7, pertaining to "thrust upon" conflicts.

## 1. Ethical Screens for Lateral Hires

We respectfully submit that the question whether it is *ethically* proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited.

Proposed Rules of Prof. Conduct, Rule. 1.10 cmt. 10 (May 17, 2010). The Board is charged with proposing changes to the standards of ethical conduct governing members of the Bar, standards that "are not intended to supersede existing law relating to members in non-disciplinary contexts." Rules Prof. Conduct, rule 1-100, Discussion. Once approved by the California Supreme Court, the Rules will be binding on all Bar members and enforceable through attorney discipline, irrespective of how the case law on ethical screens develops. Bus & Prof. Code §§ 6076, 6077; *see Hawk v. Superior Court*, 42 Cal. App. 3d 108, 126 n. 17 (1974) (disciplinary rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action . . . ."). The Board should not bypass this opportunity to clarify, as an ethical matter, the circumstances in which screening a lateral hire is effective to avoid a conflict of interest.

The trend in this state and nationwide is to recognize (1) the changed circumstances in the legal industry that have necessitated the widespread use of ethical screens; (2) their benefits to clients, attorneys and law firms alike and (3) the proven effectiveness of ethical screens. Only last month, Justice Croskey, writing for the Court of Appeal, conducted the most thorough analysis of this question under California law ever and concluded that, in some circumstances, the showing that a "tainted" attorney has been effectively screened can rebut a presumption of vicarious disqualification. *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 2010 WL 1346403, at * 12 (May 6, 2010).

First, as *Kirk* observed, trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. *Id.* at *13; *see, e.g., In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 586 (1991) ("In the era of large, multi-office law firms and increased attention to the business aspects of the practice of law, we must consider the ability of attorneys and their employees to change employment for personal reasons or from necessity."). The one-size-fits-all approach to protecting client confidentiality may have seemed sensible when we were an industry of small firms. In an era of large firms, however, the assumption that *all* confidential client information will *always* be disseminated instantaneously to *all* members of a firm is no longer valid. *Kirk, supra*, at *13 ("In a situation where the 'everyday reality' is no longer that all attorneys in the same law firm actually 'work together,' there would seem to be no place for a rule of law based on the premise that they do.").

Simultaneously, because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today. *See Howard v. Babcock*, 6 Cal. 4th 409, 420 (1993) (noting that attorneys are more transient today). Dismantling barriers to mobility is good not just for lawyers seeking to make a lateral move, but also for the firms that hire them. Clients, too, benefit when law firms increase efficiency and specialization through lateral hires. But any such benefits are necessarily impeded by continued adherence to the inflexible and out-dated automatic vicarious disqualification rule. In the meantime, the chief beneficiaries of the current rule are occasional litigants who act strategically

by seeking automatic disqualification of opposing counsel. This outdated automatic disqualification rule should be abandoned.

Finally, ethical screens have been shown to be effective to protect confidential client information. After conducting an exhaustive survey of the twenty-three states that permit some form of lateral screening, a committee of the ABA recently concluded that "properly established screens are effective to protect confidentiality" and that "[n]o reported disciplinary cases or lawsuits have demonstrated any significant problem with the efficacy of screens." ABA Standing Committee on Ethics and Professional Responsibility, Recommendation 109 at 11, 15 (February 16, 2009) (*available at* http://www.abanet.org/cpr/ethics/screening.html) ("ABA Report").

California's own experience with the use of ethical screens in the context of government and former government attorneys, non-attorneys and experts is consistent with these findings. *See In re Charlisse C.*, 45 Cal. 4th 145, 162 (2008); *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 902-03 (1981); *In re Complex Asbestos Litig.*, 232 Cal. App. 3d 572, 596 (1991); *Shadow Traffic Network v. Superior Court*, 24 Cal. App. 4th 1067, 1084-85 (1994). There is no indication that the use of ethical screens in any of the foregoing contexts has proved problematic or difficult to administer. And, as *Kirk* put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." *Kirk*, *supra*, at *16. Notably, the implementation of a screen is not conclusive on the question whether confidential client information has been improperly shared; a court still must weigh the evidence and reach that determination – something that courts are well-equipped to do. *See* ABA Report at 11 (noting that courts in screening jurisdictions "have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.").

In short, "history reveals no problems with ethical screens." ABA Report at 11. This should come as no surprise because other ethical rules already preclude attorneys from misappropriating an adversary's confidential information. *See* Rules Prof. Conduct, rule 3-100 (member generally shall not reveal confidential information of a client without informed consent); rule 1-120 (member shall not knowingly assist in or induce any violation of an ethics rule); *see also* Proposed Rules Prof. Conduct, rule 4.4 (lawyer must promptly notify the sender of inadvertently transmitted confidential or privileged writings); Bus. & Prof. Code Section § 6068(e)(1) (It is the duty of an attorney "...to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."). Lawyers understand that any potential "value" of improperly using confidential information is far outweighed not just by their own ethical standards but by the potential for case-ending and career-ending sanctions to punish such misuse. At the same time, an automatic vicarious disqualification regime imposes significant burdens on the modern legal profession without clear benefits to clients, lawyers or the public. Now more than ever, members need clarity as to the ethical propriety of the use of screens. We urge the Board to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).

**2. "Thrust Upon" or "Unforeseeable" Conflicts**

We also urge the Board to adopt Comment 5 to the ABA Model Rule 1.7, regarding "thrust upon" or "unforeseeable" conflicts. Comment 5 provides guidance for attorneys who are faced with conflicts that arise during the course of a representation and that were unforeseeable at the outset.

Thrust upon conflicts often are discussed in the case of changing corporate ownership, e.g., the firm's client's adversary is acquired by another client of the firm during litigation, but they also arise in far more pedestrian, everyday occurrences. One of the instances in which we worry the most about unforeseeable conflicts is in the context of third-party discovery. For example, assume the firm represents Client A in litigation. The firm obviously has a duty to represent Client A zealously. Suppose that, during the representation of Client A, the firm discovers that Corporation B may have documents in its possession that absolve Client A of liability, but the firm also represents Corporation B in other, unrelated matters. What should the firm do? If Corporation B refuses to waive the conflict, must the firm withdraw from the representation of Client A? May it? May the firm withdraw from the representation of Corporation B? If it does so, can Corporation B disqualify the firm in its representation of Client A? (Note that it is not clear that "conflict counsel" is a viable option in this scenario: If a lawyer advises a client to obtain other, non-conflicted counsel to obtain third party discovery from its current client, such advice may, standing alone, present duty-of-loyalty issues.)

The adoption of Comment 5 would provide some guidance as to how the firm should handle this and other thrust-upon, unforeseeable conflicts by providing that the attorney *may* have the option of withdrawing from one of the representations to avoid the conflict of interest. Because Comment 5 provides that the lawyer must maintain and protect the confidences of the client from whose representation the lawyer has withdrawn, there are no confidentiality issues. The comment essentially adopts the "thrust upon defense" established by case law from other jurisdictions. Under that case law, when a conflict arises through no fault of the attorney, the attorney may withdraw from one representation so as to convert the current client into a former client and avoid compromising the duty of loyalty. *See Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio, 1999). Most courts that have considered this issue have found the "thrust upon defense" to be a fair balancing of the need to maintain inviolate the duties of confidentiality and loyalty on the one hand and, on the other, the reality that often, even with the best procedures in place, unanticipated conflicts may arise throughout the course of a representation, and that reality should not undermine lawyers' ability to represent their clients throughout a matter. *See, e.g., Installation Software Techs., Inc. v. Wise Solutions, Inc.*, 2004 U. S. Dist. LEXIS 3388, 2004 WL 524829 (N.D. Ill. Mar. 5, 2004) (denying a motion to disqualify after weighing the factors set forth in *Gould, supra*); *Carlyle Towers Condominium Assoc., Inc. v. Crossland Savings, FSB*, 944 F. Supp. 341 (D.N.J. 1996) (same); *Hawthorne Partners v. AT&T Techs., Inc.*, 1993 U.S. Dist. LEXIS 2575, 1993 WL 63003 (N.D. Ill. Mar. 2, 1993) (denying a motion to disqualify in a case involving a thrust upon conflict on the condition that the firm withdraw from one of the representations).

Under Comment 5's guidance, lawyers and law firms would be able to balance situations such as the one described above. For example, they may be able to explain to Corporation B that, unless it accedes to the discovery requests, the law firm may have to withdraw, or it could explain to Client A that pursuing the discovery might result in the client having to obtain new counsel. The "correct" course of action in these circumstances likely would depend upon many factors, but the comment would provide the lawyers (and thus the clients) with options and guidance. While there is an understandable reluctance to allow a lawyer to "drop" one client in favor of another, that concern is outweighed here by the fact that a lawyer faced with such a conflict simply has no good options absent an ability to withdraw from one representation, if necessary. Moreover, if the Rules provide the withdrawal option, that may itself influence clients not to act strategically in determining whether to grant the requested consent.

While we understand the Board's tentative desire to wait until more courts are confronted with this issue, we believe this is an area where the Board should provide leadership. As the law currently stands, lawyers have very little guidance as to an appropriate course of action in the above-described circumstance, and every instance in which such a conflict arises is dealt with on an *ad hoc* basis. But law firms and clients benefit from settled, clear rules, and, therefore, this is an area in which the Board should comment. The one court located in California that has addressed the issue has suggested that the thrust upon defense is "probably not good law in California." *See GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*, 8 F. Supp. 2d 1182, 1187-8 (N.D.Cal. 1998), *vacated by, mandamus den'd*, 192 F.3d 1304 (9th Cir. 1999). This ruling is not binding on California courts. The ruling nonetheless creates difficulty for California lawyers trying to determine the best course of action when facing a thrust upon conflict. Furthermore, the currently uncertainty affects clients. Without guidance from the Board, it is quite possible that a client could spend hundreds of thousands of dollars (or more, in lengthy, complex litigation) on legal representation only to have its counsel compromised because the attorneys are unsure of a safe course of action.

The Bar of the City of New York (where many firms that work on engagements similar to ours are located) has provided a detailed analysis of thrust-upon conflicts and has established a balancing test for its attorneys to use when faced with these unforeseeable conflicts. *See* Association of the Bar of the City of New York, Opinion 200-5 (June 2005) (advising that a lawyer faced with a thrust-upon conflict should apply a balancing test to decide whether withdrawal is appropriate, guided by the "overriding factor" of the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client"); *see also* District of Columbia, Opinion 292 (June 15, 1999).

In light of the tremendous uncertainty in this area, we submit that the adoption of Comment 5 is appropriate and necessary.

Sincerely,

Stuart N. Senator

cc: George Niespolo, Duane Morris LLP
Jonathan Gordon, Alston + Bird LLP
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**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

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re: Comments of the Office of the Chief Trial Counsel to Proposed Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.10. Imputation of Conflicts of Interest: General Rule.**

1. OCTC is concerned with the use of the term "knowingly" in subparagraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases.
2. Again, there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions. OCTC is concerned that Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC suggests either Comment 3 be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 needs more clarification or should be stricken.

# Rule 1.11 – Public Comment – File List

X-2010-421z COPRAC [1.11]

X-2010-425-20t SDCBA [1.11]

X-2010-512a US Attorney [1.11]

X-2010-513-23 OCTC [1.11]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 14, 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, as revised on May 17, 2010, and has the following concerns.

The revised comments to the rule provide as follows:

> [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006); *Younger v. Superior Court* (1978) 77 Cal. App. 3d 892 [144 Cal.Rptr. 34]. Regarding prosecutors in criminal matters, see Penal Code section 1424.
>
> [9C] This Rule leaves open the issues of: (1) whether, in a particular matter, a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; and (2) whether the use of a timely screen will avoid that imputation. These issues are a matter of case law.

COPRAC support the implementation of screening in California through the Rules of Professional Conduct, and accordingly, prefers the prior version of the rule in which subsection (e) provided that:

> (e) If a lawyer is prohibited from participating in a matter under paragraph (d) of this Rule, no other lawyer serving in the same government office, agency or department as the personally prohibited lawyer may knowingly undertake or continue representation in the matter unless: (1) the personally prohibited lawyer is timely and effectively screened

from any participation in the matter; and (2) the personally prohibited lawyer's former client is notified in writing of the circumstances that warranted implementation of the screening procedures required by this paragraph and of the actions taken to comply with those requirements. However, notice to the former client is not required if prohibited by law or a court order.

COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.

In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline.

Accordingly, COPRAC urges the reconsideration of, and adoption, the prior language of the rule permitting screening.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

February 12, 2010

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. 4th 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App. 4th 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. 4th 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 *defacto* 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

## 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** United States Attrorney's Offices for the Central, Easter

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

*** Name** George S. Cardona

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) george.s.cardona@usdoj.gov

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.11 Special Conflicts for Former and Current Government Officers and Employees

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.

TO: Board of Governors
State Bar of California

FROM: André Birotte Jr.
United States Attorney
Central District of California

Laura E. Duffy
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 1.11, 3.8(g) and (h), 8.4(c), and 8.5(b)

DATE: June 14, 2010

We want to thank the Rules Revision Commission ("the Commission") and the Board of Governors for all the hard work that has been done on the proposed revisions to the California Rules of Professional Conduct; for the willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors; and, in a number of instances, for changes to the proposed rules based on consideration of these views. We believe the proposed rules that are before the Board of Governors include a number of modifications made during the revision process that address many of the concerns we have previously expressed. We write to provide comments on portions of four rules, Proposed Rules 1.11, 3.8(g) & (h), 8.4(c), and 8.5(b), that we continue to believe, in their current form, could have a substantial negative impact on the work of the prosecutors in our offices and the United States Department of Justice.

A. Proposed Rule 1.11

We appreciate the decision not to adopt the previously-proposed paragraph (e), which would have imputed conflicts within government agencies, and instead to recognize that both the imputation of conflicts within government agencies and the effectiveness of screening to avoid such imputation are matters better left to development by the case law. We are concerned, however, that the proposed comments addressing this topic, the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is

appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we would suggest that the Proposed Comments be modified as follows.

First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of the Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comments closer to the ABA Model Rule comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Proposed Comment [2] would read:

> [2] Paragraphs (a)(1), and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. This Rule does not impute a current government lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law.

Second, we would suggest that proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to Younger (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read:

> This Rule Not Determinative Of Disqualification
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> [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *In re Charlisse C.*, 45 Cal. 4th 145 [84 Cal.Rptr.3d 597] (2008); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424.

B. Proposed Rule 3.8(g), (h)

As you know, our offices prosecute all federal crimes in California. As prosecutors, we support the goal of Proposed Rule 3.8(g), (h). We have always held our attorneys to the highest standard of professional conduct and expect, when exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed promptly after its discovery. Moreover, we would not countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant's innocence, therefore, we expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.

Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, and, accordingly, feel obligated to object to the Proposed Rule as drafted, for the following reasons:

1. **Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.

2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Department previously provided to the ABA and the Commission modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently address this issue. We respectfully disagree. If a prosecutor in jurisdiction A learns of evidence tending to show the innocence of a defendant previously convicted by a prosecutor's office in jurisdiction B, in which the prosecutor in jurisdiction A has never served, then the prosecutor in jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in jurisdiction A will not know what evidence was presented at the trial in jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in jurisdiction B. The prosecutor in jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for

assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.

3. **Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.** Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure loses all signaling capacity it might have had – the disclosure will be interpreted not as representing a prosecutor's judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor's decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.

4. **Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein.** First, the term "knows" is undefined in the proposed rule. It is defined elsewhere in the Proposed Rules to mean "actual knowledge of the fact in question." Proposed Rule 1.0.1(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings relating to the conviction and asserting prosecutorial misconduct, often based on claims that the prosecutor concealed clear exculpatory evidence of which the defendant has just become aware. For example, a common claim is that an inmate has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant's asserted alibi for the time of the crime. Would a prosecutor receiving a letter making this claim "know" of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor would be on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant's asserted alibi.

But we submit that, without further investigation, the prosecutor simply cannot "know" whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant's alibi.

Second, we are concerned by the use of the term "material" without a correlating definition. While not defined in Proposed Rule 3.8 or its comments, or in the general terminology definitions in Proposed Rule 1.0.1, the term "material" or "materiality" is used elsewhere in the Proposed Rules and the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Proposed Rules 1.7(a)(2), 3.3(a)(1); ABA Model Rules 1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer's duty to correct material false statements made to court, "materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation."). This meaning of "material" appears to be referenced in Proposed Comment [6A], which cross-references to Proposed Rule 3.3. In the criminal context, however, the term "material" is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). In the context of Rule 3.8(g), that "materiality" should be subject to this latter interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]" We believe this is the proper interpretation of "material" for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term "material" is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.

Third, we believe the proposed rule's use of the term "promptly" is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule's ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is "new, credible, and material." Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently "promptly."

Fourth, we are concerned with the mandate that a prosecutor "undertake further investigation" or "make reasonable efforts to cause an investigation." Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of "new, credible and material" evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. **Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein.** First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps <u>may include</u> disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post-conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures

that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. **Proposed Comment [9]'s "good faith" exception.** We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. We agree with the standard chosen, that is, a quasi-subjective standard that looks to the individual prosecutor's belief, but asks whether that belief is "reasonable" ("judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted"), but believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to "know" of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not "know" of such evidence. Without some guidance on these points, it will be impossible for a prosecutor to determine whether his actions in evaluating evidence will be deemed sufficiently "reasonable" to bring the good faith exception into play should the prosecutor's judgment subsequently be second guessed.

7. **Potential conflict with other Rules of Professional Conduct and other applicable laws.** The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors' obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and Proposed Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidential information. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Alternatively, if the obligations under Proposed Rule 3.8(g), (h) are not intended to override this duty, the proposed rule should make this clear. In response to our earlier comment on this point, the Commission has suggested that conflicts of this type are not uncommon, noting in particular that "conflicts between a duty of confidentiality and a duty of candor can implicate the conduct of any lawyer," and stating that "[a] one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules." We note, however, that other proposed rules do in fact resolve disputes between specific duties of disclosure and the general duty of confidentiality. Thus, for example, Rule 3.3 (b) makes clear that a lawyer is required to take "reasonable remedial measures" only "to the extent permitted by Business and Professions Code 6068(e)." See also Rule 3.3, Comment 10 (required remedial measures "do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code Section 6068(e)").

Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(l), and the Department of Justice to civil liability, 5 U.S.C. §

552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws. Accordingly, we suggest that, if these subsections are adopted, the comments should make clear that the obligations they impose are subject to a prosecutor's compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.

8. **Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.** Prosecutors and their limited resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction) will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to ensure that they do not run afoul of this rule. The Board of Governors should understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of "new" evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted "new" witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.

C. Proposed Rule 8.4(c)

As drafted, Proposed Rule 8.4(c) defines it to be professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation." There is no comment discussing or limiting this prohibition. It is well established, however, that government attorneys may supervise investigations that require informants and agents to engage in deceit and misrepresentation in order to infiltrate criminal organizations or uncover criminal activity. See, e.g., United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers). A standard Ninth Circuit jury instruction advises juries of the propriety of such conduct. See Ninth Circuit Model Criminal Jury Instruction 4.13 (Government's Use of Undercover Agents And Informants). Government attorneys engaged in civil enforcement investigations involving consumer frauds or civil rights violations also may use individuals who misrepresent themselves to be customers or renters to uncover evidence of violations of law. Oregon has adopted a rule specifically stating that such activity by attorneys will not be deemed misconduct:

> . . . it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor of supervisor only when the 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.

Oregon Rule of Professional Conduct 8.4(b).

We believe that guidance along the lines of the Oregon model would be appropriate to ensure that government attorneys overseeing these types of investigations do not run the risk of discipline based on conduct recognized to be appropriate that serves valid public interests. To accomplish this, we propose that the following new comment be added in connection with Proposed Rule 8.4(c):

> [#] Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct, where a lawyer advises clients or others about or assists or supervises lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the 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. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful.

We recommend the addition of the last sentence above to ensure that private attorneys are not misled by the balance of the comment 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. The last sentence of this proposed comment will avoid any suggestion that it is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions.

D. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over lawyers admitted to practice in California, regardless of where their conduct occurs, and over lawyers not admitted to practice in California if they "provide[] or offer to provide any legal services in California." As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney's Offices, even if not admitted in California, may be subject to discipline in California even if only a small part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California). We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we think it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing rules of professional conduct. Otherwise, lawyers working multi-jurisdictional investigations will be put in the often impossible position of reconciling different rules of professional conduct that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)'s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts Department of Justice and other attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconciliable. We urge the Commission to adopt ABA Model Rule 8.5(b)(2), or a similarly-worded provision, to provide consistency and predicability in the choice of law rules so that lawyers working multi-jurisdictional investigations may reasonably determine what rules will apply and conform their conduct to those rules.

Although Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) to provide a consistent choice of law rule when a multi-jurisdictional matter is pending before a tribunal – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal's own rules provide otherwise – there is no similarly consistency in the choice of law rule applied when a lawyer is involved in a multi-jurisdictional investigation that is not yet pending before a tribunal, that is, before the filing of a civil complaint or criminal charge. This is because Proposed Rule 8.5(b)(2) rejects the

"predominant effect of the conduct" standard and the "safe harbor" provision of the Model Rule, substituting instead a rule that, for matters not yet before a tribunal, a lawyer is subject to the California rules unless "specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from" the California rules. See also Proposed Comment [4] (explaining that this rule is intended to apply even to those cases in which lawyer's conduct is in anticipation of proceeding that is likely to be, but not yet before a tribunal). If this rule is adopted, it will mean that a Department of Justice lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-complaint investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct during the investigation, even though the case has no nexus to California and no California resident's interests are at stake. As soon as an indictment or complaint is filed in Pennsylvania, however, the Pennsylvania Rules will apply to that same lawyer's conduct. In contrast, this lawyer's colleague, licensed in a state (such as Pennsylvania) that has adopted the ABA Model Rule "predominant effect" test, will likely be bound by the Pennsylvania rules during the investigation. The California-admitted federal government lawyer, practicing outside California, therefore, would have to tailor her investigation, including the supervision of law enforcement officers or investigators, differently than her non-California licensed colleagues in the same case, merely because she is licensed in California.[1] Moreover, the lawyer may have to change her conduct during the investigation, merely because an indictment or complaint has been filed. The opportunities for confusion and litigation are limited only by the imagination. For example, what rules will goven the lawyer's conduct if a complaint is filed that names only some, but not all of the potential defendants? If the lawyer continues her investigation, should she follow the Pennsylvania Rules only as to the named defendants while continuing to follow the California Rules as to the the unnamed defendants? What rules will govern her conduct with respect to witnesses who may provide information relating to both named and unnamed defendants? It is difficult to understand how the interests of either California or its residents are served by subjecting lawyers overseeing multi-jurisdictional investigations to the confusion resulting from different choice of law rules that may render applicable different rules of professional conduct, if California's interests are not at issue.[2]

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[1] The difficulties posed may be particularly significant in those instances where California's Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California's Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another") and 1.6(b)(3) ("to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used") or where an issue concerning the lawyer's implied authority for disclosure is at issue, a concept that has also been rejected in California's Proposed Rule 1.6.

[2] The Commission rejected our previous comment along these same lines based on its conclusion that, "The detailed explanation provided in support of this Comment argues, in effect,

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

**Conclusion**

For the foregoing reasons, we request a modification of the comments to Proposed Rule 1.11 to make more clear that the rule does not impute conflicts within government agencies. We also oppose the adoption of Proposed Rule 3.8(g), (h); if the Board of Governors ultimately concludes that adoption of some variation of these provisions is warranted, we believe that they should be substantially redrafted along the lines we previously proposed. In addition, we propose the addition of a comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

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that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions." Respectfully, we disagree. We do not believe the situations posed by the discussion above will be so rare given the growing frequency of multi-jurisdictional investigations conducted by DOJ attorneys, and we see no reason why the choice of law rules applicable to attorneys conducting such investigations should apply completely differently based solely on the timing of the filing that puts a case before a particular tribunal when it is known all along where that filing will ultimately occur. We seek not uncertainty, but the certainty that will come with a lawyer's ability to know which set of rules will apply, to know that those rules will apply both pre- and post-filing, and to conform conduct to those rules.

**Exhibit A**

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

(g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:

(1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:

(i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or

(ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).

(2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

* * * *

[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.

**U.S. Department of Justice**

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained – pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows[1] "new, credible and material" exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is "new, credible and material." Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is "new, credible and material." We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor's subjective intent should be used in determining adherence to this rule.

"Material"

Secondly, we are concerned with the use of the term "material" in the rule. . Neither the proposed Rule nor the Comments defines the term "material." In a criminal context, the term "material" is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

However, the term "material" or "materially" is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be "materially limited" by the lawyer's own interests or the interests of a third person); ABA Model Rules of Prof'l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct "material" false statements made to a court); ABA Model Rules of Prof'l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a "material" false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term "material" may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer's duty to correct material false statements made to a court, "materiality encompasses matters represented to a tribunal that the judge would

[1] The term "know" is defined in the Model Rules to mean "actual knowledge of the fact in question[,]" Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.").

We would believe that this confusion could be remedied by making clear that the term "material" is used in the Brady sense of the term.

"Promptly"

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must "promptly" disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor must "promptly" disclose the evidence to the defendant and undertake further investigation. Although the term "promptly" is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.4(a) (2007) (requiring a lawyer to "promptly" consult with clients about certain matters and "promptly" comply with a client's reasonable request for information); ABA Model Rules of Prof'l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to "promptly" notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof'l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to "promptly" notify the sender). Based upon the construction of the term "promptly" when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel's firm "promptly"; the attorney was not screened until ten days after he started working at the new firm; court discounted firm's description of administrative delays in light of the fact that the firm knew prior to the attorney's arrival that he was working as opposing counsel on the case).

When the term "promptly" is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is "new, credible and material," particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term "promptly" was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and "know" that the evidence is "new, credible and material."

"Seek to remedy the conviction"

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor "shall seek to remedy the conviction." Proposed Comment [8] states,

> Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to "seek to remedy the conviction" may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. See, e.g., Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);[1] Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to "remedy" a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

> Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

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[1]Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a)("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.[2] Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to "remedy" a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people's desire for finality of criminal convictions is an equally compelling interest to be served. "[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

> A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

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[2]Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion "[n]otwithstanding any law that would bar a motion under this paragraph as untimely." 18 U.S.C. § 3600(g)(1) (Supp. 2007).

> languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

David Margolis
Associate Deputy Attorney General

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

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

1. OCTC thanks the Commission for adding Business & Professions Code section 6131 to the Comments, but we still are concerned that subparagraph (a) is incomplete. OCTC believes it should state: Except as law may otherwise expressly permit *or prohibit*. The same is true of subparagraphs (c) and (d).
2. Subparagraph (b) of the rule 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 and 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 minority of the Commission who objected to the use of the term "*knowingly*" because it would immunize attorneys who do not bother to check for conflicts of interest. Disciplinary law has long recognized that gross negligence can constitute misconduct. That would be appropriate here. Further, it would be consistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule."
3. OCTC does not object to the concept contained in subparagraph (c), but did find it a little confusing as written. It would suggest that the Commission might want to tighten the language.
4. OCTC is concerned that subparagraph (d)(2)(ii) prohibiting government officers and employees from negotiating for private employment might be too broad. It would appear to prohibit any criminal prosecutor from negotiating with the public defender's office for a job.
5. The comments are too many and most seem more appropriate for treatises, law review articles, and ethics opinions.

# Rule 1.12 – Public Comment – File List

X-2010-425-21u SDCBA [1.12]

X-2010-513-24 OCTC [1.12]

X-2010-529g SCCBA [1.12]

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: None

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

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

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

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

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

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

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

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ X ] No [ ] Not Applicable; no existing rule.

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

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

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

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

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

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.**

1. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

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sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| | | |
|---|---|---|
| | ~~Comment [2] as currently drafted. Comment [2] with the recommended change in the substance of the rule, should read as follows: "It is the intent of this rule that it be applied consistent with PC 21350 et seq."~~ | ~~related to the client.~~ |
| ~~Rule 1.8.11: Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9 [This was Rule 1.10; now there is no Rule 1.10]~~ | ~~[NOTE: Since the SCCBA comment on this, a California 2nd Appellate District Court opinion was published that comports with the SCCBA recommendation: *Kirk v. First American Title*, April 7, 2010. ] The RRC proposal is to adopt the ABA Model Rule. However, the ABA Model Rule used by the RRC is the model rule pre-February 2009. On February 16, 2009, the ABA amended Model Rule 1.10 to add provisions allowing for the limited screening of attorneys moving from one firm to another. The amendments set out the specifics of such screening. The SCCBA recommends that the 2009 amended version of Model Rule 1.10 be adopted. The amended version recognizes the reality of modern day law practice, which involves the mobility of attorneys, the lateral movement of attorneys among firms and the practical reality that if certain parameters can be met, attorneys can be screened effectively and timely so that a conflict of interest is not created for the attorney's new firm or legal organization.~~ | ~~In the released 69 rules, the State Bar Board of Governors rejected the RRC recommendation to adopt a version of the ABA Model Rule 1.10. The current release does not include any Rule 1.10. Instead, they have added Rule 1.8.11 which imputes all conflicts by one lawyer to the firm. There is no screening at all provided for in the current version. The current version of Rule 1.8.11 reads very simply as follows: "While lawyers are associated in a law firm, a prohibition in Rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them."~~ |
| Rule 1.12: Former Judge, Arbitrator, Mediator or Other Third-Party Neutral | Subparagraph (b) is ambiguous as to whether the rule applies to the interviewing stage as opposed to the "negotiating employment" stage. The rule should apply to the interviewing stage though requiring the judges' approval for an interview is not necessary. The following language should be added at the conclusion of | The current version partially addresses the concerns raised in the SCCBA recommendation. The language has been changed from "negotiating employment" to "discussions regarding prospective employment." |

| | | |
|---|---|---|
| | subparagraph (b) as it now reads: "In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer." | However, subsection (b) still requires that the law clerk obtain approval from the judge before participating in discussions regarding prospective employment. The current version still makes no distinction between interviewing and discussions regarding prospective employment nor do any of the comments to the rule. |
| ~~Rule 3.6: Trial Publicity~~ | ~~This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1st Amendment. Much of the conduct/speech which this rules attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1st Amendment, such as, an attorney misrepresenting the facts of case; or engaging in conduct that undermines the ability of a litigant to receive a fair trial such as deceit, deception or fraud. The SCCBA understands that the California Supreme Court has previously adopted substantially similar rules but notwithstanding that this rule should be deleted.~~ | ~~The current version keeps this rule as previously proposed by the Rules Revision Commission.~~ |
| ~~Rule 3.8: Special Responsibilities of a Prosecutor~~ | ~~The SCCBA fully supports a rule that addresses the special responsibilities of a prosecutor. The currently proposed version addresses several of the concerns previously articulated by the SCCBA. However, it still sets out too broad a framework~~ for the responsibilities of a prosecutor.<br>In particular, the SCCBA suggests that | ~~The current version is substantially the same as the originally proposed version, which closely tracks the ABA Model Rule. The changes in the current version are as follows:~~<br>• ~~Subsection (a): deletes the~~ |

# Rule 1.13 – Public Comment – File List

X-2010-421y COPRAC [1.13]

X-2010-425-22v SDCBA [1.13]

X-2010-469-3c OCBA [1.13]

X-2010-513-25 OCTC [1.13]

X-2010-517o Zitrin-Multiple [1.13]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 14, 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 1.13

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.13 and generally supports the rule's adoption with the following comments.

As an initial matter, COPRAC agrees that the rule should not permit a lawyer to report outside of the organization as the Model Rule permits. To do so would be contrary to California's statutory protections and historical view on the importance of confidentiality.

With that said, the addition of the objective standard in paragraph (b) is troublesome in that a lawyer could be subject to discipline if he or she "reasonably should have known" that an act is illegal and likely to result in substantial injury to the organization. This language goes beyond both the current California rule and the Model Rule and appears to be unprecedented. What constitutes "reasonably should have known"? Will a tax lawyer be deemed to "reasonably should have known" that an action violates antitrust laws if it is outside the scope of the matter on which he or she is working? If he or she is working for a national firm with lawyers who practice in such areas, will the lawyer be held to a higher standard (essentially imputing the knowledge of others at the firm to that lawyer)? Comment [5] says that a lawyer is not required to audit the client's activities or initiate an investigation, but that statement is directed to the portion of paragraph (b) that deals with knowledge of the conduct (not the consequences thereof). For these reasons, COPRAC believes that knowledge also should be the standard with respect to the consequence of the conduct.

Further, paragraph (b) mandates that a lawyer refer such matters to a higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." While urging reconsideration to the constituent of the organization

with whom the lawyer is dealing is discussed in Comment [7], it is only mentioned as a possibility "in some circumstances." COPRAC recognizes that some occasions may arise in which reporting up the ladder may be necessary, however, contrary to the suggestion of Comment [7], COPRAC believes that in certain situations, urging reconsideration should be the first response. If the general rule becomes reporting up the ladder, the free flow of communication that is essential to the attorney-client relationship will most certainly be damaged, possibly beyond repair, as the constituents with whom the lawyer communicates on a regular basis will think twice about speaking openly with counsel. Consequently, COPRAC believes that urging reconsideration should be included in the text of the rule itself as an optional first step, except in exigent circumstances.

Similarly, while paragraph (g) requires independent consent for dual representation, Comment [17] recognizes this is not always possible and, therefore, not always required. COPRAC believes that this exception also should be included in the text of the rule.

With regard to Comment [17], COPRAC notes that the third sentence appears to be much more restrictive than the language of paragraph (g) that it is interpreting. Paragraph (g) simply permits shareholders to provide consent to dual representation, whereas Comment [17] implies that shareholders may consent only when there is no official to consent and the board is deadlocked. Neither condition is mandated by the rule, and there is no reason for both to be required.

Finally, the last sentence of paragraph (d) says that "[t]he lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with Rule 1.16." Comment [13] attempts to rephrase this in the following terms: "Paragraph (d) confirms that a lawyer may not withdraw from representing an organization unless the lawyer is permitted or required to do so under Rule 1.16." However, paragraph (d) does not seem to "confirm" such a restriction, but rather merely notes that the duty to resign or withdraw may be a permissible response. As the sentence appears to be unnecessary to Comment [13], COPRAC suggests that it be deleted.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 1.13 – Organization as a Client**
**[Existing CRPC Rule 3-600]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.13.

Rationale For Comment 1: Lack of uniformity with ABA Model Rule 1.13 is justified to preserve B&P Code §6068(e) on confidentiality.

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 1.13 – Organization as a 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 believes that proposed Rule 1.13 is inconsistent with the position taken in proposed Rule 1.6 concerning confidential client information. Proposed Rule 1.6(b) restricts permissible disclosure of confidential client information to five limited circumstances, but does not mandate such disclosures if the lawyer chooses not to reveal such information. Further, even in situations where the lawyer reasonably believes that a criminal act by the client is likely to result in substantial bodily harm or death, proposed Rule 1.6 first requires that the lawyer attempt to persuade the client not to take such action, if doing so is reasonable under the circumstances. In contrast, proposed Rule 1.13(b) *mandates* that a lawyer refer certain matters to higher authority in the organization "unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization." Urging reconsideration to the constituent of the organization with whom the lawyer is dealing is discussed not in the rule itself, but rather in Comment [7] to proposed Rule 1.13 as a possibility "in some circumstances," *i.e.*, as the "exception to the rule" of reporting up the ladder.

The OCBA recognizes that the five limited circumstances in proposed Rule 1.6(b) anticipate disclosure to a non-client, whereas proposed Rule 1.13(b) provides for disclosure to higher authority within the client organization, although the Comments [14] and [15] to proposed Rule 1.13 note that, at times, such a higher authority may be outside of the organization. Nonetheless, suggesting that a lawyer immediately report "up the ladder" rather than urging reconsideration as an initial step would conflict with the policies furthered by the duty of confidentiality as set forth in Comment [2] to proposed Rule 1.6. The policies furthered by the duty of confidentiality include encouraging the client "to seek legal assistance and to communicate fully and frankly with the lawyer." The Comment recognizes that "[t]he lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." However, if the lawyer's first response is the report up the ladder, constituents likely will not advise the lawyer of matters he or she may need to know in connection with the representation, chilling the communication necessary to such representation since the

information needed usually will not be provided by the highest authority in the organization, but by its lower-level constituents. We believe that urging reconsideration should be, absent exigent circumstances, a prerequisite to reporting up the ladder and should be expressly included as such in the text of the rule itself. Such a step is particularly important, as the lawyer: a) may be mistaken about what is in the best interest of the organization, b) may not understand the constituent's reasons for taking such actions, or c) may be able to persuade the constituent that his or her intended actions would be ill-advised.

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.13. Organization as Client.**

1. The phrase "other person associated with the organization" contained in subsection (b) of proposed rule 1.13 is vague and overbroad. Whether a person is "associated" with an organization is open to interpretation and, therefore, potential litigation.
2. OCTC seeks clarification regarding the meaning of this rule. We interpret the proposed rule to apply equally to in-house counsel and to outside counsel. OCTC wishes to clarify whether that is the intent of the rule. If so, we interpret the rule to impose a duty under certain circumstances for outside counsel to withdraw from employment and for in-house counsel to resign from his or her employer organization. OCTC seeks clarification as to whether that is the intent of the rule or whether there are circumstances in which an in-house counsel's response may be less drastic than resignation from his or her place of employment. If resignation is not necessary, OCTC recommends that information set forth in the Comment's to the rule distinguish the circumstances requiring an in-house counsel's withdrawal from representation of the organization to the in-house counsel's resignation.
3. The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

2. *Rule 1.13 – Organization as client*

Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.

## ~~V.~~ ~~Rules related to lawyers' financial interests~~

### ~~1.~~ ~~*Rule 1.5 – Use of the term "unconscionable"*~~

~~The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.~~

~~Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.~~

~~This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."~~

### ~~2.~~ ~~*Rule 1.15 – Trust accounts*~~

~~The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.~~

~~However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary *and wary* practitioners.~~

~~We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.~~

~~The Board should return this rule to the Commission with appropriate instructions.~~

### ~~3.~~ ~~*Rule 1.17 – Sale of a law practice*~~

#### ~~A.~~ ~~Geographical area~~

~~The Commission has conflated the reference to "geographic area of practice" in the ABA rule – allowing a selling lawyer to cease practice in a state or particular "geographic area" – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.~~

~~Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing~~

# Rule 1.14 – Public Comment – File List

X-2010-400 Scott Ross [1.14]

X-2010-401 Sondra J. Allphin [1.14]

X-2010-421f COPRAC [1.14]

X-2010-422 Lisa MacCarley [1.14]

X-2010-425-23w SDCBA [1.14]

X-2010-513-26 OCTC [1.14]

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** partner at Beck, Ross, Bismonte & Finley

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

*** Name** Scott Ross

*** City** San Jose

*** State** California

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

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

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

Rule 1.14 Client with Diminished Capacity

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

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

---

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

This rule, and the clarifications added by the comments, are an important step forward in protecting elders against financial and physical abuse. I strongly urge that this rule be adopted.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Trusts & Estates Attorney

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Sondra J. Allphin

*** City** San Jose

*** State** California

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

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 1.14 Client with Diminished Capacity

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 strongly support this proposed rule because I believe it will make it easier for attorneys to protect their clients who have developed diminished capacity.

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 1.14

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 1.14 - Client with Diminished Capacity. COPRAC supports the adoption of proposed Rule 1.14 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

## Hollins, Audrey

**From:** Lisa Maccarley [lisamaccarley@earthlink.net]
**Sent:** Saturday, May 08, 2010 3:04 PM
**To:** Hollins, Audrey
**Subject:** Comment on Probate California Rule No. 1.14 - Client with Diminished Capacity

As a conservator ship and elder law attorney for 17 years, and someone who has literally sat on all sides of disputes regarding conservatorships and persons with diminished capacity, I believe that this rule is WRONG OR, better yet, should NOT be applied to court appointed counsel. - Court appointed counsel should not become a tool to promote the agendas of those who are committing fraud and exercising undue influence, and also should not be advocates for the patently inappropriate wishes of clients with diminished capacity.

Sacramento County's rule No. 15.103 is RIGHT on the money. Court appointed counsel MUST have a separate role, and should not be bound to zealously advocate the "wishes" of clients.

Examples of advocacy gone wrong:
In Re: The Conservatorship of Susan Ward
Ms. Ward is a 60 year old woman who was never married. She never held a job, never wrote a check, never paid a bill, and was taken care of by her father her entire life. Mr. Ward, now in his 80's, is suffering from congestive heart failure. When Mr. Ward experienced a heart attack, a local hospital called a Private Professional Fiduciary ("PPF") and asked him to intervene on behalf of father and his clearly take action to protect Susan. Susan's estate is quite modest - and she is ineligible for social security since she has, literally, never worked a day in her life.

The PPF applied to be Ms. Ward's conservator. She objected. The court-appointed attorney came to court - without Susan - and told the Judge. Susan had a plan: Susan's boyfriend, and a friend of his, were living rent free in the attic, and they were going to take care of Susan when her father died. Sounds like a plan, right? Well, there was no attic and no boyfriend. The court-appointed attorney was well aware of this, but in the course of "advocating" for Susan, he tallied up $20,000 in legal fees. Susan didn't know that her little estate was going to take such a massive hit. Oh, and by the way, a conservator WAS appointed for Susan.

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

1333 [illegible] San Diego, CA 92101 | P 619.231.0781 | F 619.233.3065 | [illegible]

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: California has no comparable rule

Proposed New Rule No./ Title: Rule 1.14 Client with Diminished Capacity

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

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

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

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

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

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

This moderately controversial Rule 1.14 generally tracks the language of Model Rule 1.14 with six principal differences: 1) it makes an exception for minors, criminal defendants, and persons subject guardianship or conservatorship proceeding which are separarely regulated by California statutes; 2) establishes a stricter standard for when a lawyer may reveal confidential information to protect the client's interests, namely, "significantly diminished capacity"; 3) provides more detailed guidance regarding what constitutes "significantly diminished capacity"; 4) provides that this is a last resort, and enumerates factors the lawyer should considier before taking such action; 5) emphasized the nature and extent of any disclosure is strictly circumscribed, and 6) clarifies that taking action is permissive, not mandatory, and a lawyer is not subject to discipline for failing to take such action.

Some people, such as a minority of the Commission (and I suspect at least a minority of our Legal Ethics Committee), might reasonably believe the policy of abrogating confidentiality here is wrong because it impairs the trust relationship between clients and lawyers. I, however,

agree with the underlying policy of Rule 1.14 of allowing the lawyer to act competently on behalf of the client with significantly diminished capacity, to further the client's goals in the representation and to protect the client's interests, and believe the Rule is drafted well enough to greatly minimize the occurrence of such impairment of trust, and, that on balance it actually serves to protect the client's interests.

This is one rule I recommend all subcommittee members review because it brings into play significant values that I know many have strong views on.

The Commission's nonlawyer public member asserts the proposed rule wrongly assumes all lawyers possess the psychiatric professional expertise needed to determine whether a client's mental capacity is "significantly diminished" and therefore even well-intentioned lawyers will inevitably breach confidentiality to "protect the client" resulting in serious adverse consequences for the client. While this may possibly occur on occasion, I think the Rule and comments thereto provide reasonable guidance to assist the lawyer in acting when necessary as a last resort and protect the lawyer from discipline whether she or he takes action or not.

**CONCLUSIONS (pick one):**

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

[ ] We approve the new rule with modifications.*

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 1.14. Client with Diminished Capacity.**

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the confidentiality rules. Subparagraph (b) leaves too much discretion to an attorney's unqualified personal assessment of a client's abilities and using that unqualified assessment to permit the attorney to reveal a client's confidences. Further, this rule appears to be broadening the exceptions to confidentiality beyond what is permitted by Business & Professions Code section 6068(e).
2. The Comments are more appropriate for treatises, law review articles, and ethics opinions.
3. Comment 1 is problematic as to when and how to utilize the rule. When and who decides a client is not capable of making decisions - - and how and to whom does the attorney reveal this? If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client's behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule or section 6068(e). Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counselor, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.
4. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
5. Comments 5 and 6 state the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interest foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e)? This Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline of almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
6. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) According to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

# Rule 1.15 – Public Comment – File List

X-2010-425-24x SDCBA [1.15]

X-2010-513-27 OCTC [1.15]

X-2010-517q Zitrin-Multiple [1.15]

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

LEC Rule Volunteer Name(s): David Cameron Carr

Old Rule No./Title: 4-100

Proposed New Rule No./ Title: 1.15

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

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

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

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

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

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

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

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

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

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

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

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

**CONCLUSIONS (pick one):**

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

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

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

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

1. While OCTC supports some of the Commission's additions or changes to the Model Rules and there is much merit to the Commission's explanation that costs are covered by the rule, OCTC disagrees with subparagraph (d) of this rule with allows, but does not require, attorneys to place advanced fees in the trust account. We believe this creates confusion and a lack of consistency. Either every lawyer should be placing advanced fees in the Client Trust Account ("CTA") or no lawyer should be placing advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will protect clients. (While some have even argued that the funds are less safe in a CTA, OCTC disagrees and believes the safest place for the funds is in a CTA.) OCTC has many cases where the attorney does not return the unearned fees and claims not to have the funds to do so. Many who oppose mandating that advanced fees be in the CTA cite to *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164. However, that case simply stated that the Court did not need to decide the issue in that case. Since then, at least one state appellate court has found that the current rule requires attorneys to place advanced fees into the CTA. (*See T & R Foods, Inc v. Rose* (1996) 47 Cal.App.4th Supp 1, 7.) Further, the Model Rules and most other jurisdictions require attorneys to place advanced fees in the trust account. If this change to the rule is adopted, the first sentence of Comment 10 should be stricken.
2. OCTC finds very confusing and inconsistent the proposed rules as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h), and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments [12] – [14].
3. OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them. OCTC would also suggest that the rule specifically provide that the misappropriation of funds violates this rule.
4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule.
5. OCTC supports subparagraph (k), even though it is not in the Model Rules, because it is mostly current rule 4-100(B). However, OCTC is concerned that subparagraph (k)(6), which is new, does not provide for the Supreme Court or other courts to issue an order for an audit. The rule should not determine jurisdiction or send a message that attorneys can violate a court order. The Supreme Court has always provided that is has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (k)(7) should add the word "authorized" to other person to clarify that only authorized persons can request undisputed funds.
6. OCTC is concerned that the language of subparagraph (l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter

to the purpose of the rule and public protection. OCTC is concerned that rule 1.15 (l)(2) and (3) do not state, as rule 1.15(l)(1) does, that if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC also is concerned how this paragraph is impacted by the Choice of Law rule (proposed rule 8.5)

7. OCTC supports subparagraphs (l)(4). There are too many Comments and some of them appear to belong in the rule.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

2. *Rule 1.13 – Organization as client*

Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.

V. **Rules related to lawyers' financial interests**

1. *Rule 1.5 – Use of the term "unconscionable"*

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."

2. *Rule 1.15 – Trust accounts*

The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.

However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary *and wary* practitioners.

We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.

The Board should return this rule to the Commission with appropriate instructions.

3. *Rule 1.17 – Sale of a law practice*

A. Geographical area

The Commission has conflated the reference to "geographic area of practice" in the ABA rule – allowing a selling lawyer to cease practice in a state or particular "geographic area" – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.

Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing

# Rule 1.16 – Public Comment – File List

X-2010-421mm COPRAC [1.16]

X-2010-425-25y SDCBA [1.16]

X-2010-430c Glenn Alex [1.16]

X-2010-485b Toby Rothschild [1.16]

X-2010-511c State Bar LPMT [1.16]

X-2010-513-28 OCTC [1.16]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 1.16

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 1.16 – Declining or Terminating Representation. COPRAC supports the adoption of proposed Rule 1.16 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 1.16 – Declining or Terminating Representation [Existing CRPC Rule 3-700]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.16.

Rationale For Comment 1: The proposal is similar to the material points in the existing rule but clearer.

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel – a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.

The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

~~Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.~~

3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."

   In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.

~~4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."~~

~~Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."~~

(Emphasis added.)) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"

The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.

Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.

Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."

Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.

Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.

The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Toby Rothschild

*** City** Los Angeles

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) trothschild@lafla.org

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.16 Declining Or Terminating Representation [3-700]

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

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

---

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

Rule 1.16(e)(1) requires client files to be released "to the client, at the request of the client." Comment [9] defines this duty to appley when "new counsel seeks to obtain client files from the lawyer." The rule and the comment should be consistent, and should probably make clear that the request can only come from the client, or from a new attorney with the client's consent.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.
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Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

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

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 1.16 Declining Or Terminating Representation [3-700]

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

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

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

Please see attached 1 page .pdf

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 1.16 [3-700]:**
**"DECLINING OR TERMINATING REPRESENTATION**
**(DRAFT #7, 09/19/09)**

***INTRODUCTION***

The State Bar of California Law Practice Management & Technology Section (LPMT) comment on concerns Proposed Rule 1.16 paragraph (e)(2):

> The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

***ANALYSIS***

**Proposed Rule 1.16(e)(2) Should be Harmonized with Proposed Rule 1.5**

LPMT believes that Proposed Rule 1.16(e)(2) should be revised to clarify that, when a lawyer terminates a representation, the lawyer's obligation to return unearned fees to the client would be subject to Rule 1.5 (which requires flat fee agreements to state that a client may be entitled to a refund of fees if services have not been completed).

***CONCLUSION AND SUGGESTED EDITS TO THE PROPOSED RULE***

Accordingly, LPMT proposes the revised language:

> The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred consistent with Rule 1.5. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

Clean version of Rule 1.16(e)(2):

> The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred consistent with Rule 1.5. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

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Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

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[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

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Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 1.16. Declining or Terminating Representation.**

1. OCTC generally supports this rule. However, OCTC is concerned that subparagraph (b)(1) and (3) should mandate withdrawal. Proposed rule 1.16(a)(1) requires an attorney to not represent or withdraw from representation if the lawyer knows or reasonably should know that the representation will result in a violation of these rules. If the client insists upon presenting a defense in litigation or asserting a position or making a demand that is not warranted under existing law and cannot be supported by a good faith argument an attorney's following the client's instruction would be a violation of Business & Professions Code sections 6068(c) and (g) and proposed rule 3.1. So, how can it just be permissive? OCTC recognizes that current rule 3-700 has the same language (although the current rule also had language requiring withdrawal if the client is bringing an action, conducting a defense, asserting a position, or taking a appeal without probable cause and for the purpose of harassing or maliciously injuring any person. We assume this mandatory requirement was taken out because it is already covered by subparagraph (a)(1)). It makes no sense to make the taking of the position a violation but not require withdrawal for a client insisting (as compared to initially requesting) that the attorney take that position. Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. (See *Molski v. Evergreen Dynasty Corp* (9th Cir. 2007) 500 Fed.3d 1047, 1060-1, rehearing denied 521 Fed.3d 1215, cer denied 129 S. Ct. 594.) Likewise, withdrawal should be mandated if the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent since doing so would be a violation of the these rules and the State Bar Act. Comment 2, in fact, seems inconsistent with placing proposed rule 1.16(b)(1) and (3) as permissive and consistent with OCTC's view that (b)(1) and (b)(3) should be mandatory.
2. Comments 4, 5, 6, 8, and the first sentence of Comment 9, seem more appropriate for treatises, law review articles, and ethics opinions.

# Rule 1.17 – Public Comment – File List

X-2010-425-26z SDCBA [1.17]

X-2010-513-29 OCTC [1.17]

X-2010-517r Zitrin-Multiple [1.17]

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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February 12, 2010

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**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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

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[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

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

1. OCTC's concern is that as to both deceased and living clients it provides that the notice to the client can state that if there is no response to the notice the buyer-lawyer may act. It does not say it is required to act. This could create a problem. 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 also some comments providing this, but OCTC believes that it should be in the rule itself.)
2. There are too many Comments and they seem more appropriate for treatises, law review articles, and ethics opinions. Further, 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. Comments 1A, 12, 15A, and 15B should be in the rule, not the Comments.
3. Comments 7 and 11 are too long, burying information and being hard to read and understand. Comment 11 involves two different concepts: conflict checks and confidentiality. They should be separated into two separate comments.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

2. *Rule 1.13 – Organization as client*

Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.

## V. Rules related to lawyers' financial interests

1. *Rule 1.5 – Use of the term "unconscionable"*

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."

2. *Rule 1.15 – Trust accounts*

The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.

However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary *and wary* practitioners.

We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.

The Board should return this rule to the Commission with appropriate instructions.

3. *Rule 1.17 – Sale of a law practice*

A. Geographical area

The Commission has conflated the reference to "geographic area of practice" in the ABA rule – allowing a selling lawyer to cease practice in a state or particular "geographic area" – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.

Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to practice in the same field. Clients will then be shunted to another law firm not of their choosing

in a wide variety of circumstances.

This rule was designed to allow lawyers or law firms that are retiring or moving or materially changing their practice to forward their practices to other qualified lawyers. The geographical area sale proposed by CRPC 1.17 is far too broad, allowing buying and selling of areas as if the practice of law were only a business and not also a profession, and clients were products to be bought and sold.

This breadth should be narrowed substantially.

B. No increase of fees

Section (e) of the current proposed rule says that the fee to the client shall not be increased "solely" by reason of the purchase of the practice. Section (d) of the ABA rule makes this fee increase absolute. We strongly believe that the California language should also be absolute, and that the word "solely" should be stricken.

Respectfully submitted,

Drafters:

Geoffrey C. Hazard
*Thomas E. Miller Distinguished Professor of Law*
*University of California, Hastings College of the Law*
*Executive Director (1984-1999) of the American Law Institute*
*Reporter for the American Bar Association Model Rules of Professional Conduct (1983)*

Deborah L. Rhode
*Director, Center on the Legal Profession and E.W. McFarland Professor of Law*
*Stanford Law School*
*Former President of the Association of American Law Schools*
*Author of over 20 books on the legal profession*

Richard Zitrin
*Adjunct Professor of Law*
*University of California, Hastings College of the Law*
*Founding Director (2000-2004), Center for Applied Legal Ethics, University of San Francisco*
*Lead Author, Legal Ethics: Rules, Statutes and Comparisons (2010) and other legal ethics books*

Co-signers:

Cindy I.T. Archer
*Clinical Professor of Law*
*Loyola Law School*

Susan Smith Bakhshian
*Clinical Professor of Law*
*Loyola Law School*

Bruce Budner
*Lecturer, Legal Ethics*
*University of California, Berkeley, Boalt Hall School of Law*

Erwin Chemerinsky
*Dean and Distinguished Professor of Law*
*University of California, Irvine, School of Law*

# Rule 1.18 – Public Comment – File List

X-2010-421x COPRAC [1.18]

X-2010-425-27aa SDCBA [1.18]

X-2010-469-4d OCBA [1.18]

X-2010-513-30 OCTC [1.18]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 14, 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, as revised on May 17, 2010, and has the following concerns.

The revised rule provides in paragraph (d) as follows:

> When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.

Proposed new comment [8] provides as follows:

> Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

COPRAC support the implementation of screening in California through the Rules of Professional Conduct, and accordingly, prefers the prior version of the rule in which paragraph (d) provided that:

> 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 part of the

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.

Note that the above language of paragraph (d) from the prior version of the rule omits the requirement that the screen be effective. Consistent with our previous comment to the prior version of proposed rule 1.0.1 (definition of "screened"), we believe the proper test is whether the lawyer or firm took reasonable measures to screen the prohibited lawyer, not whether in hindsight the screen was in fact effective. The Model Rule does not require that the screen be "effective," and we believe Rule 1.18 (to the extent it includes screening as contemplated by above paragraph (d)) should not contain such obligation.

COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be easily referenced, and easily applied. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening.

In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline.

If this change is not adopted, we are concerned that the language, as drafted may contain a contradiction, in that the rule says that you can undertake the representation if both lawyer and client give informed written consent, but the comment directs lawyers to abide by case law, which may allow screening. Is the Commission relying on the fact that the new provision in the rule does not use the word "only" before "if both the affected client and the prospective client have given informed written consent" to avoid internal inconsistency? If so, we are concerned that this may end up causing confusion.

Finally, we note that Comment [7] incorrectly refers to paragraph (d)(1), when there is no longer a subparagraph (1). In the event the Commission does not follow our recommendation, this reference should be amended to refer to paragraph (d).

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

February 12, 2010

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.1 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.

---

1 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**

OCBA

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OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: June 9, 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 supports the adoption of proposed Rule 1.18 with one substantive change. Specifically, the OCBA notes that paragraph (d) states that, "[w]hen the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent." While this statement does not say "...permissible ***only*** if...," the language could be interpreted to imply that such a representation can only be undertaken with informed written consent. This interpretation is reinforced by the language of paragraph (c) insofar as it provides a direct prohibition with regard to "represent[ing] a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, ***except as provided in paragraph (d).***" This single exception is repeated in the next sentence of paragraph (c) with regard to imputation. However, Comment [8] states that "Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law." This appears to contradict the language of the proposed Rule itself, in that paragraph (d) could be read to suggest that a non-consensual screen (even if supported by case law) would not be permitted because it does not involve informed written consent by both clients. To correct this inconsistency, the OCBA suggests revising the language of paragraph (d) to add either of the following at the end of the sentence: "...or if otherwise allowed pursuant to case law" or "...or if otherwise allowed by law."

On a non-substantive note, the OCBA notes that Comment [7] still refers to paragraph (d)(1), even though subparagraph (1) was removed in the Commission's revisions to this proposed Rule. It appears that this reference was meant to be to paragraph (d) itself.

**THE STATE BAR OF CALIFORNIA**

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

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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

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

1. The Commission states that this is a new rule to California, although OCTC believes it is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.
2. OCTC is concerned that subparagraphs (c) and (d) are essentially a repeat 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.
3. Many of the Comments are more appropriately placed in treatises, law review articles, and ethics opinion. The inclusion of factors in 2A could be confusing and give the impression they are the exclusive factors. Further, if they are to be considered, it should be in the rule.

# Rule 2.1 – Public Comment – File List

X-2010-416b Robert Rogers [2.1]

X-2010-421g COPRAC [2.1]

X-2010-425 SDCBA [2.1]

X-2010-449 Barbara Weber [2.1]

X-2010-513-31 OCTC [2.1]

X-2010-517m Zitrin-Multiple [2.1]

# 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: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Robert K. Rogers, Jr.

*** City** Annapolis

*** State** Maryland

*** Email address**
(You will receive a copy of your comment submission.) rkrogers1854@hotmail.com

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list.
Rule 2.1 Advisor

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.
- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

---

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

I believe that the Rules should apply to an attorney's professional advice based upon the facts and the law. Extending the professional relationship to include more socially or morally relevant terms would tentatively impose a duty that is more personal than professional. The proposed change balances this by excluding the broader duty and merely making reference to it in a permissive way in the notes.

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 2.1

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 2.1 - Advisor. COPRAC supports the adoption of proposed Rule 2.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 2.1 - ADVISOR

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

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

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

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

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

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

*There is a minority that would add a provision stating that the failure to render moral, economic, social, or political advice is not a violation of this Rule (which says a lawyer "may" render such advice). Given the permissive, rather than mandatory, "may" language relating to moral, economic, social, or political advice, the minority's proposed express statement that the failure to give such advice is not a violation seems somewhat duplicative and unnecessary. Additionally, the Commission proposes striking certain language from the Comments to the Rule, which tend to indicate an affirmative obligation to provide such advice. Accordingly, I agree with the majority's opinion that the Rule should be added without the proposed addition.*

**CONCLUSIONS (pick one):**

[ X ] We approve the new rule in its entirety. (A dissenting opinion was submitted on this matter and is attached as Exhibit 1 for your consideration.)

[ ] We approve the new rule with modifications.*

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

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

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

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

June 3, 2010

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

**RE: State Bar's Special Commission for the Revision of the Rules of Professional Conduct**
**90 Day public comment on 69 Proposed New or Amended Rules of Professional Conduct**

Dear Ms. Hollins:

Please allow this communication to serve as my public comment regarding Attorney Discipline as it relates to construction defect claims and suits. I personally have contended with the brunt of a frivolous community lawsuit, as well as, encumbered professional and financial burdens due to the unethical tactics by various attorney groups.

Below are my comments/suggestions that should be examined by the Commission as it relates to Rule 2.1 Advisor, in addition to, overall disciplinary actions necessary to prevent the burdening of our legal system with unfounded claims in order for certain firms to line their checkbooks.

1. Prevent Solicitation by Plaintiff Counsel via mass mailings and door to door solicitation (STOP AMBULANCE CHASERS and WITCH HUNTS). See examples of fraudulent solicitation letters to unsuspecting owners attached.
2. Plaintiff Counsel, at time of filing, must record notice of claim/suit to the property. This will protect unsuspecting purchasers or subsequent owners by notifying them upon title search that named property is in litigation/claim status. Owners commonly will not disclose this type of info to subsequent owners which is in direct violation of California Civil Code Section 1102.6.
3. Claimants shall receive a one page (short layman's terms) summary that shall be signed and notarized by Claimant and submitted with filing of claim to courts. Example: Truth in Lending Act of 2009 for Credit Cards which was enacted has made the dissemination of legal jargon much more user friendly.
4. Real Property filings; at any time during the process of a claim/suit, the ownership of the property changes from original named claimant, property shall automatically be dismissed. New owner of property would need to sign new claim document (see item 3 above) in order for property to remain in claim/suit.
5. In order to fully comply with litigation, Claimant must be present in court in order to file. Again, this would help to prevent frivolous filings. If a Claimant knew that he/she had to attend a court filing, they would be fully and completely aware of what they have initiated.
6. SB 800 claims and construction defect claims that are not properly filed as stated in Civil Code should immediately be dismissed from court and the filing attorney group FINED for monopolizing the court system. Due to the current recession, all sorts of lawsuits have put a strain on the court system, which currently is overburdened and understaffed due to state deficits at an all time high. The impact of unfounded lawsuits impacts the availability of the

court system to handle legitimate claims and filings. If you hit them in their checkbooks, they will think twice before filing an illegitimate claim.

7. Tougher disciplinary standards for violations of professional conduct should include fines at the least, up to and including, disbarment. It is mandatory that the State Bar protect the public from lawyers who take advantage of homeowners. These firms need not conjure up issues in a home that do not exist. Homeowners are already on edge with the economic conditions and these suits/claims only exacerbate the problems by further devaluing properties.

The only individuals that gain in lawsuit claims are the attorney firms and their "dog and pony" inspection companies; the two work together to increase the bottom line profits of their companies without any consideration for the negative impacts to the client. The cost for subcontractors, builders, consultants, homeowners, insurance companies, etc. to obtain insurance to cover legal fees has put many individuals and small companies out of business, including the loss of their homes, due to these exorbitant expenses.

I appreciate your review and consideration of my comments. This process that you are evaluating is in direct correlation to the current political elections. People want change; we are tired of being taken advantage of by government politicians (most were lawyers, previously) and law firms that continue to tax the system and law abiding citizens with unethical practices and tactics.

Respectfully,

Barbara Weber

Barbara Weber
Concerned Homeowner and Citizen

# NEWSLETTER

## PROMINENT CALIFORNIA LAW FIRM CONSIDERING FILING LAWSUIT ON BEHALF OF

Attorneys at the Law Offices of Milstein, Adelman & Kreger, LLP are investigating the possibility of bringing a lawsuit against the builder of your home, for defective construction. Your home may be experiencing one or more of the following defects:

| | |
|---|---|
| ➢ Premature wear on kitchen cabinets (Poor workmanship and inferior quality paint). | ➢ Broken window seals (condensation between the double pane and leaks). |
| ➢ Improper cooling and heating of the home due to defective or inferior HVAC units. | ➢ Electrical problems including building code violations. |
| ➢ Poor plumbing throughout the house and low water pressure to bathrooms. | ➢ Slab cracks (interior and garage). |
| ➢ Exterior stucco cracking or deterioration of wood siding. | ➢ Drywall cracking and staining. |
| ➢ Leaking windows (peeling, flaking, bubbling and water staining around the window sill). | ➢ Mold around windows and on surfaces |
| ➢ Water and insect intrusion through foundation slabs. | ➢ Rotting and deteriorating fences and gates. |
| ➢ Shower leaks and tile problems | ➢ Poor drainage and ponding water |

The attorneys at Milstein, Adelman & Kreger LLP are devoted to representing homeowners throughout California in the field of complex construction defect litigation. **The attorneys have agreed to advance all costs of the litigation, and therefore, there are no out-of-pocket costs to homeowners at any time regardless of the result.** Construction defect inspectors will evaluate each home individually. Original ownership is not required to participate.

**VISUAL INSPECTIONS WILL BE SCHEDULED IN THE NEXT 60 DAYS!**

A profile sheet has been enclosed for completion and return in the postage-paid envelope provided. Whether or not you decide to participate, the information will be helpful to your community. For additional information please return the enclosed postage-paid reply card, or contact:

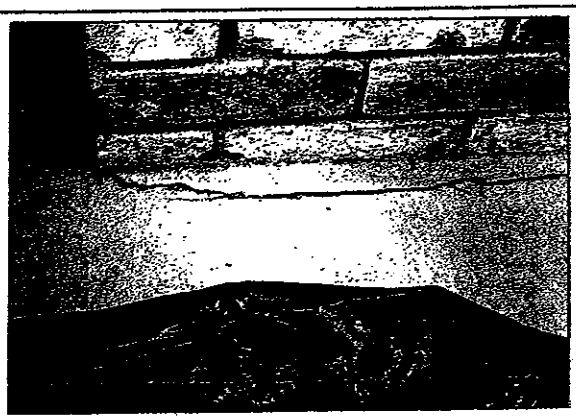
***Southern California offices:***


Anneke Stewart, Esq., x 135
Marcia Sanchez x 179 – msanchez@maklawyers.com
**MILSTEIN, ADELMAN & KREGER, LLP**
www.maklawyers.com
2800 Donald Douglas Loop North
Santa Monica, California 90405
Toll-free: 1 (888) 835-8055; Fax: (310) 396-9635

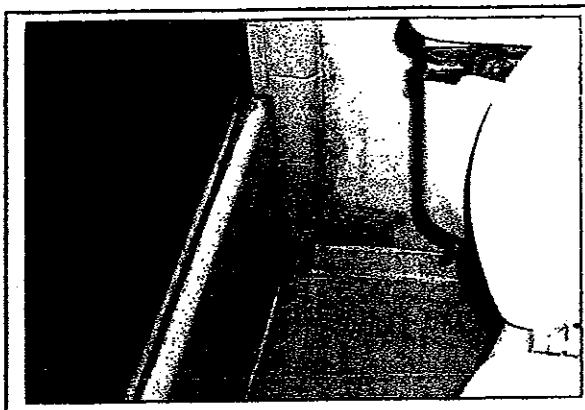

*This newsletter is intended to comply with Ca. Rules of Professional Conduct, Rule 1-400, et seq.*

# *NEWSLETTER – PAGE 2*

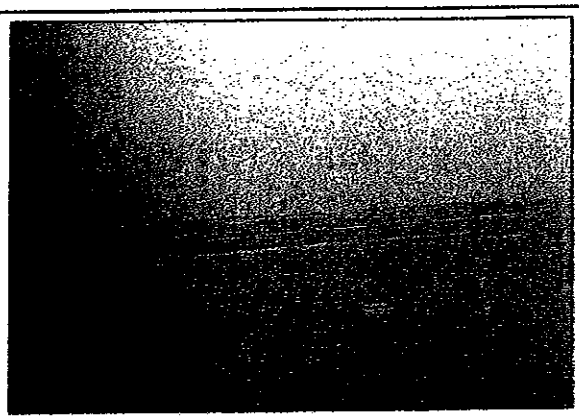
*THE FOLLOWING ARE SAMPLE PHOTOS OF **HOMES IN** WHICH OUR FIRM HAS SUCCESSFULLY REPRESENTED IN ANOTHER CASE AGAINST A DIFFERENT BUILDER. THESE ARE NOT PHOTOS TAKEN IN YOUR PARTICULAR COMMUNITY AND MAY OR MAY NOT BE CONSISTENT WITH THE CONDITIONS PRESENT IN YOUR HOME. OUR VISUAL INSPECTIONS WILL FOCUS ON MANY OF THESE ITEMS.*



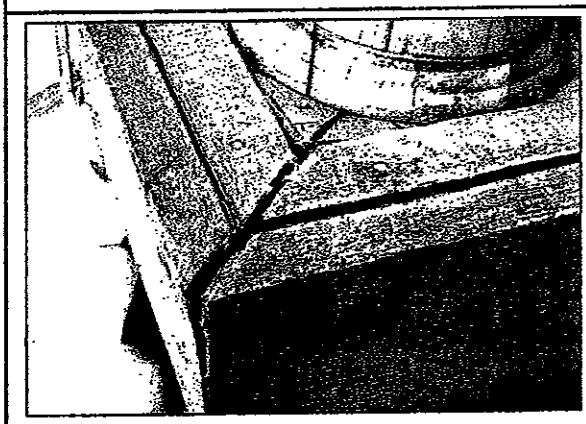
**CRACKS IN CONCRETE**



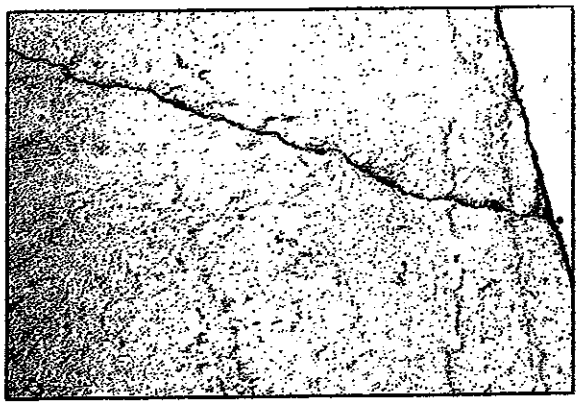
**SHOWER DOOR LEAKS / WATER DAMAGE TO FLOOR & DRYWALL**



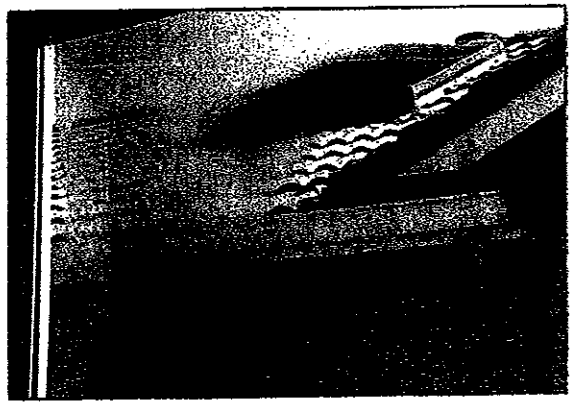
**ROOF / PLUMBING LEAKS WATER DAMAGE**



**DRY ROT / WOOD TRIM**



**STUCCO CRACKS**



**CONDENSATION BETWEEN PANES**

*This newsletter is intended to comply with Ca. Rules of Professional Conduct, Rule 1-400, et seq.*

*MILSTEIN, ADELMAN & KREGER, LLP*

# HOMEOWNER PROFILE SHEET

*Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information*

HOMEOWNER NAMES: _____

PROPERTY ADDRESS: _____

MAILING ADDRESS (*if different*): _____

PHONE NUMBERS: HOME: _____ ALTERNATE: _____

MR. WORK PHONE: _____ MRS. / MS. WORK PHONE: _____

NAME(S) OF TENANT(S) (*if any*): _____

TENANT PHONE: _____OWNER EMAIL ADDRESS: _____

ARE YOU THE ORIGINAL OWNER? _____ PURCHASE DATE? _____

HOW MANY PEOPLE LIVE IN YOUR HOME?_____ 1 OR 2 STORY HOME? _____

NAME OF THE DEVELOPER? _____ WHAT YEAR WAS THE HOME BUILT? _____

BEDS: _____ BATHS: _____ SQUARE FEET: _____

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: ____NO: ____ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

| | | |
|---|---|---|
| STUCCO CRACKS | DRYWALL CRACKS | ROOF TILE CRACKS |
| CEILING STAINS | WINDOW STAINS | WINDOW LEAKS |
| ANT / INSECT INTRUSION | CONCRETE / SLAB CRACKS | POOR PAINTING |
| MOLD AND MILDEW | ELECTRICAL PROBLEMS | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING PROBLEMS |
| YARD DRAINAGE PROBLEMS | HEATING & COOLING PROBLEMS | OTHER: _____ |

Please explain the above-circled defects. You may use additional sheets if necessary.

_____

_____

_____

*AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.*

KASDAN
SIMONDS
RILEY &
VAUGHAN LLP
ATTORNEYS AT LAW

REPLY TO:
SOUTHERN CALIFORNIA OFFICE

www.KasdanSimonds.com

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

THIS COMMUNICATION IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND SHOULD BE TREATED IN A CONFIDENTIAL MANNER. DISCLOSURE TO ANYONE OTHER THAN YOUR ATTORNEYS AND THEIR STAFF MAY JEOPARDIZE THE PRIVILEGE, AND RESULT IN DISCLOSURE TO ADVERSE PARTIES.

# IMPORTANT HOMEOWNER NEWSLETTER

**Re: Update on Litigation RE: Construction Defects in the a Project**

Dear

This law firm has been retained by more than 18 of your neighbors in the development to pursue a construction defect lawsuit against the developers and subcontractors which built the homes located in your development. As part of our representation, our office has investigated defective conditions at the project, including analysis by trained experts of defective conditions present in the homes. In addition, we have performed an analysis of the applicable statutes of limitations on our clients' homes. **Please note the 10 year Statute of Limitations may very likely expire on your particular home as early as if it has not already done so.**

Conditions which have been consistently identified throughout the project are as follows:

- Leaks in windows causing water stained window sills, drywall and surrounds, resulting in the growth of mold and fungus
- Plumbing leaks,
- Roof leaks,
- Excessive stucco cracking and discoloring,
- Adverse soils conditions; and
- Improper installation of the concrete slabs and foundations.

We have attached photographs of stucco, sliding glass doors and concrete conditions which exist at some of your neighbors' homes. Does your home have similar conditions? These kinds of conditions should not exist in your home.

Since the defective conditions appear to be uniform at the homes in the project, we offer you the opportunity to join in the action. This suit is **not** a class action and your rights and interests will

Advertisement

not be protected or pursued unless you either join this suit or file your own separate action. There are substantial benefits to be obtained by joining in the collective action, as costs of investigation can be shared and there is a significant strength in numbers. However, timing is important.

There are several "Statutes of Limitations" concerning deadlines for filing construction defect lawsuits. Which ones apply depends on the legal theory asserted in the complaint. Failure to file your complaint within any of the applicable time periods may forever bar your claims. The 10 year Statute of Limitations which may very likely expire on your particular home as early as if it has not already done so. Once a Statute of Limitations expires, it will ordinarily forever bar you from recovering from the builder of your home even if you should subsequently discover it was built with substandard materials or methods. Some of the deadlines are the following:

First, and in any event, you must file your claim within ten years of "substantial completion" of the work. Generally, the "substantial completion" is the earlier of the date of final inspection, the date of recordation of a valid Notice of Completion, or the date of occupancy of the premises. There are certain specific exceptions to these time periods and factual circumstances which may lead to an "equitable tolling" or suspension of these periods. An attorney should analyze the facts of your case.

Other limitation periods include a four-year period relating to contracts and warranty claims, and three years for various tort claims.

These guidelines are general and we have not undertaken an investigation of your property or provided any specific advice regarding any other deadlines which may apply as to your potential claims, and we have not filed a lawsuit on your behalf. The issues can be more complex and technical than we can cover here, so you should consider consulting legal counsel if you desire. If you have previously retained other counsel for these issues, it is not our intention to suggest that you change counsel.

Our firm's main emphasis is representing homeowners in construction defect actions. While no attorney can guarantee results, in prior years we have recovered in excess of $350 million in settlements and verdicts for our construction defect clients. Based upon our experience in this area, it appears that homes in your development may be suffering from substantial defective conditions. You may want to visit our firm's website **www.KasdanSimonds.com** for further information on these types of defective conditions and for background on our firm.

If you are interested in more information regarding the potential construction defect lawsuit in your community, please ", please contact Katja Base, our firm's intake paralegal or the undersigned at (949) 851-9000 or (800) 593-3332. We look forward to the possibility of representing you and advocating these most important claims.

Very truly yours,

Jack A. Lucas
of KASDAN, SIMONDS, RILEY & VAUGHAN LLP

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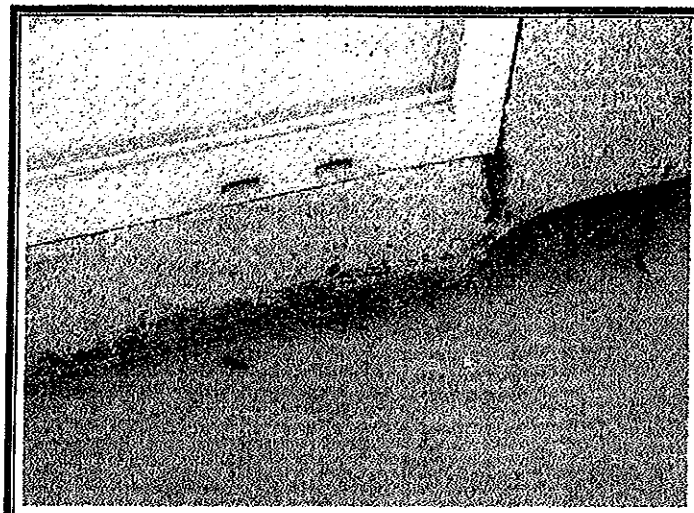
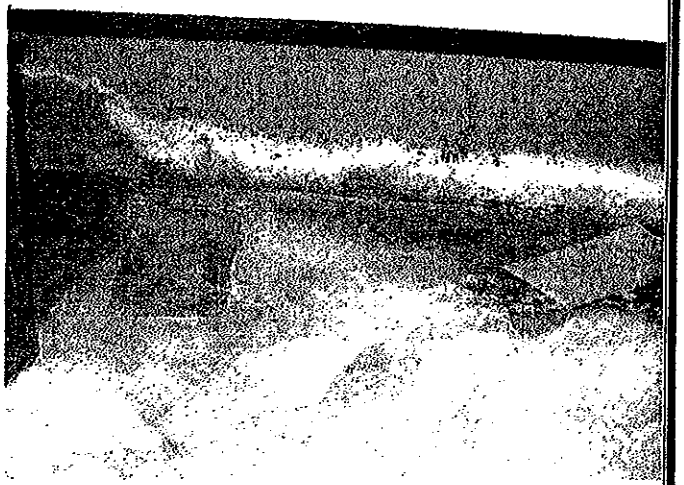
**Kasdan Simonds Riley & Vaughan llp**
CONSTRUCTION DEFECT ATTORNEYS

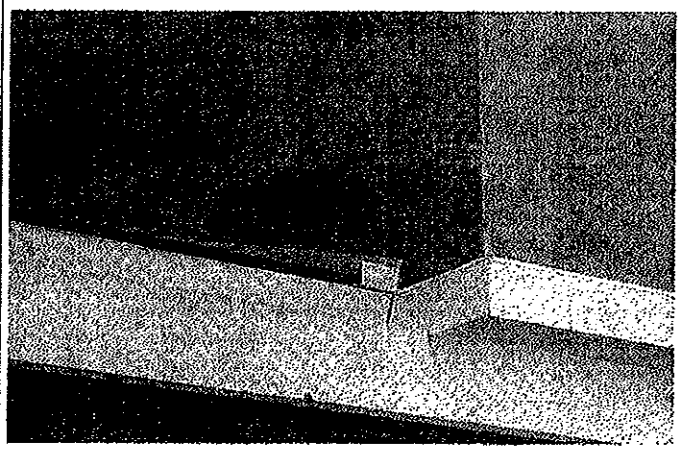
2600 Michelson Dr.
Suite 1000
Irvine, CA 92612-6510
Phone: (800) 593-3332
Fax: (949) 833-9455
www.KasdanSimonds.com



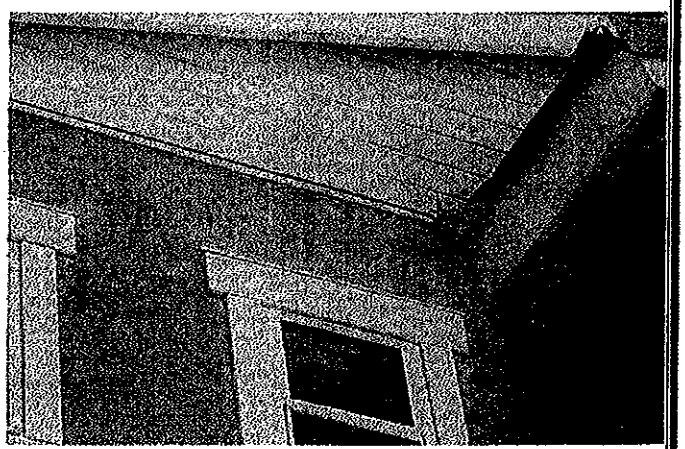
SLIDING GLASS DOOR THRESHOLD



GARAGE FLOOR AND STEM WALL - EFFLORESCENCE



WATER INVADING STUCCO



DETERIORATING WOOD TRIM AND DISCOLORED STUCCO

ADVERTISEMENT

# Prospective Client Questionnaire

[redacted]

Please mail to me at the address listed below the Legal Services Agreement so I may sign up for the lawsuit.

Please contact me at the telephone number listed below.

* * *

Name: _____

Address: _____

City: _____ ZIP: _____

Home Phone: (___) _____ Work Phone: (___) _____

Fax: (___) _____ E-Mail: _____

Please share with us the type of defects your recliners / your nose has:

☐ Recalled Items ☐ Seats ☐ Upholstery ☐ Frames ☐ Arms

☐ Mechanisms ☐ Springs ☐ Motors ☐ Electrical ☐ Hydraulic

☐ Other: _____

Kasdan Simonds Riley & Vaughan LLP

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Suite 1000
Irvine, CA 92612-6510
Phone: (800) 593-3332
Fax: (949) 833-9465
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Clayton M. Anderson, APC
Construction Defect Division

Anderson & Kriger
*A Limited Liability Partnership*

Joel M. Kriger, APC
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.
Gordon C. Mears
William M. Sickinger
Matthew R. Schoech
Mary C. Tyler

**Homeowner Construction Defect Claims**
**Trial Attorneys - Insurance & Contract Claims**

8220 University Avenue, Second Floor
La Mesa, CA 91941-3837
**(619) 589-8800**
(800) 425-6397 • Fax: (619) 464-5414
http://www.a-k.com • E-mail: a-k@a-k.com

CALIFORNIA OFFICES
Riverside / San Bernardino
Orange
Los Angeles / Kern
San Diego / Imperial
Sacramento Area

**Re:** _____

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within the Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ♦Drainage / Soils Problems
- ♦Stucco Cracks
- ♦Concrete / Foundation Cracks
- ♦Electrical / Plumbing Problems
- ♦Mold / Mildew in Walls / Showers
- ♦Broken or Cracked Tile / Grout
- ♦Roofs /Windows Leaks
- ♦Tub / Shower Leaks
- ♦Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a $1.3 million dollar verdict for our clients.

Your legal rights include:

(1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.

(2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.

(3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,
ANDERSON & KRIGER

Jodie Wacht / JL

Jodie Wacht, Paralegal

***Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.***

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*

Anderson & Kriger
ATTORNEYS AT LAW

*A Professional Law Corporation*

# Homeowner's Contingent Attorney Fee Agreement



THIS AGREEMENT

is made this _____ day of _____ 20____, at _____, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

_____

_____,

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%) From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

***Please sign and date on the reverse side of this form.***



| CASE NAME | CASE NUMBER |
|---|---|
| | |

Anderson & Kriger
ATTORNEYS AT LAW

7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;

b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;

c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;

d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;

e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.

f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE:** LEGAL FEES ARE **NOT** SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED

on the _____ day of _____, 20____.

ANDERSON & KRIGER

By: _____

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

MAILING ADDRESS

CITY, STATE, ZIP

E-MAIL

HOME PHONE

WORK PHONE

X
CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME

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GRANT DEED

NOC

CLIENT OWNERSHIP REVIEWED BY

0408

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 2.1. Advisor.**

1. Comments 1 and 2 seem more appropriate for treatises, law review articles, and ethics opinions.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses "means that have *no substantial purpose other than*" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

*6. Rule 5.7 – Rule application to "law-related services"*

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

*7. Rule 2.1 – Lawyer as advisor*

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" – two vital and important concepts that are nevertheless not the same.

## IV. Rules related to confidentiality

*1. Rule 1.6 – Basic confidentiality*

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.[4] The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

[4] The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.

# Rule 2.4 – Public Comment – File List

X-2010-421dd COPRAC [2.4]

X-2010-513-32 OCTC [2.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 14, 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 2.4

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 2.4 – Lawyer as Third-Party Neutral. COPRAC supports the adoption of proposed Rule 2.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
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- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

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[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

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We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 2.4. Lawyer as Third-Party Neutral.**

1. Comments 1, 3, and 4 seem more appropriate for treatises, law review articles, and ethics opinions.

# Rule 2.4.1 – Public Comment – File List

X-2010-421h COPRAC [2.4.1]

X-2010-513-33 OCTC [2.4.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 2.4.1

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 2.4.1 - Lawyer as Temporary Judge. COPRAC supports the adoption of proposed Rule 2.4.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 2.4.1. Lawyer as Temporary judge, Referee, or court-appointed Arbitrator.**

1. OCTC supports this rule.

# Rule 3.1 – Public Comment – File List

X-2010-421i COPRAC [3.1]

X-2010-430d Glenn Alex [3.1]

X-2010-513-34 OCTC [3.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 3.1

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 3.1 - Meritorious Claims. COPRAC supports the adoption of proposed Rule 3.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel – a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.

The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

~~Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.~~

3. ~~Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."~~

~~In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.~~

4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."

Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."

(Emphasis added.)) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).

5. ~~Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.~~

~~Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.~~

~~Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"~~

~~The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-~~

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.

Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.

Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."

Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.

Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.

The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

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We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 3.1. Meritorious Claims and Contentions.**

1. OCTC is concerned that proposed rule 3.1 has narrowed what is currently contained in rule 3-200(A). It removes the prohibition on bringing an action whose purpose is to harass or maliciously injure any person. We believe that still belongs in the rules.
2. The Comments are too long and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Further, while Comment 2 references Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, it, especially the first sentence, could be interpreted to be contrary to Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, which require an attorney to make an inquiry reasonable under the circumstances. The duty to make a reasonable inquiry should be stated in a clearer language. It should also be made clearer that attorneys may have a duty to even investigate their client's statements. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])

# Rule 3.3 – Public Comment – File List

X-2010-425-29cc SDCBA [3.3]

X-2010-513-35 OCTC [3.3]

X-2010-517i Zitrin-Multiple [3.3]

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

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

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

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

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

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

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

A. Proposed Subparagraph (d) reads:

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

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

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

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

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

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

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

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

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

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

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

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

See comments to (2) above.

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

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

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

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

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

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 3.3. Candor Toward the Tribunal.**

1. OCTC is concerned that this proposed rule requires knowingly. Rule 1.0 defines knowingly as "actual knowledge." However, this is contrary to established California law. An attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are at a minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) That is, California disciplines attorneys for dishonesty or moral turpitude based on gross negligence. (See sections 6068(d) and 6106; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar 266, 2381-282; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rtpr. 80; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117. See also Comment 2B to proposed rule 8.4.) In fact, CCP section 128.7 requires that all statements in pleadings be made "after an inquiry reasonable under the circumstances." We should not be allowing lawyers to make false statements without proper inquiry and a good faith basis for the statement. Moreover, while good faith may be a defense to a charge of misrepresentation, this is because it is a statutory violation, not a rule violation. Good faith is generally not a defense to a violation of a Rule of Professional Conduct. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rpt. 138, 148; *Zitny v. State Bar, supra,* 64 Cal.2d at 793.) Further, this rule is inconsistent with proposed rules 8.2, 8.4, 4.2, and Comment 2B of proposed rule 8.4. While negligence is not a basis for discipline, gross negligence is. While we could still prosecute attorneys for gross negligence under sections 6068(d) and 6106 (and apparently 8.4) that creates inconsistent duties and could mislead attorneys into believing that actual knowledge is required for discipline when gross negligence can support discipline for this conduct.
2. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes the word should remain in the rule.
3. OCTC is concerned that the proposed rule omits without Comment the following language in the current rule: 1) prohibiting an attorney from intentionally misquoting to a tribunal the language of a book, statute or decision; and 2) shall not knowing its invalidity cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional. (See current rule 5-200(c) and (d).) OCTC is aware that some of this language was removed by the Board of Governors because they believed that it was duplicative of proposed rule 3.3(a)(1) and (2). However, some form of this language has existed in the rules since the original Rules of Professional Conduct. OCTC requests a comment to explain that this is not a change in the law, but merely because it is already covered by proposed rule 3.3(a)(1) and (2).
4. OCTC is concerned that the rule omits the language in current rule 5-200(E) that an attorney "[s]hall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and has seen attorneys violate this rule in an attempt to prejudice a party and deny them a fair trial. (See e.g. *In the Matter of Philip E. Kay, Case No. 01-O-193.* The hearing department finding and recommendation in Kay's case is currently pending before the California Supreme Court, Supreme Court Case No. S180405.)

OCTC suggests that this language be included in the rule.

5. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for when an attorney 1) states or alludes at trial to evidence that the attorney knows or reasonably should know is not relevant or admissible evidence or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); 2) states the attorney's belief in the credibility of a witness (see *Hawk v. Superior Court, supra,* 42 Cal.App.3d at 123); or 3) includes when an attorney violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed rule 3.4, but they are not there either. They should be somewhere.
6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions.
7. Comment 3 is too long. If knowingly is stricken from the rule, this Comment should be also stricken. Further, this comment does not address CCP 128.7 or Rule 11 or that an attorney may have a duty to investigate even the client's claims in some situations. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

The Commission in its *May 2010 Non-Adoption Summary* argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.

We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.

3. *Rule 3.3 – Duty of candor*

Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.

Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.

The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.

Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.

4. *Rule 3.9 – Advocate in non-adjudicative proceeding*

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance *is* required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

5. *Rule 4.4(a) – Barring use of embarrassment, delay, or burden*

Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the *May 2010 Non-Adoption Summary* – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule

# Rule 3.4 – Public Comment – File List

X-2010-421j COPRAC [3.4]

X-2010-425-30dd SDCBA [3.4]

X-2010-513-36 OCTC [3.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 3.4

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 3.4 - Fairness to Opposing Party and Counsel. COPRAC supports the adoption of proposed Rule 3.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
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| Rule 4.2 | Communication with a Person Represented by Counsel |
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| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
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| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 3.4– Fairness to Opposing Party and Counsel [Existing CRPC Rules 5-200, 5-220, 5-310]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 3.4 with the following modification: Delete section (e)(3).

Rationale For Comment 1: The new rule is overbroad in two key respects, and the breadth is not necessary to achieve the stated policy objectives.

Proposed Rule 3.4 section (e) sets limits on compensation paid to witnesses. Subparts (1) and (2) limit to a reasonable amount any compensation or expenses paid to fact witnesses. These two limitations promote the policy that fact witnesses should not be paid an unreasonably high sum that would tend to improperly influence their testimony about facts necessary to a party's claims or defenses.

However, section (e)(3) sets limits on payments to expert witnesses. Expert witnesses are fundamentally different from fact witnesses, because they are typically sophisticated witnesses familiar with the legal system and retained to testify on behalf of one party. They negotiate a fee in exchange for professional expert services and typically have no first-hand knowledge of the facts giving rise to any party's claims or defenses. Although comment [4] attempts to define objective guidelines for what constitutes a reasonable fee, the test is inherently subjective. Experts are chosen by a party based upon perceived

qualifications, and a party should be free to negotiate any payment to an expert, whether subjectively or objectively reasonable to another party.

In litigation, the compensation to and potential biases of the expert can be brought out in discovery through deposition or at trial in cross-examination. A judge and jury are likely to react negatively to a fee they perceive as too high, and thus the system polices itself. An attorney should not be penalized with potential ethics violations if he or she, or his or her client, paid an amount for expert services that another person believes is too high to be objectively or subjectively reasonable.

In other words, improper influence of testimony is less of a concern with expert witnesses because of their unique situation. Comment [3] to ABA Model Rule 3.4, which was not included in the comments to proposed Rule 3.4, acknowledges that it is less of a concern by stating, "it is not improper ... to compensate an expert witness on terms permitted by law."

Therefore, we recommend that proposed rule section (e)(3) be struck as overbroad and unnecessary to accomplish the policy objective of preventing the improper influence of witness testimony. The rule should be limited to prevent undue influence of fact witnesses. If, in the alternative, section (e)(3) is retained, then the portion of comment [3] to ABA Model Rule 3.4 that states "it is not improper to compensate and expert witness on terms permitted by law" should be included, because it permits any compensation to an expert that is permitted by law.

Comment 2: Approve Proposed Rule 3.4 with the following modification: Delete section (h).

Rationale for Comment 2: Section (h) is too broad to be reasonably implemented by an attorney. Without section (h), proposed Rule 3.4 is more narrowly tailored to the policy of preventing obstructive tactics in discovery procedure. Section (h) requires an attorney to refrain from requesting a person other than a client to refrain from giving relevant information to another party unless: "(1) the person is a relative or employee or other agent of a client, and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. (2) the person may be required by law to refrain from disclosing the information." Its effect is that an attorney could not advise someone other than a client (or a client's relative, employee or agent) to refrain from disclosing "relevant" information in any legal matter. Notably, section (h) is not limited to a discovery or litigation context. Therefore, it applies to attorneys participating in any legal transaction (real estate, mergers and acquisitions, licensing, etc.), including transactions where full disclosure of all "relevant" information may not be required or desirable. Therefore, section (h) should at least be limited to the litigation context.

However, even if section (h) was limited to the litigation context, it does not allow for full and frank participation in joint defense agreements (between parties or between a party and a non-party) or other normal commercial activity that would benefit a client's

interests. If section (h) were adopted, it could be unethical for an attorney to discuss legitimate tactics, such as timing or disclosure of potentially relevant business information in discovery, with an entity other than his or her client, even if the entity had entered into a joint defense agreement with the client. For example, the attorney could not request that the non-client refrain from producing relevant information unless served with a subpoena, and could not request that the non-client refrain from producing relevant information while the parties negotiated the scope of the potential production.

In other words, in some circumstances, there may be legitimate and legally permissible business reasons for refraining from giving relevant information voluntarily, at least for a particular period of time. An attorney should not be ethically prohibited from having these discussions, which are in the best interests of his or her client, particularly where the discussions do not obstruct legitimate discovery.

Section (h) also is unnecessary and duplicative in light of section (a), which more narrowly accomplishes the purpose of preventing a lawyer from unlawfully obstructing another party's access to evidence. Section (a) also prohibits a lawyer from counseling or assisting another person in any such obstruction.

Therefore, we recommend that proposed rule section (h) be struck as overbroad and unnecessary to accomplish the policy objective of preventing obstructive tactics in discovery, especially in light of section (a).

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 3.4. Fairness to Opposing Party and Counsel.**

1. While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, is vague and potentially overbroad. It is unclear whether "an obligation under the rules of a tribunal" includes, for example, local court rules or a judge's individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation.
2. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter.
3. Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment 2 has too many ideas for one comment.

# Rule 3.5 – Public Comment – File List

X-2010-421qq COPRAC [3.5]

X-2010-425-31ee SDCBA [3.5]

X-2010-513-37 OCTC [3.5]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 3.5

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 3.5 - Impartiality and Decorum of the Tribunal. COPRAC supports the adoption of proposed Rule 3.5 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
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| Rule 3.6 | Trial Publicity |
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1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

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The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 3.5 – Impartiality and Decorum of the Tribunal [Existing CRPC Rules 5-300, 5-320]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 3.5 with the following modification: Delete the requirement that lawyers be familiar with the Code of Judicial Ethics.

Rationale For Comment 1: Most lawyers are not familiar with the Code of Judicial Ethics and are not required to be familiar with them so the Comment should not impose that requirement on them.

Comment 2: Approve Proposed Rule 3.5 with the following modification: Add "confidential" after "ex parte" in section (b)(5).

Rationale for Comment 2: Addition will clarify existing CRPC Rule 5-300 since California recognizes "regular" ex parte proceedings where all counsel must be present.

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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

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**SUMMARY**

We summarize our main concerns as follows:

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**GENERAL COMMENTS**

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In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 3.5. Impartiality and Decorum of the Tribunal.**

1. OCTC recommends that subparagraph (g) also include that a lawyer shall not communicate to the juror or prospective jurors after discharge when the communication is intended to prevent either the juror with communicating with the other party or the court. (*Lind v. Medevac* (1990) 219 Cal.app.3d 516).) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it was its own prohibition.
2. Comment 4 seems more appropriate for a treatise, law review article, or ethics opinion.

# Rule 3.6 – Public Comment – File List

X-2010-421pp COPRAC [3.6]

X-2010-425-32ff SDCBA [3.6]

X-2010-513-38 OCTC [3.6]

X-2010-525c LA Public Defender [3.6]

X-2010-529h SCCBA [3.6]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 3.6

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 3.6 - Trial Publicity. COPRAC supports the adoption of proposed Rule 3.6 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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**State Bar Board of Governors District Nine Representative**
Wells B. Lyman

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

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

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

Proposed New Rule No./ Title: 3.6 Trial Publicity

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

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

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

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

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

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

See Attached.

**CONCLUSIONS (pick one):**

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

[ ] We approve the new rule with modifications.*

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

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

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

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

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

**Summary:**

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

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

**General Comment:**

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

**Comments:**

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

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

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

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

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

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

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

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

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 3.6. Trial Publicity.**

1. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 8 is identical to Comment 7 and should, therefore, be stricken.

**LAW OFFICES**
**LOS ANGELES COUNTY PUBLIC DEFENDER**
CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
210 W. TEMPLE STREET, SUITE 19-513
LOS ANGELES, CALIFORNIA 90012
(213) 974-2801 / FAX (213) 625-5031
TDD (800) 801-5551

**MICHAEL P. JUDGE**
PUBLIC DEFENDER

**EXECUTIVE OFFICE**

June 14, 2010

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

Dear Ms. Hollins:

This letter address the public comment provided for the 69 proposed new or amended Rules of Professional Conduct developed by the Commission for the Revision of the Rules of Professional Conduct.

There is a rule and comment that seem to be internally inconsistent. Rule 3.8(e), concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the rule, saying it is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

There is no "genuine need" exception written into the Rule and it should not swallow up the Rule's protections.

There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.

Comments [7] and [8] to Rule 3.6 seem duplicative.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

> This e-mail may contain confidential and privileged material for the
sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| | | |
|---|---|---|
| | ~~subparagraph (b) as it now reads: "In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer."~~ | ~~However, subsection (b) still requires that the law clerk obtain approval from the judge before participating in discussions regarding prospective employment. The current version still makes no distinction between interviewing and discussions regarding prospective employment nor do any of the comments to the rule.~~ |
| Rule 3.6: Trial Publicity | This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1st Amendment. Much of the conduct/speech which this rules attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1st Amendment, such as, an attorney misrepresenting the facts of case; or engaging in conduct that undermines the ability of a litigant to receive a fair trial such as deceit, deception or fraud. The SCCBA understands that the California Supreme Court has previously adopted substantially similar rules but notwithstanding that this rule should be deleted. | The current version keeps this rule as previously proposed by the Rules Revision Commission. |
| ~~Rule 3.8: Special Responsibilities of a Prosecutor~~ | ~~The SCCBA fully supports a rule that addresses the special responsibilities of a prosecutor. The currently proposed version addresses several of the concerns previously articulated by the SCCBA. However, it still sets out too broad a framework for the responsibilities of a prosecutor.~~<br>~~In particular, the SCCBA suggests that~~ | ~~The current version is substantially the same as the originally proposed version, which closely tracks the ABA Model Rule. The changes in the current version are as follows:~~<br>• ~~Subsection (a): deletes the~~ |

# Rule 3.7 – Public Comment – File List

X-2010-421ff COPRAC [3.7]

X-2010-425-33gg SDCBA [3.7]

X-2010-485c Toby Rothschild [3.7]

X-2010-513-39 OCTC [3.7]

X-2010-517d Zitrin-Multiple [3.7]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 3.7

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 3.7 and offers the following comments.

The proposed Rule has been revised from the prior Rule, which applied to all trials, not just jury trials. COPRAC continues to support a version of Rule 3.7 that would apply to both bench and jury trials. As noted in COPRAC's comments dated October 22, 2009, concerning the prior draft of Rule 3.7, COPRAC does not agree that bench officers would not be confused by a lawyer's dual role since practice background when taking the bench and length of time on the bench vary greatly, and both may impact how any given judge perceives an attorney who also acts as a witness.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
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| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

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

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

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

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

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

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

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

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

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

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

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

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

See No. 1 above.

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

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

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

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

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

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

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

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

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Toby Rothschild

*** City** Los Angeles

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) trothschild@lafla.org

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 3.7 Lawyer As A Witness [5-210]

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

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

---

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

Comment [2] to Rule 3.7 addresses the lawyer as witness in non-tribunal procedings. This comment was necessary when the draft rule covered all procedings. When it was limited to testimony before a jury, Comment [2] became unnecessary. Please help save a tree or two.

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 3.7. Lawyer as Witness.**

1. While this is the current law, OCTC does not understand why the client's informed written consent only applies to jury trials. It seems that clients in non-jury matters should also be advised of the risks of this situation and give their informed written consent. Comment 2 seems more appropriate for a treatise, law review article, or ethics opinion.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

4. *Rule 3.7 – Lawyer as witness – conflicts of interest – jury trial vs. tribunal*

We note that the proposed California rule remains broader than the ABA rule in that it allows clients to give informed written consent to allow a lawyer to testify as a witness. The ABA rule narrowly allows lawyers to testify on broadly substantive matters only when the lawyer's disqualification, essentially in order to enable testimony, "would work substantial hardship" on the client, even when the lawyer's testimony could be significantly helpful to the client's case.

We agree with the California construction. We note that the client *should* be able to get the full assistance of counsel, including testimony, *so long as* informed consent is given.

Nevertheless, conflicts of interest can and may occur despite informed consent. For example, the lawyer might be impeached based on collateral issues relating to credibility, a circumstance that would have been included the document obtaining the client's informed consent. However, *if* such conflict of interest exists or occurs between lawyer and client, the distinction between testimony at a *jury trial* vs. other adjudicative proceedings makes little if any sense. The issue is the conflict of interest by virtue of the lawyer's testimony, not the forum. The rule should be modified to strike the word "jury" and add the word "tribunal."[3]

~~II.~~ **~~Rules relating to able representation~~**

~~1.~~ *~~Rule 1.1 – Competence~~*

~~This comment is closely connected to the next comment, on MR 1.3, Diligence.~~

~~The competence rule, as modified, gives an unfortunate and overly broad "free pass" to a lawyer committing any first act of negligence, or any first "mistake," *no matter how egregious* that mistake may be. Section (a) of the rule remains unchanged: "A lawyer shall not *intentionally*, *recklessly*, or *repeatedly* fail to perform legal services with competence." (Emphasis added.) However, Comment ¶ 6 has been added, explicitly stating that the rule is "not intended to apply to *a single act* of negligent conduct *or a single mistake*…." (Emphasis added.)~~

~~This comment is seriously misguided. The comment is supported by the Commission's rules introduction, which claims that "most jurisdictions" apply the competence rule only to intentional, reckless, or repeated acts." Evidence is to the contrary, however, as is the ABA rule. At best the Commission relies on an unsupported anecdotal statement.~~

~~Moreover, Comment ¶ 6 would forbid discipline even if the "single act" would meet a "gross negligence" standard. Use of the common non-legal word "mistake," muddies the scope of 1.1(a) and creates the possibility that *any* single mistake, however great, would fall outside the rule.~~

~~Fixing this rule is not difficult. First, we strongly recommend that this Board eliminate ¶ 6 of the Comment. At the very least, the Board should strike the words "or a single mistake" and add the word "simple" before "negligent conduct," so that the comment would only excuse a first act of simple negligence.~~

~~Second, we recommend that the Board add the words "gross negligence" to 1.1(a): "A lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence…."~~

[3] We see no reason to limit application to "trial," as under the ABA Model Rule, as opposed to "tribunal." We note, however, that the definition of "tribunal," as it has been proposed by the Commission, is seriously flawed in its narrow construction. See *infra*.

# Rule 3.8 – Public Comment – File List

X-2010-421k COPRAC [3.8]

X-2010-425-34hh SDCBA [3.8]

X-2010-504 DA Ventura County [3.8]

X-2010-512b US Attorney [3.8]

X-2010-513-40 OCTC [3.8]

X-2010-525d LA Public Defender [3.8]

X-2010-529i SCCBA [3.8]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 3.8

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 3.8 - Special Responsibilities of a Prosecutor. COPRAC supports the adoption of proposed Rule 3.8 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

November 11, 2009

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

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

Dear Ms. Hollins:

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

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

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

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: RPC 5-110

Proposed New Rule No./ Title: 3.8 Special Responsibilities of a Prosecutor

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

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

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

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

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

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

The proposed rule is acceptable except (1) the omission of the ABA language on pretrial publicity described in Approach #1 below and (2) objection was voiced with respect to subparagraphs (d) and (f) to the extent noted in Approach #2 below. Therefore, no position was taken on the proposed rule. The two approaches are set forth below for your consideration:

Approach #1: Approve but modify to include the ABA Rule on pretrial publicity that is currently excluded in the proposed rule

This is a wholesale addition to the Rules as the closest current rule 5-110 only concerns the probable cause issue. Recently the State Bar recommended discipline of a district attorney and utilized 5-220 regarding the suppression of evidence. The adoption of this provision would have provided a more specific basis for the decision. You can view the lengthy decision of the State Bar Judge at: In the Matter of Benjamin T. Field #168197
http://members.calbar.ca.gov/search/member_detail.aspx?x=168197

The providing of discovery in a timely manner is probably one of the most contentious issues between prosecution and defense. The California Commission on Fair Administration of Justice identified failure to provide discovery by the prosecution as a reason for wrongful convictions. You can view their report on the issue at the link below.

**CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE: OFFICIAL REPORT AND RECOMMENDATIONS ON PROSECUTORIAL DUTY TO DISCLOSE EXCULPATORY EVIDENCE**
http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20BRADY%20COMPLIANCE.pdf

Personally, I would like to hear a discussion among the committee concerning the exclusion of the ABA language on prosecutorial pretrial publicity which states:

> except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and . . .

I can't disagree, necessarily, with the commission's statement that 3.6 takes care of it. It comes down to a difference between the language of 3.6: "have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter" and the 3.8 ABA language (now proposed for exclusion) "substantial likelihood of heightening public condemnation of the accused"

I believe the language of sometimes over-zealous or just excited prosecutors wanting to get on the Nancy Grace show (no names mentioned) does often heighten public condemnation of the accused which might not necessarily be considered to materially prejudice the matter.

[sic]

Interestingly, mentioned in the commentary are the ABA Standards of Criminal Justice Relating to the Prosecution Function which is available here: http://www.abanet.org/crimjust/standards/pfunc_blk.html. There the language "substantial likelihood of prejudicing a criminal proceeding" is used.

In the comments (I note that on page 1 it states that only prosecutors appeared at Commission meetings):

> [1] I am not sure why they exclude the language about the ABA Standards which could be useful to attorneys looking at these sections and the language about rectifying the convictions of innocent persons.
>
> [5] Same arguments as above.

Reasoning behind Approach #1:

Blegojevich: Did The United States Attorney Cross the Line?

On December 9, 2008, in a press conference broadcast to millions of viewers, United States Attorney Patrick Fitzgerald announced the arrest of Illinois Governor Rod Blagojevich on federal corruption and bribery charges. Citing examples from a 76-page criminal complaint, Fitzgerald detailed the wide ranging criminal pay-to-play conspiracy in which Blagojevich is accused of participating. But he did not stop there. In a speech that has raised eyebrows and drawn charges of its own, Fitzgerald offered his personal opinion on Blagojevich's "political corruption crime spree," asserting that Blagojevich "has taken us to a truly new low," characterizing his behavior as "cynical" and "appalling," and remarking "[t]he conduct would make Lincoln roll over in his grave."

According to some in the legal community, these extrajudicial comments crossed the line. In a New York Times Op-Ed column, former prosecutor Barry Coburn wrote that "Mr. Fitzgerald's expressions of revulsion, use of hyperbolic rhetoric and implicit assertion of his personal belief that the charges have merit clearly run afoul of the rules." The "rules" to which Mr. Coburn refers are rules of professional responsibility governing trial publicity.

Most states, including California, have enacted rules restricting the right of lawyers to make public statements about pending cases. California Rule of Professional Conduct ("CRPC") 5-120 (modeled after American Bar Association Rule of Professional Conduct Model Rule ("ABAMR") 3.6) provides that an attorney who is participating in the litigation of a matter "shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if [the attorney] knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Though the Rule applies to all kinds of cases, it has its most important application in the criminal context where extrajudicial speech has the potential to undermine the presumption of innocence and compromise a defendant's constitutional right to a fair trial by an impartial jury. The obvious purpose of the Rule is to prevent lawyers from making public statements about a pending matter that might taint the pool of prospective jurors and thereby influence the outcome of a case. As Supreme Court Justice Oliver Wendell Holmes wrote more than 100 years ago:

> The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence, whether of private talk or public print.

*Patterson v. Colorado*, 205 U.S. 454 (1907). Justice Holmes's comments, of course, were made before the invention of broadcast media and the internet. Today, given the volume and variety of "public print" and the ease with which it is created, duplicated, and disseminated, the potential for lawyers to "induce a conclusion" through extrajudicial speech is far greater, particularly in high profile cases.

Notwithstanding the general prohibition against materially prejudicial statements to the media, CRPC 5-120(B) specifically permits extrajudicial speech in a number of limited areas,

including, most significantly, any matters of public record. In Blagojevich's case, the public was entitled to know, and Fitzgerald was authorized to disclose the fact of Blagojevich's arrest and the nature and extent of the charges. There is no violation where a lawyer provides information contained in a criminal complaint or indictment, gives the status of a case, or requests assistance from the public. But when a prosecutor goes beyond the four corners of the complaint offering opinion on the charges or the accused, the speech will likely run afoul of the rules. Comment 5 to ABAMR 3.6 provides that a public statement is "more likely than not to have a material prejudicial effect on a proceeding" when it relates to "the character, credibility, reputation or criminal record of a party" or when it relates to an "opinion as to the guilt or innocence of a defendant or suspect in a criminal case." Fitzgerald's subjective comments arguably fall within these categories.

Though Blagojevich cannot un-ring the bell, his lawyers have some leeway under ABAMR 3.6 and the equivalent Illinois Rule of Professional Conduct 3.6 to publicly respond to the speech without risking a violation. Where an attorney believes that his or her client has suffered "substantial undue prejudic[e]" as a result of extrajudicial statements made publicly by another party, ABAMR 3.6 (and CRPC 5-120(C)) authorizes the attorney to make a statement that a reasonable attorney would believe is necessary to protect the client. The statement, however, must be narrowly tailored to mitigate the harm caused by the adverse publicity.

Given the essential constitutional rights at stake, and the lack of an adequate remedy for violations of the Rule, attorneys, particularly prosecutors, should err on the side of silence. The public record, without hyperbole, is always a safe harbor. But beyond that, the safest bet is to keep quiet.

*The information in this column is intended to be informational only and does not constitute legal advice. Shepardize all codes and case law before using.*

Approach #2: Disaaprove proposed rule 3.8, Special Responsibilities of a Prosecutor, with respect to subsections (d) and (f) to the extent described below:

First, proposed subsection (d) adds the requirement that a prosecutor "comply with all constitutional obligations as defined by relevant case law regarding the" timely disclosure of [discovery]. I believe that a requirement that a prosecutor have knowledge of "all relevant case law" regarding discovery would be unduly burdensome; I am not sure any lawyer could ever find enough hours in the day to comply with that additional requirement, particularly given on how quickly the law changes in this area.

Subsection (f) is another section that could be hard to enforce - regarding prosecutors' duty to "exercise reasonable care to prevent investigators, law enforcement . . .etc. from making an extrajudicial statement that the prosecutor would be prohibited from making . . ." While working with law enforcement agencies often involves cooperation, different agencies handle cases very differently. Prosecutors do not have supervisory responsibilities over the employees of other agencies, and it may be unfair to require prosecutors to exercise control they don't have. While prosecutors can provide training regarding the law, ultimately the employees of other agencies will answer to their own chain of command.

(This statement is made as an individual and not as a representative of any prosecutorial agency. Thank you for your consideration.)

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety. (Discussion suggested, see above).

[ ] We approve the new rule with modifications.*

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

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

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

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

# OFFICE OF THE DISTRICT ATTORNEY
## County of Ventura, State of California

**GREGORY D. TOTTEN**
District Attorney

**JAMES D. ELLISON**
Chief Assistant District Attorney

**MICHAEL K. FRAWLEY**
Chief Deputy District Attorney
Criminal Prosecutions

**GREGORY W. BROSE**
Chief Deputy District Attorney
Special Prosecutions

**MICHAEL D. SCHWARTZ**
Special Assistant District Attorney

**ROBERT A. BRINER**
Chief Investigator

June 14, 2010

**VIA FACSIMILE (415) 538-2171**
**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

Re: Proposed Rule 3.8 of the Rules of Professional Conduct

Dear Ms. Hollins:

On October 20, 2009, District Attorney Gregory D. Totten wrote to express concerns regarding proposed Rule 3.8, which would replace existing rule 5-110 of the Rules of Professional Conduct of the State Bar. I appreciate that changes have since been made to proposed rule 3.8(a). However concerns remain regarding paragraphs (b), (c) and (f).

Rule 3.8(b)

This rule is unnecessary. The court has the duty to advise the defendant of the right to counsel. (Pen. Code, §§ 860, 987.) There is no reason to shift this responsibility to prosecutors, or to discipline the prosecutor if the court has failed to comply with its statutory duty.

Comment 1B states that paragraph (b) is not intended to expand the obligations imposed on prosecutors by applicable law. But neither federal nor California law place upon prosecutors the duties laid out in paragraph (b), i.e., to make efforts to assure that the accused is advised of the right to, and procedure for obtaining counsel, and is given reasonable opportunity to obtain counsel. Paragraph (b) of rule 3.8 should be deleted.

Rule 3.8(c)

This rule prohibits a prosecutor from seeking to obtain from an unrepresented accused a waiver of important pretrial rights such as the right to a preliminary hearing, unless the tribunal has approved the appearance of the accused *in propria persona*. California law already prohibits an unrepresented defendant from waiving preliminary hearing. (Pen. Code, § 860; *In re Van Brunt* (1966) 24 Cal.App.2d 96, 104, overruled on other grounds in *In re Smiley* (1967) 66 Cal.2d 606, 627. ) If a case is going to be resolved by way of guilty plea rather than by trial, the defendant must waive the rights to jury trial, to confront and cross-examine witnesses, and the privilege against self-incrimination. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) The standard guilty plea forms include these waivers, and the court must satisfy itself that the waivers are free and voluntary before they are accepted.

A defendant has the constitutional right to self-representation. (*Faretta v. California* (1975) 422 U.S. 806.) This is a choice by the defendant, not by the prosecution, and not by the court. The court does not really "approve" a defendant's exercise of this right.

The application of the proposed rule to infractions is problematic. The defendant has no right to appointed counsel, and most represent themselves. The proposed rule would apparently prohibit a discussion between the prosecutor and the defendant regarding waiving trial and pleading guilty, until the court makes a ruling "approving" self-representation.

While I appreciate the concern in protecting the rights of unrepresented defendants, the proposed rule is overbroad and unnecessary.

Rule 3.8(f)

The rule would require prosecutors to "exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecution" from making certain extrajudicial statements. This rule should not be adopted because it could be read as requiring the prosecutor, in every case, to issue directives to police, victims, witnesses, and other persons over which prosecutors have no supervisory authority. This would include statements by independent elected officials such as police chiefs.

Comment 6 explains that this duty applies "even when such persons are not under the direct supervision of the prosecutor." Rules 5.1 and 5.3, which are cited in Comment 6, make attorneys responsible only for persons over whom they have managerial authority or direct supervisory authority. The State Bar should not mandate prosecutors to issue directives to persons in other agencies over whom they have no supervisory or managerial authority.

CONCLUSION

We hope the State Bar will modify the provisions discussed above in accordance with our comments.

Very truly yours,

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

MDS/ck

pc: W. Scott Thorpe, CDAA

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** United States Attorney's Offices for the Central, Eastern

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

*** Name** George S. Cardona

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) george.s.cardona@usdoj.gov

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 3.8 Special Responsibilities of a Prosecutor [5-110]

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

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

---

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

TO: Board of Governors
State Bar of California

FROM: André Birotte Jr.
United States Attorney
Central District of California

Laura E. Duffy
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 1.11, 3.8(g) and (h), 8.4(c), and 8.5(b)

DATE: June 14, 2010

We want to thank the Rules Revision Commission ("the Commission") and the Board of Governors for all the hard work that has been done on the proposed revisions to the California Rules of Professional Conduct; for the willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors; and, in a number of instances, for changes to the proposed rules based on consideration of these views. We believe the proposed rules that are before the Board of Governors include a number of modifications made during the revision process that address many of the concerns we have previously expressed. We write to provide comments on portions of four rules, Proposed Rules 1.11, 3.8(g) & (h), 8.4(c), and 8.5(b), that we continue to believe, in their current form, could have a substantial negative impact on the work of the prosecutors in our offices and the United States Department of Justice.

A. Proposed Rule 1.11

We appreciate the decision not to adopt the previously-proposed paragraph (e), which would have imputed conflicts within government agencies, and instead to recognize that both the imputation of conflicts within government agencies and the effectiveness of screening to avoid such imputation are matters better left to development by the case law. We are concerned, however, that the proposed comments addressing this topic, the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is

appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we would suggest that the Proposed Comments be modified as follows.

First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of the Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comments closer to the ABA Model Rule comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Proposed Comment [2] would read:

> [2] Paragraphs (a)(1), and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. This Rule does not impute a current government lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law.

Second, we would suggest that proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to Younger (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read:

> This Rule Not Determinative Of Disqualification
>
> [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *In re Charlisse C.*, 45 Cal. 4th 145 [84 Cal.Rptr.3d 597] (2008); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424.

B. Proposed Rule 3.8(g), (h)

As you know, our offices prosecute all federal crimes in California. As prosecutors, we support the goal of Proposed Rule 3.8(g), (h). We have always held our attorneys to the highest standard of professional conduct and expect, when exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed promptly after its discovery. Moreover, we would not countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant's innocence, therefore, we expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.

Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, and, accordingly, feel obligated to object to the Proposed Rule as drafted, for the following reasons:

1. **Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.

2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Department previously provided to the ABA and the Commission modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently address this issue. We respectfully disagree. If a prosecutor in jurisdiction A learns of evidence tending to show the innocence of a defendant previously convicted by a prosecutor's office in jurisdiction B, in which the prosecutor in jurisdiction A has never served, then the prosecutor in jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in jurisdiction A will not know what evidence was presented at the trial in jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in jurisdiction B. The prosecutor in jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for

assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.

3. **Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.** Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure loses all signaling capacity it might have had – the disclosure will be interpreted not as representing a prosecutor's judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor's decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.

4. **Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein.** First, the term "knows" is undefined in the proposed rule. It is defined elsewhere in the Proposed Rules to mean "actual knowledge of the fact in question." Proposed Rule 1.0.1(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings relating to the conviction and asserting prosecutorial misconduct, often based on claims that the prosecutor concealed clear exculpatory evidence of which the defendant has just become aware. For example, a common claim is that an inmate has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant's asserted alibi for the time of the crime. Would a prosecutor receiving a letter making this claim "know" of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor would be on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant's asserted alibi.

But we submit that, without further investigation, the prosecutor simply cannot "know" whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant's alibi.

Second, we are concerned by the use of the term "material" without a correlating definition. While not defined in Proposed Rule 3.8 or its comments, or in the general terminology definitions in Proposed Rule 1.0.1, the term "material" or "materiality" is used elsewhere in the Proposed Rules and the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Proposed Rules 1.7(a)(2), 3.3(a)(1); ABA Model Rules 1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer's duty to correct material false statements made to court, "materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation."). This meaning of "material" appears to be referenced in Proposed Comment [6A], which cross-references to Proposed Rule 3.3. In the criminal context, however, the term "material" is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). In the context of Rule 3.8(g), that "materiality" should be subject to this latter interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]" We believe this is the proper interpretation of "material" for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term "material" is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.

Third, we believe the proposed rule's use of the term "promptly" is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule's ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is "new, credible, and material." Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently "promptly."

Fourth, we are concerned with the mandate that a prosecutor "undertake further investigation" or "make reasonable efforts to cause an investigation." Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of "new, credible and material" evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. **Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein.** First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps <u>may include</u> disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post-conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures

that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. **Proposed Comment [9]'s "good faith" exception.** We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. We agree with the standard chosen, that is, a quasi-subjective standard that looks to the individual prosecutor's belief, but asks whether that belief is "reasonable" ("judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted"), but believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to "know" of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not "know" of such evidence. Without some guidance on these points, it will be impossible for a prosecutor to determine whether his actions in evaluating evidence will be deemed sufficiently "reasonable" to bring the good faith exception into play should the prosecutor's judgment subsequently be second guessed.

7. **Potential conflict with other Rules of Professional Conduct and other applicable laws.** The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors' obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and Proposed Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidential information. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Alternatively, if the obligations under Proposed Rule 3.8(g), (h) are not intended to override this duty, the proposed rule should make this clear. In response to our earlier comment on this point, the Commission has suggested that conflicts of this type are not uncommon, noting in particular that "conflicts between a duty of confidentiality and a duty of candor can implicate the conduct of any lawyer," and stating that "[a] one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules." We note, however, that other proposed rules do in fact resolve disputes between specific duties of disclosure and the general duty of confidentiality. Thus, for example, Rule 3.3 (b) makes clear that a lawyer is required to take "reasonable remedial measures" only "to the extent permitted by Business and Professions Code 6068(e)." See also Rule 3.3, Comment 10 (required remedial measures "do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code Section 6068(e)").

Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(l), and the Department of Justice to civil liability, 5 U.S.C. §

552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws. Accordingly, we suggest that, if these subsections are adopted, the comments should make clear that the obligations they impose are subject to a prosecutor's compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.

8. **Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.** Prosecutors and their limited resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction) will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to ensure that they do not run afoul of this rule. The Board of Governors should understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of "new" evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted "new" witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.

C. Proposed Rule 8.4(c)

As drafted, Proposed Rule 8.4(c) defines it to be professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation." There is no comment discussing or limiting this prohibition. It is well established, however, that government attorneys may supervise investigations that require informants and agents to engage in deceit and misrepresentation in order to infiltrate criminal organizations or uncover criminal activity. See, e.g., United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers). A standard Ninth Circuit jury instruction advises juries of the propriety of such conduct. See Ninth Circuit Model Criminal Jury Instruction 4.13 (Government's Use of Undercover Agents And Informants). Government attorneys engaged in civil enforcement investigations involving consumer frauds or civil rights violations also may use individuals who misrepresent themselves to be customers or renters to uncover evidence of violations of law. Oregon has adopted a rule specifically stating that such activity by attorneys will not be deemed misconduct:

> . . . it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor of supervisor only when the 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.

Oregon Rule of Professional Conduct 8.4(b).

We believe that guidance along the lines of the Oregon model would be appropriate to ensure that government attorneys overseeing these types of investigations do not run the risk of discipline based on conduct recognized to be appropriate that serves valid public interests. To accomplish this, we propose that the following new comment be added in connection with Proposed Rule 8.4(c):

> [#] Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct, where a lawyer advises clients or others about or assists or supervises lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the 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. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful.

We recommend the addition of the last sentence above to ensure that private attorneys are not misled by the balance of the comment 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. The last sentence of this proposed comment will avoid any suggestion that it is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions.

D. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over lawyers admitted to practice in California, regardless of where their conduct occurs, and over lawyers not admitted to practice in California if they "provide[] or offer to provide any legal services in California." As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney's Offices, even if not admitted in California, may be subject to discipline in California even if only a small part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California). We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we think it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing rules of professional conduct. Otherwise, lawyers working multi-jurisdictional investigations will be put in the often impossible position of reconciling different rules of professional conduct that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)'s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts Department of Justice and other attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconciliable. We urge the Commission to adopt ABA Model Rule 8.5(b)(2), or a similarly-worded provision, to provide consistency and predicability in the choice of law rules so that lawyers working multi-jurisdictional investigations may reasonably determine what rules will apply and conform their conduct to those rules.

Although Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) to provide a consistent choice of law rule when a multi-jurisdictional matter is pending before a tribunal – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal's own rules provide otherwise – there is no similarly consistency in the choice of law rule applied when a lawyer is involved in a multi-jurisdictional investigation that is not yet pending before a tribunal, that is, before the filing of a civil complaint or criminal charge. This is because Proposed Rule 8.5(b)(2) rejects the

"predominant effect of the conduct" standard and the "safe harbor" provision of the Model Rule, substituting instead a rule that, for matters not yet before a tribunal, a lawyer is subject to the California rules unless "specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from" the California rules. See also Proposed Comment [4] (explaining that this rule is intended to apply even to those cases in which lawyer's conduct is in anticipation of proceeding that is likely to be, but not yet before a tribunal). If this rule is adopted, it will mean that a Department of Justice lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-complaint investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct during the investigation, even though the case has no nexus to California and no California resident's interests are at stake. As soon as an indictment or complaint is filed in Pennsylvania, however, the Pennsylvania Rules will apply to that same lawyer's conduct. In contrast, this lawyer's colleague, licensed in a state (such as Pennsylvania) that has adopted the ABA Model Rule "predominant effect" test, will likely be bound by the Pennsylvania rules during the investigation. The California-admitted federal government lawyer, practicing outside California, therefore, would have to tailor her investigation, including the supervision of law enforcement officers or investigators, differently than her non-California licensed colleagues in the same case, merely because she is licensed in California.[1] Moreover, the lawyer may have to change her conduct during the investigation, merely because an indictment or complaint has been filed. The opportunities for confusion and litigation are limited only by the imagination. For example, what rules will goven the lawyer's conduct if a complaint is filed that names only some, but not all of the potential defendants? If the lawyer continues her investigation, should she follow the Pennsylvania Rules only as to the named defendants while continuing to follow the California Rules as to the the unnamed defendants? What rules will govern her conduct with respect to witnesses who may provide information relating to both named and unnamed defendants? It is difficult to understand how the interests of either California or its residents are served by subjecting lawyers overseeing multi-jurisdictional investigations to the confusion resulting from different choice of law rules that may render applicable different rules of professional conduct, if California's interests are not at issue.[2]

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[1] The difficulties posed may be particularly significant in those instances where California's Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California's Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another") and 1.6(b)(3) ("to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used") or where an issue concerning the lawyer's implied authority for disclosure is at issue, a concept that has also been rejected in California's Proposed Rule 1.6.

[2] The Commission rejected our previous comment along these same lines based on its conclusion that, "The detailed explanation provided in support of this Comment argues, in effect,

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

**Conclusion**

For the foregoing reasons, we request a modification of the comments to Proposed Rule 1.11 to make more clear that the rule does not impute conflicts within government agencies. We also oppose the adoption of Proposed Rule 3.8(g), (h); if the Board of Governors ultimately concludes that adoption of some variation of these provisions is warranted, we believe that they should be substantially redrafted along the lines we previously proposed. In addition, we propose the addition of a comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

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that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions." Respectfully, we disagree. We do not believe the situations posed by the discussion above will be so rare given the growing frequency of multi-jurisdictional investigations conducted by DOJ attorneys, and we see no reason why the choice of law rules applicable to attorneys conducting such investigations should apply completely differently based solely on the timing of the filing that puts a case before a particular tribunal when it is known all along where that filing will ultimately occur. We seek not uncertainty, but the certainty that will come with a lawyer's ability to know which set of rules will apply, to know that those rules will apply both pre- and post-filing, and to conform conduct to those rules.

**Exhibit A**

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

(g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:

(1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:

(i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or

(ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).

(2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

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[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.

**U.S. Department of Justice**

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained – pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows[1] "new, credible and material" exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is "new, credible and material." Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is "new, credible and material." We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor's subjective intent should be used in determining adherence to this rule.

"Material"

Secondly, we are concerned with the use of the term "material" in the rule. . Neither the proposed Rule nor the Comments defines the term "material." In a criminal context, the term "material" is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

However, the term "material" or "materially" is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be "materially limited" by the lawyer's own interests or the interests of a third person); ABA Model Rules of Prof'l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct "material" false statements made to a court); ABA Model Rules of Prof'l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a "material" false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term "material" may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer's duty to correct material false statements made to a court, "materiality encompasses matters represented to a tribunal that the judge would

[1] The term "know" is defined in the Model Rules to mean "actual knowledge of the fact in question[,]" Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.").

We would believe that this confusion could be remedied by making clear that the term "material" is used in the Brady sense of the term.

"Promptly"

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must "promptly" disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor must "promptly" disclose the evidence to the defendant and undertake further investigation. Although the term "promptly" is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.4(a) (2007) (requiring a lawyer to "promptly" consult with clients about certain matters and "promptly" comply with a client's reasonable request for information); ABA Model Rules of Prof'l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to "promptly" notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof'l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to "promptly" notify the sender). Based upon the construction of the term "promptly" when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel's firm "promptly"; the attorney was not screened until ten days after he started working at the new firm; court discounted firm's description of administrative delays in light of the fact that the firm knew prior to the attorney's arrival that he was working as opposing counsel on the case).

When the term "promptly" is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is "new, credible and material," particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term "promptly" was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and "know" that the evidence is "new, credible and material."

"Seek to remedy the conviction"

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor "shall seek to remedy the conviction." Proposed Comment [8] states,

> Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to "seek to remedy the conviction" may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. See, e.g., Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);[1] Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to "remedy" a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

> Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

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[1]Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a)("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.[2] Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to "remedy" a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people's desire for finality of criminal convictions is an equally compelling interest to be served. "[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

> A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

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[2]Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion "[n]otwithstanding any law that would bar a motion under this paragraph as untimely." 18 U.S.C. § 3600(g)(1) (Supp. 2007).

> languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

David Margolis
Associate Deputy Attorney General

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 3.8. Special Responsibilities of a Prosecutor.**

1. OCTC thanks the Commission for its changes in subparagraph (a), which is preferable to the original proposal, and its inclusion of a reference to section 6131 in Comment 10.
2. OCTC is, however, concerned about subparagraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the procedure for obtaining counsel and has been given a reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor, control this. The police, at least in California, are usually independent of the criminal prosecutor. (See e.g. *People v. Jacinto* (2010) _ Cal.App.4th __, WL 2105069 [finding that the Sheriff's deportation of witness not attributed to prosecutor].) Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to subparagraph (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.
3. Likewise, OCTC is concerned with subparagraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 1A defining prosecutor to include the office of the prosecutor and all lawyers affiliated with the prosecutor's office should be in the rule, not a Comment.

**LAW OFFICES**
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**MICHAEL P. JUDGE**
PUBLIC DEFENDER

**EXECUTIVE OFFICE**

June 14, 2010

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

Dear Ms. Hollins:

This letter address the public comment provided for the 69 proposed new or amended Rules of Professional Conduct developed by the Commission for the Revision of the Rules of Professional Conduct.

There is a rule and comment that seem to be internally inconsistent. Rule 3.8(e), concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the rule, saying it is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

There is no "genuine need" exception written into the Rule and it should not swallow up the Rule's protections.

There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.

Comments [7] and [8] to Rule 3.6 seem duplicative.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

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sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply e-mail and delete all copies of this message.

**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
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www.sccba.com
www.probonomatch.org

| | | |
|---|---|---|
| | ~~subparagraph (b) as it now reads: "In addition, a law clerk may interview with a party, or with a lawyer or law firm for a party in a matter in which the clerk is participating personally and substantially, but only after notifying the judge or other adjudicative officer."~~ | ~~However, subsection (b) still requires that the law clerk obtain approval from the judge before participating in discussions regarding prospective employment. The current version still makes no distinction between interviewing and discussions regarding prospective employment nor do any of the comments to the rule.~~ |
| ~~Rule 3.6: Trial Publicity~~ | ~~This is an unnecessary rule and constitutionally infirm in that it attempts to prohibit speech that is protected by the 1st Amendment. Much of the conduct/speech which this rules attempts to proscribe is actually covered by other rules which are set in contexts that do not violate the 1st Amendment, such as, an attorney misrepresenting the facts of case; or engaging in conduct that undermines the ability of a litigant to receive a fair trial such as deceit, deception or fraud. The SCCBA understands that the California Supreme Court has previously adopted substantially similar rules but notwithstanding that this rule should be deleted.~~ | ~~The current version keeps this rule as previously proposed by the Rules Revision Commission.~~ |
| Rule 3.8: Special Responsibilities of a Prosecutor | The SCCBA fully supports a rule that addresses the special responsibilities of a prosecutor. The currently proposed version addresses several of the concerns previously articulated by the SCCBA. However, it still sets out too broad a framework for the responsibilities of a prosecutor.<br>In particular, the SCCBA suggests that | The current version is substantially the same as the originally proposed version, which closely tracks the ABA Model Rule. The changes in the current version are as follows:<br>• Subsection (a): deletes the |

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| | in subsection (f), the words "or direction" be deleted so that prosecutors are only held accountable for persons under their direct control as employees as opposed to those who may undertake action at their direction but who are not required to do so.<br><br>Finally, the SCCBA would commend the RRC to once again seriously consider the input provided by the California District Attorneys Association in a letter to the RRC dated November 13, 2009. | requirement of "recommend" and "reasonably should know" and only requires that a prosecutor refrain from commencing or prosecuting a charge that the prosecutor actually knows is not supported by probably cause;<br>• Subsection (e): with regard to not subpoenaing a lawyer who represents a criminal client in other proceedings, this version adds civil proceeding to those already enumerated which were grand jury and criminal and adds "related to a criminal proceeding" to further define proceeding so that (e) now requires as follows: that a prosecutor "not subpoena a lawyer in a |

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| | | grand jury proceeding, criminal proceeding, or civil proceeding related to a criminal matter to present evidence about a past or present client unless the prosecutor reasonably believes… .”<br>• Subsection (f): adds “persons under the supervision or direction of the prosecutor, including…” and then goes on to list investigations, law enforcement and others. This addition cleans up the problem of the original version that read literally could require prosecutors to get investigators and especially law enforcement officers to refrain from making public |

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| | | statements about a case when the prosecutor can't actually control certain of those individuals. |
| Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence | The SCCBA recommends adopting this rule as proposed with the following additions, deletions and comments.<br><br>*Subsection (a)(4) and Comment [4]:* The SCCBA recommends adding to Comment [4] language to alert attorneys about the existence of numerous internet based "lawyer referral" services as well as internet sites that are only marketing sites. The comment should point out that this rule may apply to internet based "lawyer referral" services to which a lawyer may be paying a fee for referrals. The comment should delineate between an internet based site that simply requires the attorney to pay a fee to post a "marketing" profile where the client searches the site and chooses the attorney based on the information posted by the attorney (a marketing/advertising site) as opposed to an internet service that requires the attorney to pay a fee to the internet service which does the screening of clients and where the clients contacts the service directly, not the attorney (a referral service). If the attorney is participating in the latter, it is only either is the internet based service is certified by the State Bar.<br><br>*Subsection (e):* The SCCBA | The current version changes subsection (e) so that it conforms to the recommendation made by the PRRFT. However, the current version does not include any comments related to internet sites or lawyer referral services on the internet as recommended by the SCCBA in its change to the original comment [4]. |

# Rule 3.9 – Public Comment – File List

X-2010-421w COPRAC [3.9]

X-2010-425-35ii SDCBA [3.9]

X-2010-513-41 OCTC [3.9]

X-2010-517j Zitrin-Multiple [3.9]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 24, 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–Advocate of Non-Adjudicative Proceedings. COPRAC supports the adoption of proposed Rule 3.9 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

February 12, 2010

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**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

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

1. OCTC is concerned with the Commission's departing 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 not make a difference that it is in litigation or before a non-adjudicative proceeding. The rules eliminated by the Commission, like the rule added by the Commission, address truthfulness and fairness. There is no reason to depart from the ABA's rule.
2. If the rule is changed to be like Model Rules 3.9, then the Comments will have to be changed or deleted. Comments 1-2 are too general and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC would also request a comment that other rules may apply depending on the facts and circumstances.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

The Commission in its *May 2010 Non-Adoption Summary* argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.

We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.

3. *Rule 3.3 – Duty of candor*

Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.

Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.

The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.

Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.

4. *Rule 3.9 – Advocate in non-adjudicative proceeding*

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance *is* required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

5. *Rule 4.4(a) – Barring use of embarrassment, delay, or burden*

Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the *May 2010 Non-Adoption Summary* – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule

# Rule 3.10 – Public Comment – File List

X-2010-421jj COPRAC [3.10]

X-2010-425-36jj SDCBA [3.10]

X-2010-513-42 OCTC [3.10]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 3.10

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 3.10 - Threatening Criminal, Administrative, or Disciplinary Charges. COPRAC supports the adoption of proposed Rule 3.10 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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Wells B. Lyman

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
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| Rule 3.6 | Trial Publicity |
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| Rule 4.2 | Communication with a Person Represented by Counsel |
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| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 3.10 – Threatening Criminal, Administrative, or Disciplinary Charges**
**[Existing CRPC Rule 5-100]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 3.10 with the following modification: Change the standard in Proposed Rule 3.10 Comment 2 from "good faith" to "probable cause".

Rationale For Comment 1: The proposed standard is too subjective.

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 3.10. Threatening Criminal, Administrative, or Disciplinary Charges.**

1. OCTC supports this rule. Comment 1, however, could be shortened.

# Rule 4.1 – Public Comment – File List

X-2010-425-37kk SDCBA [4.1]

X-2010-517h Zitrin-Multiple [4.1]

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May 6, 2010

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

Re:

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Dear Ms. Hollins:

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The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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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

February 12, 2010

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)

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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.

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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.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

2. *Rule 1.3 – Diligence*

Most unfortunately, the Commission also determined not to approve Rule 1.3 on diligence. The Commission's explanation, in its document updated May 17, 2010 entitled "Rules and Concepts that Were Considered, But Are Not Recommended for Adoption" ("*May 2010 Non-Adoption Summary*") argues that "diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence." This is not so.

Although proposed Rule 1.1 pays lip service to the concept of diligence in subsection (b) and Comment ¶ 2, this is not close to adequately replacing the diligence rule. For instance, while proposed Comment ¶ 2 is similar to ABA Rule 1.3's Comment ¶ 1, other important components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work overload (ABA Rule 1.3, Comment ¶ 2), procrastination and delay (ABA Comment ¶ 3), and following through on matters to completion (ABA Comment ¶ 4).

We strongly agree with the Commission's minority report with respect to this rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: *paying adequate attention*. MR 1.3 and its comments need to be approved by the Board.

## III. Rules omitted in whole or part by the Commission

1. *Rule 1.0.1(m) – Definition of Tribunal*

The excellent definition of "tribunal" under the ABA Model Rules "denotes a court, an arbitrator … or a legislative body, administrative agency or other body acting in an adjudicative capacity," that is, where the body "will render a binding legal judgment directly affecting a party's interests…."

Unfortunately, that broad and appropriate definition was not followed by the Commission. The Commission's definition is limited to courts, arbitrators, administrative law judges and special masters referred by the court. The result is that adjudications may occur in other forums that are simply deemed by the Commission *not* to be tribunals.

The effect of this can be enormous. The limited definition of "tribunal" could have a significant effect on how Rules 3.7, 3.9 and, if passed, 4.1 (see *infra*) are interpreted. Most tellingly, however, is the substantial and material effect on the vitally important Model Rule 3.3, "Candor to a Tribunal." If the definition of tribunal is unduly limited, lawyers in California will not have any ethical requirement to be candid towards a number of adjudicative bodies that are making binding decisions.

Surely, we hope and expect that California's integrated State Bar would not want to convey to its lawyers or the public that members of the California bar may be less than candid before certain adjudicative bodies. Nevertheless, that is what the current proposal implies. This definition must be changed to conform to the broader ABA definition.

2. *Rule 4.1 – Truthfulness to others*

Similar issues about the integrity of California bar members are raised by the absence of Model Rule 4.1. This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.

The Commission in its *May 2010 Non-Adoption Summary* argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.

We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.

~~3. *Rule 3.3 – Duty of candor*~~

~~Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.~~

~~Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.~~

~~The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.~~

~~Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.~~

~~4. *Rule 3.9 – Advocate in non-adjudicative proceeding*~~

~~Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance *is* required by ABA MR 3.9.~~

~~We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")~~

~~This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.~~

~~5. *Rule 4.4(a) – Barring use of embarrassment, delay, or burden*~~

~~Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the *May 2010 Non-Adoption Summary* – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule~~

# Rule 4.2 – Public Comment – File List

X-2010-425-38ll SDCBA [4.2]

X-2010-430e Glenn Alex [4.2]

X-2010-505 John Dalton [4.2]

X-2010-506 Jason Oliver [4.2]

X-2010-513-43 OCTC [4.2]

X-2010-522 San Bernardino County Public Defender [4.2]

SAN DIEGO COUNTY BAR ASSOCIATION

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Wells B. Lyman

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 4.2 – Communications with a Person Represented by Counsel**
**[Existing CRPC Rule 2-100]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 4.2 and keep existing rule 2-100

Rationale For Comment 1: The new rule changes an attorney's duty to avoid communicating ex parte with a represented "party" to a rule barring ex parte communications with a represented "person." The new rule is designed to protect an attorney's relationship with a client who is represented in a matter, but who is not formally a party in the matter. The rule also is designed to keep a lawyer from taking advantage of an unrepresented person outside of the presence of the person's lawyer, who would be able to protect that person from the attorney's wiles.

The Committee claims this is "a clarifying change." It isn't. The recent State Bar Court opinion *In the matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798 makes that clear. The existing rule uses the term "party" deliberately to limit the scope of an attorney's duty to avoid talking to people who may be represented, broadly speaking, "in the matter" (whatever that means) in which he or she represents a client, but who is not a party in the matter, with all of the legal risk that comes with being a party to a lawsuit or criminal proceeding. No authority is cited for the Bar's conclusion that the revision conforms to the "historical interpretation of the rule." The Committee's interpretation ends up restoring an interpretive "history" without a past.

Beyond that, the Committee does not give adequate weight to the countervailing policy considerations for allowing an attorney to talk to party represented in some capacity in a matter (whatever that means) in pursuit of his or her client's interest in the case in which the client is a party and to the tools at the represented "person's" disposal. A lawyer's duty is to his or her client. That duty is first and foremost; it is not first among equal duties to other constituencies, other than the duty as an officer of the court. There may be legitimate reasons, in both the civil and criminal areas, where a lawyer would prefer to talk to a person outside of the presence of the person's attorney. This broadening of an attorney's duty counsels a timidity that is unwarranted and unwise. The tools at the disposal of the represented person? They can just say no . . . or call their own attorney. The power of an attorney to overwhelm these tools of a person savvy enough to have retained a lawyer even though they are not a party may be overstated.

We must remember that the very first sentence of the rules of professional conduct announce that the purpose and function of the rules is "to regulate professional conduct of members of the State Bar *through discipline*." (RPC 1-100(A), emphasis added.) Nothing more and nothing less. (See *Ibid.*: "Nothing in these rules is intended to create new civil causes of action. Nothing in these rules shall be deemed to create, augment, diminish, or eliminate any substantive legal duty of lawyers or the non-disciplinary consequences of violating such a duty.") Putting lawyers at risk of discipline where it is, at best, unclear where the ultimate public interest is best served would be unfair.

The comments play too great a role in setting the parameters of the rule and its exception.

This proposed change would expand a lawyer's duties to non-clients, increase the risk of discipline, and distract the lawyer from their overarching duty to their client for reasons not compelled by the lawyer's broader duty as an officer of the court. No evidence is cited that the current rule is broken; that is evidence enough that it needn't be fixed.

Comment 2: Disapprove Proposed Rule 4.2 and keep existing CRPC Rule 2-100 modified to add a new sub-section "(C)(4) Communications with an investigative officer in civil or criminal case".

Rationale for Comment 2: Investigative officers should be included in the scope of both the existing CRPC Rule 2-100 and in ABA Rule 4.2.g. since it is required for the proper functioning of an adversary system.

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel – a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.

The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.

3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."

In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.

4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."

Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."

~~(Emphasis added.))~~ ~~Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).~~

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

   Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

   Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"

   The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

6. ~~Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.~~

~~Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.~~

Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."

Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.

Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.

The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

Law Offices of
**John W. Dalton**
674 Via De La Valle, Suite 212
Solana Beach, California 92075

Telephone (858) 720-8422 Fax (858) 720-8424

June 15, 2010

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

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

Re: Rule Change Regarding Ex Parte Contact With Percipient Witnesses

Dear Ms. Hollins:

The proposed rule change which would prohibit contacting a "person" represented by counsel, as opposed to the current rule which prohibits contact with a "party" represented by counsel will severely prejudice plaintiffs in employment cases and be tremendously helpful to the defense in such cases. All the defense would have to do is send a letter to plaintiffs counsel indicating that all employees of the company are "represented" for the sole purpose of litigation and plaintiffs will be prohibited from interviewing percipient witnesses. This will almost immediately put an end to meritorious employment discrimination and harassment cases, or at a minimum, have a serious negative impact on such cases. Further, such a rule change has no impact on "attorney misconduct" by an attorney, it would merely allow the defense in employment cases to "hide the ball" from plaintiffs counsel who are conducting good faith investigations into, what are often, very serious allegations of workplace misconduct.

In employment discrimination cases, plaintiffs counsel are on the outside looking in, and in most cases must seek out their evidence because defense attorneys are loathe to provide witness information to plaintiffs. Moreover, many times this work is done "pre-litigation," meaning the plaintiffs counsel will investigate first to insure the case is meritorious. In most instances, employees contacted in such an investigation want to cooperate because the misconduct (many times sexual assaults and batteries) in the workplace is quite despicable and they want to try and put a stop to it. If employees do not want to cooperate with an investigation, all they have to do is say so.

The proposed rule change places plaintiffs at a huge disadvantage and strongly favors the defense in employment cases. I have spoken to many of my employment lawyer colleagues, as well as many of my clients, and all are strenuously against such a rule change.

Thank you for taking the time to read my correspondence about this extremely important issue.

Sincerely,
LAW OFFICES OF JOHN W. DALTON

John W. Dalton

JWD/sc

LAW OFFICES OF
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June 14, 2010

**By Fax: 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: Comment on Proposed Rule Change Regarding Ex Parte Contact ("Party" v. "Person")

Dear Ms. Hollins:

I am writing to voice my strenuous opposition, as well as that of my clients and fellow plaintiff's employment lawyers, to the proposed rule change which would prohibit contacting a "person" represented by counsel, as opposed to the current rule which prohibits contact with a "party" represented by counsel.

Imagine if, upon receiving a demand letter, all a defense lawyer had to do to prevent a plaintiff's employment lawyer from interviewing company witnesses was to send a letter that all employees and former employees of the defendant employer were represented by him or her.

That could be reality if this proposed rule change to the State Bar rules on ex parte contact passes.

I regularly receive witness lists in discovery from defense lawyers who despite being asked to provide phone numbers and address information for potential employee witnesses in the Judicial Council approved Form Interrogatory, refuse to give the information, stating the person "may be contacted through counsel." I am then forced to go to court and seek an order compelling the information. To this date, I have not been date such information by a court. No plaintiffs lawyer should have to divulge work by telegraphing to defense counsel whose testimony he deems important by requiring the plaintiff's attorney to contact the employee only through defense counsel. (See, e.g., *Nacht & Lewis Architects, Inc. v. Superior Court* (App. 3 Dist. 1996) 47 Cal.App.4th 214 [Identities of and information regarding individuals interviewed by defendants'

counsel concerning incident that was subject of plaintiff's lawsuit were protected from discovery by virtue of qualified work product privilege, as list of potential witnesses interviewed by defendants' counsel would necessarily reflect counsel's evaluation of case by revealing which persons counsel deemed important enough to interview].) The proposed rule change will only encourage such improper conduct, as defense attorneys will likely have the employer add provisions to the handbook or simply send letters to the employee witness pool stating that, unless they opt out, one of the "benefits" of their employment is that they have been provided a lawyer free of charge, who should be notified if they are contacted by any lawyers. Such a result will harm plaintiffs with valid civil rights claims by prohibiting their access to evidence, while allowing unfettered access by employers to those same employees.

Currently, a plaintiff's lawyer may contact "persons" (who are not managing agent/control group types) as long as that person is not a "party" in the case. Under the current system, a defense lawyer or employer defendant may not "convert" an rank and file employee, whether represented or not, into a "party," just by sending a letter or by having the employer include a provision in an employee handbook about representation. Under the new rule, this would be possible. Based on what I see every day, I would say such abuse will is not just possible, but likely, as defendants fight these cases tooth and nail and seek every advantage they can get.

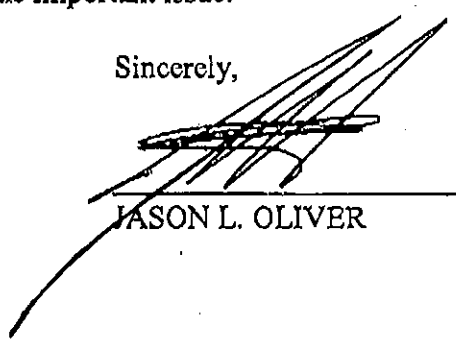
Moreover, passing the proposed rule will likely lead to increased "frivolous lawsuits" which although frivolous when filed, become frivolous after filing and the plaintiff's lawyer gets access to evidence through discovery, since a plaintiff's attorney will likely be forced to bring a lawsuit based only on the testimony of one person, i.e., the client.

In civil rights and employment cases, our pre-filing and post-filing investigations are of paramount importance to vindicating the important rights of our clients. If the proposed rule is passed, defendant employers will be handed a huge advantage over plaintiffs with meritorious cases, since there will likely be wholesale restrictions on who we can speak to in our investigations.

This proposal is awful and I would hope the State Bar would not pass a rule which would cause undue harm to countless civil right victims in California.

Thank you for your kind consideration of this important issue.

Sincerely,



JASON L. OLIVER

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 4.2. Communication with a Person Represented By Counsel.**

1. OCTC is concerned that this rule may still not address the issues raised in *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798. In *Dale*, the Review Department failed to find an attorney culpable of violating current rule 2-100 for his communications with an incarcerated arsonist without the consent of the arsonist's criminal attorney because the arsonist was represented only in the criminal matter and not the civil matter Dale was handling. (The arsonist was not a party to the civil lawsuit, which was between the tenants and their landlord regarding the fire that the arsonist set.) Dale engaged in this communication despite the objection of the arsonist's attorney. OCTC believes that California law should cover the Dale type of situation. Even the court in Dale appeared to encourage that. While the rule now states person and not party so that the Dale would seem to be covered, it is not clear and unambiguous. OCTC would, therefore, request that either the rule be made clearer or, at least, a comment should be added to clarify that the *Dale* type of situation is covered by this rule.
2. There are way too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comments 7 and 12 should be in the rule, not a comment.

**Law Offices of the Public Defender**
Administration

Doreen B. Boxer
Public Defender

SAN BERNARDINO COUNTY

June 15, 2010

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

RE: Public Comment About Proposed Rule 4.2

Sent via email (Audrey.hollins@calbar.ca.gov) and first-class mail

Ladies and Gentlemen:

As the San Bernardino County Public Defender, I submit this letter in opposition to Proposed Rule 4.2 in its present form as it violates criminal defendants' constitutional rights and will cause significant additional costs, case processing delays, and backlog and will further overburden limited judicial, prosecutorial, and defense resources.

**1. Proposed Rule 4.2 Will Impermissibly Infringe on a Criminally Accused's Right to Effective Assistance Counsel**

**a. Defense Counsel's Duty to Investigate**

It is well settled that the criminally accused have a right to the assistance of counsel. (U.S. Const., 6th Amend; Cal. Const. Art. I, §15.) These protections not only entitle the criminally accused to the assistance of counsel but to *effective* assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 690-691.) (See also *In re Visciotti* (1996) 14 Cal.4th 325, 348; *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *Bakker v. Grutman* (4th Cir.1991) 942 F.2d 236, 239-242 [counsel in civil cases also has a duty to fully investigate his client's case].) Defense attorneys not only have a duty to make reasonable investigation, they also have a duty to make reasonable decisions that render further investigation based on the facts of their case unnecessary. (*Strickland, supra,* 466 U.S. at p. 691.) Counsel's duty to investigate requires the exercise of "considerable ingenuity" to locate potential witnesses and to secure their cooperation. (ABA Stds. for Crim. Justice (3d ed. 1993) std. 4-4.1, p. 182.) A criminal conviction can be reversed on appeal as a result of an attorney's failure to fully investigate potential witnesses who may possess or know of information relevant to an accused's defense. (*People v. Shaw* (1984) 35 Cal.3d 535; *In re Edward S.* (2009) 173 Cal.App.4th 387; *People v. Bess* (1984) 153 Cal.App.3d 1053.)

**b. Proposed Rule 4.2 Restricts Defense Counsel's Ability to Investigate, Will Overburden Scant Judicial Resources, and Cause Unnecessary Costs, Delay, and Backlog**

Proposed Rule 4.2 prohibits direct or indirect communication of any kind with *any* person represented by another lawyer "in the matter" without prior approval of counsel. The proposed changes make the rule far too vague, especially since investigation into a witness' credibility will affect any "matter" in which he is involved, regardless of his involvement or the status of his representation. In addition to delaying prosecutions by increasing barriers to the defense, the proposed rule significantly impacts the ability of defense lawyers to zealously represent their clients because they will not know what to do and, out of fear of being found culpable of ethical misconduct, may not initiate or further pursue investigations they normally would in order to effectively defend their client.

The question for the defense bar becomes, in the case of a criminal complaint, does the proposed rule apply only to *any* person, *e.g.,* victim, witness, etc. who retains counsel to insulate themselves from defense inquiry related to the criminal investigation, or does it apply to situations where counsel is retained on a collateral legal issue tangentially related to the criminal case? Take for example the following scenario:

> There is a shooting at a convenience store, and the owner of the store was present and witnessed the shooting. The owner is sued on a premises liability claim relating to the shooting and retains counsel. The defendant in the criminal case wants to interview the owner on an issue related to suspect identification. The defendant is not the least bit interested and has no involvement in the premises liability claim. May defendant interview the owner?

Neither the proposed rule nor its numerous official comments answers this question. At the Commission for the Revision of the Rules of Professional Conduct's October 31, 2008, meeting, members of the Commission assured me and other public commenters that the "authorized by law" language in the Rule's (c)(3) paragraph ensures that "investigations not prohibited by current RPC 2-100" would remain permissible under Proposed Rule 4.2 and for that reason denied a request for an express exception, protecting criminal defense investigations. (Minutes of October 31, 2008, Commission meeting, page 5.) Nevertheless, when I posed the above hypothetical, the members were unable to answer whether the proposed rule would prevent the defense attorney from interviewing the convenience store owner without prior approval from his premises liability attorney, thereby illustrating that, without the requested clarifying language, Proposed Rule 4.2 broadens the scope of prohibited attorney investigation without limitation in criminal proceedings and fails to reliably protect the rights of the accused.

Comment 4 seems to indicate in the above scenario the defense could not speak with the owner/witness since it states, "'the subject of the representation,' 'matter,' and 'person' are not limited to a litigation context. This proposed rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates." Comment 19 states, "[a]lthough the 'authorized by law' exception in these circumstances may run counter to the broader policy that underlies this proposed rule, nevertheless, the exception in this context is in the public interest and is necessary to promote legitimate law enforcement functions that would otherwise be impeded. Communications under paragraph (c)(3) implicate other rights and policy considerations, including a person's right to counsel under the Fifth and Sixth Amendments of the U.S. Constitution and parallel provisions of the California Constitution (Cal. Const., Art. I, §15) that are beyond the scope of this Comment." Neither these comments nor the language of the proposed rule clearly protect the rights of the accused. The proposed rule's silence as to the rights of the criminal defendant is aggravated by its specific protection of prosecutorial investigation. Thus, an attorney or a court, seeing a specific exemption for prosecutorial investigation and no equivalent language for defense investigation, will

predictably and understandably read the proposed rule to prohibit the defense, but not the prosecution, from contacting a represented witness without counsel's approval.

Recognizing the inevitable confusion of this proposed rule, Comment 21 then offers, "[a] lawyer who is uncertain whether a communication with a represented person is permissible might be able to seek a court order." This suggestion will bring possibly thousands of otherwise unnecessary proposed orders to the courts, thereby wasting judicial resources, slowing case processing, and increasing case backlog in our already overburdened justice system. Even if it is feasible to seek and obtain orders to conduct investigation, this requirement unconstitutionally inserts judicial oversight into the scope of criminal defense investigation and case preparation. Moreover, if the Commission's intent is to maintain 2-100's scope as it relates to criminal investigations, this confusion, delay, and expense are unnecessary and imprudent.

Similarly, Proposed Rule 4.2 undermines the vitality of the Sixth Amendment right to the effective assistance of counsel since arguably a criminal defendant may be able to more effectively investigate his case if he were to be unrepresented.

Proposed Rule 4.2 in many cases will prevent defense attorneys from providing the level of representation they are obligated to provide and deprive the criminally accused the level of representation to which they are entitled. Consider, for example, a situation where an accused has an alibi that he was at another location when the crime occurred and has an alibi witness who will corroborate his story. If this witness is represented by counsel on an unrelated case that would be used by the defense attorney to attack the witness' credibility on the present matter and the witness knows several other witnesses who would corroborate the accused's alibi, Proposed Rule 4.2 may prohibit counsel from contacting this witness, which would also prevent him from locating and interviewing the other potential witnesses. Such a scenario would effectively deprive the accused of his fundamental right to effective assistance of counsel. This our Federal and State Constitutions do not allow. In an abundance of caution, defense attorneys may find themselves subpoenaing witnesses with whom they were prevented from speaking, increasing the costs to courts and defense, as well as delaying the prosecution of such cases.

At the October 31, 2008, Commission hearing on Proposed Rule 4.2, when confronted with the above convenience store example, members stated the rule was not intended to change a criminal defense attorney's ability to speak with witnesses from the scope that exists presently under Rule 2-100. This statement was not recorded and is not clearly stated in any literature. However, if the Commission's intent was truly to maintain the ability of defense attorneys to effectively investigate on behalf of their clients, Proposed Rule 4.2 does not make that clear and should include an exemption like that granted to the prosecution. The proposed rule, in its present form, impermissibly interferes with the defense function and will cause substantial delays and costs, as well as wrongful convictions.

**2. Proposed Rule 4.2 Will Deprive the Criminally Accused the Right to Equal Protection of the Law**

**a. Criminally Accused Persons Are Entitled to Equal Protection Under the Law**

Equal protection under the law means that no person or class of persons shall be denied the same protection of the law enjoyed by another in like circumstances. (*People v. Leng* (1999) 71 Cal.App.4th 1, 11.) Those similarly situated shall not be treated differently unless the disparity is justified. (*Ibid.*)

Classifications affecting fundamental rights are subject to strict judicial scrutiny. (*Leng, supra,* at p. 11.) A law that has a discriminatory effect upon a fundamental right will not be given effect unless the state "...establishes the classification bears a close relation to the promotion of a compelling state interest, the

classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible." (*Ibid.*) All other classifications will satisfy the requirements of equal protection if they bear a rational relationship to a legitimate state interest. (*Ibid.*)

The right to assistance of counsel is a fundamental right guaranteed to the criminally accused under the Sixth Amendment to the Federal Constitution and applicable to the states through the due process clause of the Fourteenth Amendment to the Federal Constitution. (*Gideon v. Wainwright* (1963) 372 U.S. 335.)

**b. Proposed Rule 4.2 Violates Equal Protection Guarantees**

The entities similarly situated here are the government and the defendant; both are entitled to due process in a criminal proceeding. (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 122 (overruled on other grounds in *Malloy v. Hogan* (1964) 378 U.S. 1); *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092.) California demonstrated its desire to further level the field in criminal proceedings with the passage of Proposition 115 in 1990, which created the reciprocal discovery provisions now found in Penal Code section 1054, et seq. (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356.) Proposed Rule 4.2 would provide one side, the government, with a distinct advantage in the investigation of criminal cases than that which is provided the other side, the defense.

The disturbing equal protection problem involving Proposed Rule 4.2 stems not from its original language but from the added language exempting prosecutors. Prosecutors will have an overwhelming advantage prosecuting cases because they can contact any "person" while the defense cannot. In situations where a person represented by counsel is contacted by the prosecution and has information that may be helpful to the accused, the accused is now at the mercy of the prosecution to procure and divulge the information. The problem here is that the prosecution may not know the accused's defense and, therefore, will not probe a potential witness for information related to the defense. Defense counsel, knowing the accused's defense, will know what questions to ask and seek the information needed. Another scenario is where a person who has information helpful to the accused will not speak with the prosecution but will speak with the defense. In this scenario, the information helpful to the accused will never get to him because the person who has it will not reveal it to the only party allowed to obtain it, the prosecution.

That prosecutors in other instances are allowed to do things in criminal prosecutions that the defense bar is not does not insulate Proposed Rule 4.2 from scrutiny under the equal protection clause. If this were so, the State could enact statutory provisions with impunity and grant prosecutors one advantage after another in criminal prosecutions simply because there is a law that already allows prosecutors to run a RAP sheet, or grant a confidential informant immunity, etc. This issue here is whether *this* proposed rule violates the equal protection clause; and if not, no other unrelated rule remedies its constitutional defects.

It is true that Proposed Rule 4.2 does not prohibit defense counsel from speaking to any person; it only requires they first request permission from the person's lawyer before speaking to the person. However, a prima facie showing of an equal protection violation having been established, the burden is on the Commission to establish why Proposed Rule 4.2 is necessary to further a compelling state interest or, at minimum, how it is rationally related to a legitimate state interest; it is not the defense bar's burden to establish how the proposed rule burdens the defense. Nowhere in the discussion draft does the Commission satisfy either test. Proposed Rule 4.2 violates the equal protection clause.

### 3. *Jorgensen v. Taco Bell* Does Not Solve the Problem

On October 31, 2008, at the Commission's hearing, one member of the panel claimed any concern the defense bar may have regarding the scope of Proposed Rule 4.2 or the prosecutor exemption is alleviated by *Jorgenson v. Taco Bell* (1996) 50 Cal.App.4th 1398. This is not so.

In *Jorgenson, supra*, the respondent filed a sexual harassment lawsuit against Taco Bell; respondent was an ex-employee. Seven months prior to filing suit against Taco Bell, a private investigator hired by respondent's attorney interviewed the alleged harasser and two other Taco Bell employees. Taco Bell brought a motion to disqualify respondent's counsel on the grounds he violated Rule 2-100. The claim was those interviewed were represented by Taco Bell corporate counsel; therefore, they were parties represented by counsel, and their interviews were conducted in violation of Rule 2-100. The motion was denied. The denial of the motion was affirmed because the Taco Bell employees were interviewed long before there was a lawsuit. Since there was no lawsuit when the employees were interviewed, the employees were not parties represented by counsel and, therefore, no violation of Rule 2-100 occurred.

As *Jorgenson* relied upon Rule 2-100 (now Proposed Rule 4.2), it only applies to situations where an action has been filed. In the case of a criminal prosecution where the accused has been formally charged, there is always a legal action filed, *e.g.,* complaint, indictment. There will never be a situation where an accused is formally charged where no legal action will be pending. Therefore, *Jorgenson* will never apply to a situation where an accused is formally charged and, therefore, offers no relief from the suffocating effects of Proposed Rule 4.2.

In addition, the *Jorgenson* Court refused to extend 2-100 to situations that were covered by the ABA's Model Rules and ethics opinions on which Proposed Rule 4.2 is based. The Court contrasted the scope of 2-100 against that which is articulated by the ABA's rules and opinions (and is now proposed in Rule 4.2) and arrives at its holding based on the differences between the two, not the similarities. Thus, if the Bar were to change the rule from 2-100 to 4.2, the holding of the *Jorgenson* case would likely be superseded.

### 4. Conclusion

Proposed Rule 4.2 impermissibly infringes on the rights of the criminally accused to effective assistance of counsel by curtailing defense investigation. The proposed exemption for prosecutors does nothing more than exacerbate the problem by giving prosecutors an unfair advantage over the criminally accused in the prosecution of criminal cases. The State has not established how the granting of this advantage to prosecutors is necessary to promote a compelling state interest or even rationally related to a legitimate state interest. Therefore, the proposed exemption violates the equal protection clause.

The solution is simple: Allow the exemption to apply to prosecutors *and* the defense bar. That will level the playing field and the Proposed Rule 4.2 will accurately articulate the Commission's intent.

Sincerely,

Doreen B. Boxer
San Bernardino County Public Defender

DBB/roz

# Rule 4.3 – Public Comment – File List

X-2010-421xx COPRAC [4.3]

X-2010-425-39mm SDCBA [4.3]

X-2010-436 Patricia Long [4.3]

X-2010-513-44 OCTC [4.3]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 4.3

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 4.3–Dealing with Unrepresented Person. COPRAC supports the adoption of proposed Rule 4.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 4.3 – Dealing with Unrepresented Person**
**[Existing CRPC Rule: None]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Disapprove Proposed Rule 4.3.

Rationale For Comment 1: Proposed Rule 4.3 imposes new duties on an attorney with respect to unrepresented persons. Beyond diluting the duty a lawyer has to his or client, it takes little imagination to see this being used as a weapon by those who have unpleasant encounters with lawyers. The common law provides sufficient protection against the abuses of lawyers toward the unrepresented without adding a rule of discipline that may ultimately compromise, in addition to a lawyer's duty toward his or her client, the protections of the litigation privilege. (Civil Code section 47.)

The Proposed Rule 4.3 Comments play too great a role in setting the parameters of the rule and its exception. For example, Proposed Rule 4.3 Comments 4 and 5 state exceptions not found in the Proposed Rule itself.

The Proposed Rule 4.3 requires a lawyer to avoid giving legal advice if the person to whom he is speaking has interests that "have a reasonable possibility of being in conflict" with the interests of the client. It is unclear what this means and even whether it is limited to the present or to the foreseeable future.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

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

*** Name** Patricia J. Long

*** City** Clovis

*** State** California

*** Email address**
**(You will receive a copy of your comment submission.)** kinlawfresno@comcast.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct**.

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*** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.**

Rule 4.3 Dealing with Unrepresented Person

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

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

---

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

In Family Law cases, there is a duty of divorcing spouses to give full financial disclosure as if they were business partners both at the beginning of the divorce and at the end. As a Family Law practitioner, upon the passage of this proposed rule, I would worry that I could somehow be accused of a violation by seeking to get this all-too-often private financial info under the Family Law Code.

I would like to know what constitutes misleading the opposing, unrepresented spouse? Can you give us real-world examples? What if, as in many of my dissolution of marriage cases, there are issues of mental illness and/or substance abuse or cultural differences and, hence, that person's perception of being mislead is askewed? I had a case a few years back where the ex-husband signed a consent form clearly stating he understood that he was NOT my client, but he went to the State Bar complaining as my client. He was not mislead, but believed he was. With a high percentage of Family Law cases--and with the economic downturn these numbers are increasing--having one unrepresented party. So many times I can tell a person the

**ENTER COMMENTS HERE.**

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Then I had a case last year where opposing counsel threatened criminal action to get an advantage in a civil matrimonial case--clearly attempting to mislead my client before I came into the case, but nothing was done by the State Bar. If existing violations are overlooked on other rules, what guarantees that violations of the proposed rules will not also go that way? We practitioners need certainty and clarity when it comes to the proposed rules.

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 4.3. Dealing with Unrepresented Person.**

1. OCTC supports this rule, but believes that there are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions.

# Rule 4.4 – Public Comment – File List

X-2010-421ss COPRAC [4.4]

X-2010-425-40nn SDCBA [4.4]

X-2010-511d State Bar LPMT [4.4]

X-2010-513-45 OCTC [4.4]

X-2010-517k Zitrin-Multiple [4.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 - Respect for Rights of Third Persons. COPRAC supports the adoption of proposed Rule 4.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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

February 12, 2010

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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

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

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 4.4 Respect for Rights of Third Persons

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.

CORRECTED . . . This time with indication that comments are on behalf of LPMT.
Please see attached 10 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 4.4 [N/A]**
**"DUTIES CONCERNING INADVERTENTLY TRANSMITTED WRITINGS"**
**(DRAFT #5, 04/21/10)**

***INTRODUCTION***

LPMT's comment on Proposed Rule 4.4 concerns what was originally paragraph (b) but now constitutes the entire rule:

> A lawyer who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine, and where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender.

We recommend that Proposed Rule 4.4 be removed from the Commission's proposed revisions.

***ANALYSIS***

## I. ABA Model Rule 4.4(b) is as Unsusceptible as 4.4(a) to Migration to the California RPC

Rule 4.4 of the ABA Model Rules of Professional Conduct (MPRC) – from which Proposed Rule 4.4 is drawn – has always been a bit odd. With the title "Respect for Rights of Third Persons", MPRC 4.4 paragraph (b) would appear tacked on for lack of a better home. Paragraph (a) is the only part that refers to third persons.

The Commission has correctly decided not to keep paragraph (a). It should do the same for paragraph (b). We assume the Commission considered 4.4 because it was already part of the MRPC.

Once the Commission decided to consider and revise rules of the MPRC for application to California, Rule 4.4 came up for review. Otherwise we doubt that the Commission would find a need for what has become Proposed Rule 4.4. It has no precedent in the CRPC, and its significance relates primarily to discovery, a topic generally omitted from the CPRC and the current proposed rule revisions.

Even those in favor of MRPC 4.4(b) [now the entire Proposed Rule 4.4], recognized the anomaly. *See, e.g.,* Orange County Bar Association, Comments at Rule 4.4 Discussion Draft (April 24, 2010) at 24 ("we respectfully raise 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 parties."). Indeed, the Commission decided to split off MRPC 4.4(b), keeping only it, and the narrowing it further.

## II. 2009 eDiscovery Enactments by the Legislature and Judicial Council Militate Against Adoption of 4.4(b)

Although the latest version bears the date of April 24, 2010, the Commission's decision to include MRPC 4.4(b) [in the Public Comment version] presumably occurred before the enactment of the Electronic Discovery Act ("EDA") (signed by the Governor on June 29, 2009) regarding electronic discovery.

In any event, it appears unlikely the Commission took the EDA into account because it does not cite the EDA in its listing of Existing California Law section 2031.285 of the California Code of Civil Procedure ("C.C.P."), which regulates inadvertently produced electronically stored information ("ESI") in discovery.[1]

[1] Electronic Discovery Act at § 18:

> SEC. 18. Section 2031.285 is added to the Code of Civil Procedure, to read:
>
> 2031.285. (a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as attorney work product, the party making the claim may notify any party that received the information of the claim and the basis for the claim.

In addition, it appears unlikely the Commission took into account the Judicial Council's subsequent related amendments to California Rules of Court, Rule 3.724. Duty to meet and confer:

> Unless the court orders another time period, no later than 30 calendar days before the date set for the initial case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in rule 3.727 and, in addition, to consider the following:
>
> * * *

---

2031.285 *(c't'd)*

(b) After being notified of a claim of privilege or of protection under subdivision (a), a party that received the information shall immediately sequester the information and either return the specified information and any copies that may exist or present the information to the court conditionally under seal for a determination of the claim.

(c) (1) Prior to the resolution of the motion brought under subdivision (d), a party shall be precluded from using or disclosing the specified information until the claim of privilege is resolved.

(2) A party who received and disclosed the information before being notified of a claim of privilege or of protection under subdivision (a) shall, after that notification, immediately take reasonable steps to retrieve the information.

(d) (1) If the receiving party contests the legitimacy of a claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal.

(2) Until the legitimacy of the claim of privilege or protection is resolved, the receiving party shall preserve the information and keep it confidential and shall be precluded from using the information in any manner.

CRC 3.724 *(c't'd)*

> (8) Any issues relating to the discovery of electronically stored information, including:
>
> * * *
>
> (E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;
>
> (F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings; * * *

*Rule 3.724 amended effective August 14, 2009; adopted effective January 1, 2007.*

We should hesitate to select from the many California Supreme Court and Court of Appeal regarding what parties and their attorneys must do and create a disciplinary rule where none existed before. In support of Proposed Rule 4.4, the Commission cites *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]. *Rico* provides a California rationale for Rule 4.4(b), but it is doubtful that proposed rule 4.4(a) would have made it onto the Commission's plate if there had been no MRPC on the subject. Existing law already gives lawyers the same guidance, if not more.

Where a statute and a rule of court address a lawyer's conduct in a particular circumstance, we believe the State Bar need not add a separate injunction. Among other reasons, the judicial interpretation of the concepts underlying a particular statute and a rule of court should retain primacy, especially where the application of a disciplinary rule by the State Bar may in time diverge from such judicial interpretation.

A particular feature of American jurisprudence is that courts do not give advisory opinions. Rather American case law develops in response to disputes regarding the application of law to specific facts. Even when a senior appellate body, such as the California makes a broad pronouncement, it is left to the lower court to develop the contours of the law as applied, the nuances, and, for example here, such terms as "obviously appears", "reasonably apparent", and, particularly, "inadvertently."[2]

## II. It Is Misguided to Focus on the Recipient-Attorney Instead of the Producing/Sending-Attorney

Upon reviewing the rule, LPMT Executive Committee members reacted first – when noticing the title of *Duties Concerning Inadvertently Transmitted Writings* – that the emphasis in any rules governing a lawyer's conduct regarding transmitted writings should be on the duties of the sending or producing lawyer. That is not to say the Commission need add more to rule 4.4 – after all, California Business and Professions Code §6068(e)(1) already deals with a lawyer's disclosure of her or his client's confidential information.

In addition the law and practice regarding the inadvertent sending and producing of confidential information is evolving. Rather, the proposed discipline by the State Bar of the receiving attorney for a lack of action is inapt. The State Bar should save its powder and devote its resources to helping lawyers develop procedures to reduce the risk of inadvertently sending a client's confidential information to another.

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[2] *See also* the comment of the Los Angeles Superior Court of California regarding inadvertently produced information in its comments regarding the draft text of what will become the EDA:

> "Additionally, C.C.P. § 2031.285 only addresses the obligations of a party who receives privileged information, and then receives a 'notification of privilege' from the party who produced the information. It does not address whether the production of privileged information as part of a document production with 'quick peeks' or 'claw back provisions' is deemed to be 'inadvertent' so that the obligations of the receiving lawyer set forth in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807 apply."

*California Judicial Council Report on Electronic Discovery: Proposed Legislation* [including attachments] (April 16, 2008) ("Council Report") at 164.

As the Commission has stressed, "the State Bar disciplinary process has limited resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy . . . when the law provides other . . . remedies." Proposed Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation, Explanation of Changes to the California Rule 2-400, at 7.

## III. Inadvertent Disclosure Is a Nuanced Area, Due to Differences Between Litigation-Related and Transactional Exchanges of Information

As with the two salient California Supreme Court cases on the issue of inadvertent disclosure, the issue usually arises in the context of litigation. Indeed, the Commission recognizes as much when it inserts "or produced" into the equivalent text of the MRPC: "where it is reasonably apparent that the writing was inadvertently sent *or produced*, [the receiving lawyer] shall promptly notify the sender."

The *Rico* court's agreement with *amicus curiae* The Product Liability Advisory Council, Inc. refers to the burden's of responding to "a request for mass production." *Rico* at *5. Hence, the tribunal before which an instance of inadvertent disclosure arises has sufficient authority to sanction attorneys – including referral to the State Bar – if warranted.[3]

[3] Even when a court must notify the State Bar of an attorney's misconduct pursuant to Business and Professions Code § 6086.7, the law carves out an exception for certain misconduct regarding discovery. *See* Bus. & Prof. C. § 6086.7(3) ("The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).). In addition, under circumstances reasonably suggesting that the crime-fraud exception applies, however, a lawyer may ethically read the communication and not be subject to sanctions. *See* Proposed Formal Opinion Interim No. 06•0004 (Confidential Information and Unsolicited E-Mail Correspondence): "The opinion digest states:

> "If an attorney receives a confidential written communication between opposing counsel and opposing counsel's client under circumstances reasonably suggesting that the crime-fraud exception precludes application of the attorney-client privilege, the attorney may ethically read the communication."

*Id.* at <http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=97668> (accessed June 14, 2010).

## IV. Metadata's Complexity and Still-Developing Ethical Principles Warrant that the Commission Decline to Adopt Proposed Rule 4.4

LPMT has a further concern, particularly as the use of technology by lawyers is right in LPMT's wheelhouse.

Complex issues regarding the receipt of confidential material lie just under the surface of what appears to be a straightforward rule. An important example is that of the propriety of a receiving lawyer's accessing or viewing metadata in the received item.

Metadata is the hidden or embedded data in a writing in an electronic medium. For such a writing, The Electronic Discovery Act uses the term "electronically stored information" (ESI). "'Electronically stored information' means information that is stored in an electronic medium." C.C.P. § 2016.020(e).[4] Examples of metadata include the "properties" in a Microsoft Word file (document), for example, when it was created and last modified. Formulas and comments in a spreadsheet, usually not visible in a printed copy, provide another example.

An attorney may be unaware, however, of metadata's presence or significance because:

- Metadata is often hidden.
- Metadata is often created automatically by the user's computer.
- As a piece of computer mumbo-jumbo, attorneys may be unaware of what metadata is or that it even exists.

[4] The EDA offers the following definitions for ESI in a revised C.C.P. § 2016.020:

> (d) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> (e) "Electronically stored information" means information that is stored in an electronic medium.

- Even those attorneys who know about metadata may be unaware of its special characteristics or what special care must be taken regarding it.

- Metadata may be revealed by certain applications' features such as MS Word's Track Changes, of which many people are unaware.[5]

Lawyers and their clients create and transmit almost all "writings" or "documents" electronically. Examples include what you are now reading and the ubiquitous email, with attachments. All ESI contains metadata not apparent viewable on the "face" of the ESI/document. For convenience, we will use as an example of ESI a Microsoft Word file and refer to it as a "document."

If a lawyer receives a document from another lawyer, some of that document's metadata may contain another's confidential information. At times, the metadata is hidden from view. In that case, the lawyer is safe from the proposed rule in that the metadata is not obvious, although sometimes the metadata is obvious, such as when opening a document that reveals tracked changes made to an earlier version of the document. In either case, there are legitimate reasons for a lawyer to access and view certain metadata.

Other examples of usually hidden metadata are the formulas and comments in a spreadsheet, usually not visible in a printed copy. Likewise, with metadata, one may trace the Internet route of an e-mail—by viewing the "full header" (a.k.a. Internet header)—or one may see who was sent a blind copy (bcc) of an e-mail. A document's metadata also include a hash value, which is a kind of digital fingerprint that will change if any part of the document, including its other metadata, is changed.

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[5] Businessman Derrick Max, reacting to Democrats' outrage when his e-mailed Congressional testimony revealed input from the Republican Social Security Administration, vented that, "The real scandal here is that after 15 years of using Microsoft Word, I don't know how to turn off 'track changes.'" Zeller, Tom, Jr., *Beware Your Trail of Digital Fingerprints*, N.Y. Times (Nov. 7, 2005) <nytimes.com/2005/11/07/business/07link.html?_r=1&pagewanted=print>. *See generally* Robert D. Brownstone, *Metadata: To Scrub or Not To Scrub; That is the Ethical Question*, Cal. B.J. (Feb. 2008) <http://metadata-mcle-2-1-08.notlong.com/> (written by LPMT Executive Committee Chair-Elect for 2010-11) .

Regarding metadata received from opposing counsel, even outside the context of litigation, several state ethics opinions prohibit the receiving party's viewing of ***any*** metadata. This prohibition may even apply to metadata that ordinarily would not be considered confidential – for example, the "full header" (a.k.a. "Internet header"[6]) of a non-confidential email.[7]

Many states' ethics opinions decry such viewing of received metadata as unethical and worse.[8] The heart of the matter is that such state ethics opinions presume that metadata is *per se* confidential to its author. Thus, even if the on its face the document is not confidential, these ethics opinions presume that the associated metadata is.

There is a broad debate among attorneys who focus on technology and rules of professional conduct regarding those states' ethics opinions. Many criticize them as not comprehending the nuances of metadata. It should be noted that several jurisdictions have not adopted – or have specifically rejected – the proscriptions describe above. [See infra LPMT's comments on Proposed Rule 8.5 regarding the difficulties that would arise if a rule such as Proposed Rule 4.4 were part of the CPRC's extraterritorial scope.]

*(c't'd)*

[6] **Header**: In information technology, a header is, in general, something that goes in front of something else and is usually repeated as a standard part of the units of something else. A header can consist of multiple fields, each containing its own value. In email it is the part of the message containing information about the message, such as the sender, date sent and other brief details. *The Sedona Conference® Glossary: E-Discovery & Digital Information Management* (2d ed. Dec. 2007).

[7] *See, e.g.,* New York State Bar Association Opinion 749 (Dec. 14, 2001) (concluding that, "A lawyer may not make use of computer software applications . . . to trace e-mail.").

[8] By describing the viewing of metadata not on the face of a document as surreptitious, the New York State Bar Association (NYSBA) implies that such viewing is unseemly and deceptive. *See, e.g.,* New York State Bar Association Opinion 749 (Dec. 14, 2001) (concluding that "[a] lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents or to trace e-mail") <http://NYSBA-Op-749-2001.notlong.com>. By describing the viewing of metadata not on the face of a document as surreptitious, the New York State Bar Association implies that such viewing is unseemly and deceptive. "Something *surreptitious* is stealthy, furtive, and often unseemly or unethical: *the surreptitious mobilization of troops preparing for a sneak attack*." *The American Heritage® Dictionary of the English Language (4th Ed.* 2002) (in the note regarding synonyms of "secret"). But note that, several years later, the NYSBA recognized that the focus of metadata inadvertent-disclosure ethics should be on the need for the *sending* attorney to exhibit "reasonable care." NYSBA Op. 782 (Dec. 8, 2004) <http://NYSBA-Op-782-2004.notlong.com>.

***CONCLUSION***

California should follow the law as it evolves and not begin to discipline lawyers as prescribed by Proposed Rule 4.4. The rule is unnecessary in light of existing statute and case law. In addition, it is premature and likely unwise considering the many related but unacknowledged issues re e-discovery, including the appropriateness of accessing metadata in a document received from another party or its attorney.

For the foregoing reasons, we recommend that Proposed Rule 4.4 be removed from the Commission's proposed revisions.

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**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 subparagraph (a), which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted that they are concerned regarding the vagueness and over breadth of such terms as embarrass, delay, or burden a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and when balanced against the need to prevent litigation abuse, OCTC believes the ABA has it correct.

   Further, the State Bar Act already prohibits counseling or maintaining actions, proceedings, or defenses only as appear to him or her legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct already prohibit 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* (9th Cir. 1981) 638 F2d 1190, 1197.)

   In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term "offensive personality." While some of this misconduct can be handled under other rules, not all of it can or should be and this would give better guidance to the attorneys in this state. OCTC believes that California should follow the rest of the country and that 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 are 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 seems more appropriate for a treatise, law review article, or ethics opinion. Comment 2 is too long and covers at least two distinct concepts. It could be two comments.

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

The Commission in its *May 2010 Non-Adoption Summary* argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.

We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.

3. *Rule 3.3 – Duty of candor*

Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.

Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.

The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.

Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.

4. *Rule 3.9 – Advocate in non-adjudicative proceeding*

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance *is* required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

5. *Rule 4.4(a) – Barring use of embarrassment, delay, or burden*

Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the *May 2010 Non-Adoption Summary* – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule

might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses "means that have *no substantial purpose other than*" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

*6. Rule 5.7 – Rule application to "law-related services"*

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

*7. Rule 2.1 – Lawyer as advisor*

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" – two vital and important concepts that are nevertheless not the same.

## IV. Rules related to confidentiality

*1. Rule 1.6 – Basic confidentiality*

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.[4] The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

[4] The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.

# Rule 5.1 – Public Comment – File List

X-2010-425-41oo SDCBA [5.1]

X-2010-511e State Bar LPMT [5.1]

X-2010-513-1 OCTC [5.1]

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
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Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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

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

Dear Ms. Hollins:

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule 5.1: Responsibilities of Partners, Managers and Supervisory Lawyers**

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

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

* * * * *

Comment 1:

The Commission should strike one of the two identical phrases ("the resulting misapprehension") that appear twice, in succession, in the middle of the last sentence of Comment [4] to Rule 5.1.

Rationale For Comment 1:

To delete a redundancy. We otherwise approve the proposed rule.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

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

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers [3-110]

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

- (•) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

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

Please see attached 1 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 5.1 [RPC N/A]**
**"RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS"**
**(DRAFT #5, 04/21/10)**

***INTRODUCTION***

The State Bar Law Practice Management & Technology Section (LPMT) supports Proposed Rule 5.1 and its core principle that a subordinate lawyer cannot be used as a scapegoat by a law firm.

***ANALYSIS***

The dissent is misguided in its suggestion that only the "guilty" lawyer should be responsible for negligence. We have long passed the time when lawyers practice in isolation. They currently (except for solos) practice in firms. They are given assignments by responsible attorneys. These assignments may be for the entire file, or just a part of the file, such as drafting a pleading, and the like.

The firm, and not the lawyer individually, is the entity with ultimate responsibility to the client. The money from the client goes to the law firm, not the individual lawyer. The resources of the firm, not of the individual lawyer, are used to advance the interests of the firm and the client.

To say otherwise is to disregard reality and provide a shelter to the law firm. The various decisions in the past few years in the *Qualcomm* case in federal court in San Diego have made clear that all the lawyers on a matter function as a team that must be supervised by senior firm partners.

Law is a business when multiple lawyers gather to increase their revenue and profit. The entire unit should be responsible for any mis-/mal-feasance.

The buck should not stop at the desk of an overworked junior associate.

***CONCLUSION***

The LPMT's position is that the Commission should adopt this Proposed Rule "as is."

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers.**

1. OCTC supports this Rule as it is simply a codification of existing California law. (See e.g. *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403; and the discussion to current rule 3-110.)
2. There are too many Comments, many are too long and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC supports Comments 7, 13, 14 and 15.

# Rule 5.2 – Public Comment – File List

X-2010-421l COPRAC [5.2]

X-2010-425-42pp SDCBA [5.2]

X-2010-513-1 OCTC [5.2]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 5.2

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 5.2 - Responsibilities of a Subordinate Lawyer. COPRAC supports the adoption of proposed Rule 5.2 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
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Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule 5.2: Responsibilities of a Subordinate Lawyer**

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

* * * * *

We approve the proposed new rule in its entirety.

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.2. Responsibilities of a Subordinate Lawyer.**

1. OCTC supports this rule. It appears to be consistent with California law.
2. OCTC is concerned, however, that the Comments are too long, and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC is especially concerned with the last sentence of Comment 1, which states that if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules of Professional Conduct unless the subordinate knows the document's frivolous character. This Comment is inconsistent with CCP section 128.7 and FRCP rule 11 (and the cases interpreting those rules), which hold that by signing a pleading an attorney is certifying that to the best of the signing attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the matter is not being presented for an improper purpose, that the claims, defenses and other legal contentions are warranted under existing law or by nonfrivolous arguments for extension, modification, or reversal of existing law, and the allegations and other factual conclusions have evidentiary support or are likely to have evidentiary support. (See *Moser v. Bret Harte Union High School District* (E.D. Cal. 2005) 366 Fed.Supp.2d 944 [public reprimand to associate attorney and law firm for filing frivolous pleadings], especially pp. 977, 978, 980, and 984.) Gross negligence would support a violation for such conduct.

# Rule 5.3 – Public Comment – File List

X-2010-421m COPRAC [5.3]

X-2010-425-43qq SDCBA [5.3]

X-2010-513-48 OCTC [5.3]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 5.3

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 5.3 - Responsibilities Regarding Nonlawyer Assistants. COPRAC supports the adoption of proposed Rule 5.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
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| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
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1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
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| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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**Conference of Delegates of California Bar Associations District Nine Representative**
Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule 5.3: Responsibilities Regarding Nonlawyer Assistants**

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

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

* * * * *

We approve the proposed new rule in its entirety.

**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

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

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[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

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**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

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Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

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Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.**

1. OCTC supports this rule as it is a codification of existing California law. (See e.g. *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122-123.) However, Comment 3 should be stricken.

# Rule 5.3.1 – Public Comment – File List

X-2010-421n COPRAC [5.3.1]

X-2010-425-44rr SDCBA [5.3.1]

X-2010-469-5e OCBA [5.3.1]

X-2010-513-1 OCTC [5.3.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 5.3.1

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 5.3.1 - Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member. COPRAC supports the adoption of proposed Rule 5.3.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
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| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
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| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule 5.3.1: Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member**

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

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

* * * * *

We approve the revised proposed rule in its entirety.

OCBA

ORANGE COUNTY
BAR ASSOCIATION

PRESIDENT
LEI LEI WANG EKVALL
PRESIDENT-ELECT
JOHN C. HUESTON
TREASURER
DIMETRIA A. JACKSON
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OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 5.3.1 – Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member**

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:

Paragraph 5.3.1 (b) provides that, "[a] lawyer shall not employ, . . . a person the lawyer knows or *reasonably should know* is disbarred, suspended, . . .." (emphasis added). The OCBA is concerned that "reasonably should know" in these circumstances requires further explanation by the Commission. The OCBA suggests that it should be presumed that a lawyer "reasonably should know" that another lawyer has been disbarred, suspended, etc., if such information appears on the State Bar website, and that it should be presumed that a lawyer should *not* reasonably know if such information does not appear on the State Bar website. The OCBA urges the Commission to clarify the standard in this manner.

Paragraphs (b)(1) and (b)(3) through (b)(5) refer to "*the* client," indicating that it means the particular client on whose behalf the suspended or disbarred lawyer is hired. Paragraph (b)(2), however, refers to "*a* client." It is not clear if this is merely a typographical error, and that the Commission intended it to say "the client," or whether the Commission intends to expand the scope of paragraph (b)(2) beyond that of the other subsections in paragraph (b). The OCBA seeks clarification.

Comment [1] refers back to paragraph (d), and states that "Paragraph (d) is not intended to prevent or discourage a lawyer from fully discussing with the client the activities that will be performed by the disbarred, . . . member on the client's matter." This Comment implies that paragraph (d) otherwise could be read as preventing or limiting a lawyer's ability to discuss with his client the status of the disbarred, etc., lawyer. Paragraph (d), however, expressly requires a lawyer to provide written notice to his client of the status of the disbarred, etc., lawyer. Thus, as written, Comment [1] is confusing. We recommend that the first sentence of Comment [1] be modified to read as follows: "Paragraph (d) is not intended to provide an exhaustive description of the information to be conveyed to the client or to otherwise limit the scope of any discussions between the lawyer and the client, but rather is intended to provide a minimum description of

information that must be conveyed upon the employment of a disbarred, suspended, resigned, or involuntarily inactive member."

**THE STATE BAR OF CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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FACSIMILE: (415) 538-2220
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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.3.1. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member.**

1. OCTC generally supports this rule. However, OCTC recommends splitting subparagraph (d) into two parts, (d)(1) and (d)(2), to make it easier to read and understand. A Comment should also refer lawyers to section 6132 regarding the responsibilities of any lawyer or law firm that employs a suspended or disbarred attorney.

# Rule 5.4 – Public Comment – File List

X-2010-421vv COPRAC [5.4]

X-2010-425-45ss SDCBA [5.4]

X-2010-513-1 OCTC [5.4]

X-2010-529j SCCBA [5.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 5.4

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 5.4 – Duty to Avoid Interference with a Lawyer's Professional Independence. COPRAC supports the adoption of proposed Rule 5.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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Wells B. Lyman

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
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| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
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| Rule 8.3 | Reporting Professional Misconduct |
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| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subject: Proposed Rule 5.4 – Duty to Avoid Interference with a Lawyer's Professional Independence**
**[Existing CRPC Rule 1-310, 1-320, 1-600]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 5.4.

Rationale For Comment 1: The proposal tracks ABA Model Rule 5.4 and is similar to existing CRPC rules on the subject. It should be adopted in the interest of uniformity.

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.4. Duty to Avoid Interference with a Lawyer's Professional Independence.**

1. Comment 1 more appropriately belongs in a treatise, law review article, or ethics opinion.

**From:** Hull, Doug
**Sent:** Wednesday, June 23, 2010 12:19 PM
**To:** Difuntorum, Randall; McCurdy, Lauren
**Cc:** Hollins, Audrey
**Subject:** FW: SCCBA Comments on Set of 69 Rules of Professional Conduct

Randy and Lauren:

This came to me. I thought it was comment on my rules, but I was mistaken. Sorry I didn't send it to you earlier.

Doug Hull
State Bar Court
(415) 538-2015
doug.hull@calbar.ca.gov

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**From:** Chris Burdick [mailto:chrisb@sccba.com]
**Sent:** Friday, May 28, 2010 10:32 AM
**To:** Hull, Doug
**Cc:** Hayashi, Roberta
**Subject:** SCCBA Comments on Set of 69 Rules of Professional Conduct

Dear Mr. Hull,
Attached please find a set of comments from the Santa Clara County Bar Association on selected rules from the recently released set of 69 proposed rules.

If you need anything additional from us on these or need further clarification on any of our comments, please do not hesitate to contact me. Thank you for the opportunity to comment,

Best regards,

Christine Burdick
Executive Director & General Counsel
Santa Clara County Bar Association
chrisb@sccba.com
Voice: 408.975.2121
Fax: 408.850.1506
www.sccba.com
www.probonomatch.org

| | | |
|---|---|---|
| | | ~~statements about a case when the prosecutor can't actually control certain of those individuals.~~ |
| Rule 5.4: Duty to Avoid Interference with a Lawyer's Professional Independence | The SCCBA recommends adopting this rule as proposed with the following additions, deletions and comments.<br><br>*Subsection (a)(4) and Comment [4]:* The SCCBA recommends adding to Comment [4] language to alert attorneys about the existence of numerous internet based "lawyer referral" services as well as internet sites that are only marketing sites. The comment should point out that this rule may apply to internet based "lawyer referral" services to which a lawyer may be paying a fee for referrals. The comment should delineate between an internet based site that simply requires the attorney to pay a fee to post a "marketing" profile where the client searches the site and chooses the attorney based on the information posted by the attorney (a marketing/advertising site) as opposed to an internet service that requires the attorney to pay a fee to the internet service which does the screening of clients and where the clients contacts the service directly, not the attorney (a referral service). If the attorney is participating in the latter, it is only either is the internet based service is certified by the State Bar.<br><br>*Subsection (e):* The SCCBA | The current version changes subsection (e) so that it conforms to the recommendation made by the PRRFT. However, the current version does not include any comments related to internet sites or lawyer referral services on the internet as recommended by the SCCBA in its change to the original comment [4]. |

| | | |
|---|---|---|
| | recommends that this subsection be deleted. This subsection is confusing in that attorneys are not subject to the State Bar Rules and Regulations Pertaining to Lawyer Referral Services; lawyer referral services are subject to the Rules and Regulations. This subsection would seem to suggest that all lawyers are subject to the rules. | |
| | | |

# Rule 5.5 – Public Comment – File List

X-2010-418 Norman Cohen [5.5]

X-2010-421o  COPRAC [5.5]

X-2010-425 SDCBA [5.5]

X-2010-513-1 OCTC [5.5]

## Hollins, Audrey

**From:** Norman R. Cohen [nrchn1@earthlink.net]
**Sent:** Monday, May 03, 2010 7:31 PM
**To:** Hollins, Audrey
**Subject:** Professional Conduct Rules

I am a retired attorney and inactive member of the California Bar. As I understand it, the rules now consider an attorney who does FINRA arbitrations (among others) as being engaged in the practice of law which effectively prohibits retired lawyers like my self who do not want to retain active status from sitting as an arbitrator even as being simply a "public" member of any arbitration panel.
The rule has reduced the number of arbitrators available to sit on panels and, I believe is absurd in its application as it differentiates between active and inactive members of the bar without any rational other than to force inactive lawyers who want to sit as arbitrators to pay bar dues and endure CLE courses which have no relationship to FINRA's securities arbitration panels. For years the rules were interpreted so as to permit lawyers to sit on such panels without construing it as being engaged in the practice of law but that was reversed a few years ago and organizations such as FINRA (with whose representatives I have discussed the issue at length) feel that they are helpless to fight a state bar rule. I ask that the current interpretation be reversed or that a new rule be promulgated which permits inactive bar members to sit on these panels without their participation being considered as practicing law.
Norman R. Cohen

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 5.5

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 5.5 - Unauthorized Practice of Law; Multijurisdictional Practice. COPRAC supports the adoption of proposed Rule 5.5 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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

**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

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

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

* * * * *

Comment 1:

The changes to the language of 1-300 related to the unauthorized practice of law by California lawyers are sound.

Rationale For Comment 1:

Prohibiting only "knowing" assistance of another in the unauthorized practice of law is a good change. It is conceivable, for example, that a California lawyer could assist someone in the practice of law who is disbarred without the lawyer knowing the person he or she is assisting is disbarred or not otherwise licensed to practice in California. The change to this part of the rule also brings this rule into line with other rules requiring that the offense be "knowing," such as RPC 2-100 prohibiting that contact with a person the lawyer knows is represented by counsel in the matter. (See *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187.)

Comment 2:

Proposed comment 7, purporting to explain subsection (a)(2) of the proposed rule, is confusing and either should be reworded or deleted.

Rationale for Comment 2:

Comment 7 says that the rule against assisting others in the unauthorized practice of law does not "prohibit a lawyer from counseling lawyers or non-lawyers in how to proceed in their own matters." If the commentator intends by this only that a California lawyer may assist a pro se litigant or drafter, whether admitted to a different bar or not a lawyer at all, it should say so. Otherwise, "their own matters" makes no sense. If, for example, a non-California lawyer has as one of his "own matters" a California case he is not otherwise authorized to handle, the rule against assisting in the unauthorized practice would apply even if it is the lawyer's "own matter" as lawyers generally refer to matters under their control.

The second sentence of Comment 7 purports to permit California lawyers to advise those who are not California lawyers about "the kinds of legal services they may provide in California." We assume the comment writer is distinguishing between "legal services" that do not constitute "the practice of law" and "legal services" that do constitute the practice of law. If so, the second sentence should add the following underlined insertion: "Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services not constituting the practice of law they may provide in California."

Comment 3:

The flaws in 5.5(b), addressing the multijurisdictional practice of law, are more serious. First, is the practical problem of subjecting to discipline before the California State Bar lawyers who are admitted only elsewhere.

Rationale for Comment 3:

N/A

Comment 4:

Comment 2 says that "paragraph (b) [of Proposed Rule 5.5] prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law." No it doesn't.

Rationale for Comment 4:

Paragraph (b) only prohibits non-California lawyers from establishing or maintaining an office or continued presence in this state or representing to others that the lawyer is admitted to practice in California. That is not the same thing as flatly barring non-California lawyers from practicing law in this state except as otherwise allowed.

By contrast, ABA Model Rule 5.5(a) says: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. . . ."

That expressly limits lawyers – *all lawyers* – to practice in those jurisdictions where they are licensed or otherwise authorized to practice.

We recommend adding new subsection (b)(1): "except as authorized by these Rules or other law, engage in any activity constituting the 'practice of law' as that term is construed under California law." We would renumber what are now subsections (1) and (2) as numbers (2) and (3).

We do not agree that the prohibition on the practice of law in California by non-California lawyers is necessarily implied by the prohibition on representing oneself as admitted to practice law in this state when one is not. Even if it were, the central purpose of a rule should be expressed not merely implied.

Please see Exhibit A for clean and redlined versions of the suggested changes to this proposed new rule.

Concurring Comments

Query whether the comment is accurate in saying that "paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law." To the contrary, (b) gives rise to the argument that a particular practice is not systematic or continuous, nor part of a resident office.

The question of inter-jurisdictional practice is an area in which lawyers really *do* need guidance, and therefore the rules should be clear. Without taking a position on what "the unlawful practice of law" is or should be, the rule is of little assistance and it an unambiguous articulation of the issue is needed.

# EXHIBIT A

## CLEAN AND REDLINED VERSIONS

## SDCBA SUGGESTED REVISION TO PROPOSED RULE 5.5

**Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, engage in any activity constituting the "practice of law" as that term is construed under California law;

(2) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(3) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

**Comment**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

*Guidance on what constitutes the practice of law*

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 6126, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services not constituting the practice of law they may provide in California.

**SDCBA SUGGESTED REVISION TO PROPOSED RULE ~~(CLEAN VERSION)~~5.5**

**Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or

(2) knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these Rules or other law, engage in any activity constituting the "practice of law" as that term is construed under California law;

(2) except as authorized by these Rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(~~2~~3) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

**Comment**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law.

[2] Paragraph (b) prohibits lawyers from practicing law in California unless admitted to practice in this state or otherwise entitled to practice law in this state by court rule or other law. (See California Business and Professions Code, sections 6125 and 6126. See also California Rules of Court, rules 964 [registered legal services attorneys], 965 [registered in-house counsel] 966 [attorneys practicing law temporarily in California as part of litigation], 967 [non-litigating attorneys temporarily in California to provide legal services], 983 [counsel *pro hac vice*], rule 983.1 [appearance by military counsel], 983.2 [certified law students], rule 983.4 [out-of-state attorney arbitration counsel program] and rule 988 [registered foreign legal consultant].) A lawyer does not violate paragraph (b) to the extent the lawyer is engaged in activities authorized by any other applicable exception. (See, e.g., 35 U.S.C. section 32(b)(2)(D) and *Sperry v. Florida ex rel. Florida Bar* (1963) 373 U.S. 379 [83 S.Ct. 1322]; *Augustine v. Dept. of Veteran Affairs* (Fed. Cir. 2005) 429 F.3d 1334.)

*Guidance on what constitutes the practice of law*

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. The purpose of prohibiting the unauthorized practice of law is to protect the public and the administration of justice from the provision of legal services by unqualified persons or entities. Except as otherwise prohibited in Rule 5.3.1, paragraph (a)(2) is not intended to prohibit a lawyer from employing the services of para-professionals or other assistants and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work as provided in Rule 5.3. Likewise, paragraph (a)(2) is not intended to prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, including claims adjusters, employees of financial or commercial institutions or entities, social workers, accountants, low cost legal service programs, and persons employed in government agencies.

[4] In California, the definition of the "practice of law" has evolved through case law and is generally understood to include the following:

(a) Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law. (*Bluestein v. State Bar* (1975) 13 Cal.3d 162, 175, [118 Cal.Rptr. 175, 183, fn. 13]. See also Business and Professions Code section 6126, subdivision (a).)

(b) Appearing on behalf of another or performing services in a representative capacity before a tribunal in any matter pending therein throughout its various stages and in conformity with the adopted rules of procedure. (See *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct. (ESQ Business Services, Inc.)* (1998) 17 Cal.4th 119, 128 [70 Cal.Rptr.2d 304, 308]; *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [209 P 363, 365]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542 [86 Cal.Rptr. 673, 677].)

(c) Giving legal advice and counsel to another which involves the application of law or legal principles to the specific facts and circumstances, rights, obligations, liabilities or remedies of that person or organization or of another, whether or not a matter is pending in any court. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535, [209 P 363, 365].)

[5] Merely holding oneself out as being admitted or entitled to practice law in California when actually not admitted or otherwise entitled to practice law in California has been held to be the unauthorized practice of law. (E.g., *In re Cadwell* (1975) 15 Cal.3d 762 [543 P.2d 257, 125 Cal.Rptr. 889]; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [355 P.2d 490, 494, 7 Cal.Rptr. 746, 750]. See also Rule 7.5.)

[6] Under Business and Professions Code 6126, a member who has resigned from the State Bar with charges pending is prohibited from representing another person in a state administrative hearing, even if the state agency permits non-lawyers to practice before it. (*Benninghoff v. Superior Court* (2006) 38 Cal.App.4th 61 [38 Cal.Rptr.3d 759]. See also Rule 5.3.1.)

[7] Paragraph (a)(2) is not intended to prohibit a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters. Paragraph (a)(2) is also not intended to prohibit a lawyer from counseling non-lawyers or lawyers not admitted to practice law in California concerning the kinds of legal services not constituting the practice of law they may provide in California.

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.**

1. OCTC supports this rule as it is a codification of existing law. Comment 1 more appropriately belongs in a treatise, law review article, or ethics opinion.

# Rule 5.6 – Public Comment – File List

X-2010-421rr COPRAC [5.6]

X-2010-425-47uu SDCBA [5.6]

X-2010-513-1 OCTC [5.6]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 5.6

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 5.6 – Restrictions on Right to Practice. COPRAC supports the adoption of proposed Rule 5.6 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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**MEMORANDUM**

Date: October 16, 2006

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

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

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

**Subj: Proposed Rule Rule 5.6: Restrictions on Lawyer's Right to Practice**

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

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

* * * * *

The majority of the Legal Ethics Committee, with one member of the Committee dissenting, approves the proposed new rule, except that we believe it is a bad idea to delete current subdivision 1-500(B) ("A member shall not be a party to or participate in offering or making an agreement which precludes the reporting of a violation of these rules,"). We see no explanation for the deletion in the Commission's analysis and, if the matter is not addressed elsewhere, the subsection should be reinserted.

Dissent 1:

5.6(b) should not be included in its current form, because it can be used to prevent lawyers from serving clients in a specialized field once they leave a firm. Either the lawyer has earned the compensation for past work or he/she has not, and he/she should be paid on that basis.

Dissent 2:

In sum, I object to the use of the ethics code or rules to enforce or protect law firm agreements relating to compensation issues (i.e. restrictive covenants or retirement agreements).

I object to Rule 5.6 to the extent that it purports to authorize or give the imprimatur of an "ethics code or rule" violation for lawyers acting contrary to a restrictive covenant. The comment to 5.6 (a) (1), I believe expands, and it states that (a) (1) permits restrictive covenants in "a law corporation, partnership or employment agreement." However, there is no explanation for this conclusion. What is the basis of invoking the ethics rules or the powers of the state bar in relation to this issue? The Comments do not make any statement regarding it.

In fact, the New Jersey Committee of Professional Ethics has agreed in substance that restrictive covenants violate the ethics rules. See Advisory Committee on Professional Ethics, Appointed by the Supreme Court of New Jersey, Opinion 78 – Restrictive Covenants for In House Counsel.

In addition to the extent the *Howard v. Babcock* (1993) 6 Cal.4$^{th}$ 409 [25 Cal.Rptr.2d 80] permits restrictive covenants, I disagree in that (1) clients are always free to chose their attorneys (2) a law firm should not be permitted to prohibit a lawyer from engaging in "non–competitive" areas of practice to the law firm that he or she is a partner, of counsel or associate, and (3) these restrictive covenants must be used to prohibit moon lighting by attorneys (who in essence are just trying to make more money).

Furthermore, I object to section (b)(2). Again, what is the policy behind this proposed rule and how does it further the public interest? If the Rules are used to protect financial arrangements between law firm attorneys, then why not have the rules deal with all types of financial arrangements between lawyers. That would not be a simple task.

What are the ethics polices or issues that these financial arrangements seek to protect. No such policy is stated. Moreover, no facts have been provided that back up the argument to have the state bar involved in this area. My fear is that law firms may use the state bar mechanism to achieve their private ends rather than protecting the public from unscrupulous lawyers (which is what I understand the gist of the ethics rules to be). Why are these rules in the ethics code?

**THE STATE BAR OF CALIFORNIA**

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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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**SUMMARY**

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- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
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- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
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**GENERAL COMMENTS**

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[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 5.6. Restrictions on a Lawyer's Right to Practice.**

1. OCTC supports this rule, but believes Comment 1 more appropriately belongs in a treatise, law review article, or ethics opinion.

# Rule 5.7 – Public Comment – File List

X-2010-517l Zitrin-Multiple [5.7]

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

Lauren McCurdy
State Bar of California
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105
**BY EMAIL ONLY**

Dear Lauren:

Enclosed please find a letter co-signed by 29 California ethics professors – three drafters, me, Prof. Geoffrey Hazard of Hastings, and Prof. Deborah Rhode of Stanford, and 26 others named and identified in the letter.

This letter addresses over 20 specific issues raised by the rules of professional conduct as proposed by the Commission. Given the number of issues raised, we think the letter is as succinct as possible. While some issues are more important than others, *each issue* raised had the support of each and every signatory, with the exception of one co-signer as to one issue, as noted.

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyala's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

Richard Zitrin / by sca

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum

UNIVERSITY OF CALIFORNIA
# HASTINGS COLLEGE OF THE LAW

*FACULTY*

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

A few additional preliminary notes:

[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

## I. Rules relating to conflicts of interest

### 1. *Rule 1.7 – Basic conflict of interest rule*

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

#### A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

#### B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised

[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses "means that have *no substantial purpose other than*" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

*6. Rule 5.7 – Rule application to "law-related services"*

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

*7. Rule 2.1 – Lawyer as advisor*

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" – two vital and important concepts that are nevertheless not the same.

## IV. Rules related to confidentiality

*1. Rule 1.6 – Basic confidentiality*

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.[4] The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

[4] The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.

# Rule 6.1 – Public Comment – File List

X-2010-421gg COPRAC [6.1]

X-2010-425-48vv SDCBA [6.1]

X-2010-430f Glenn Alex [6.1]

X-2010-433 M. Sue Talia [6.1]

X-2010-434b CCAJ [6.1]

X-2010-438 Alameda County Bar Association [6.1]

X-2010-439 Delivery of Legal Services [6.1]

X-2010-441 Public Interest Law Project [6.1]

X-2010-442 Jamienne Studley [6.1]

X-2010-445 Mental Health Advocacy Svcs [6.1]

X-2010-446 Public Counsel [6.1]

X-2010-451 Richard Odgers [6.1]

X-2010-470 Bet Tzedek-LAAC [6.1]

X-2010-472 Golden Gate Univ. School of Law [6.1]

X-2010-474 Legal Aid of Marin [6.1]

X-2010-475 HIV-AIDS Legal Svcs. Alliance [6.1]

X-2010-476 UC Irvine School of Law [6.1]

X-2010-477 Walter Pyle [6.1]

X-2010-478 UC Hastings School of Law [6.1]

X-2010-479 Legal Svcs. of Northern California [6.1]

X-2010-480 Martin Carr [6.1]

X-2010-481 Karen Goodman [6.1]

X-2010-482 Peter Carson [6.1]

X-2010-483 Ophelia Zeff [6.1]

X-2010-489 Neighborhood Legal Services of LA County [6.1]

X-2010-490 Legal Services for Prisoners w-Children [6.1]

X-2010-491 Central California Legal Svcs [6.1]

# Rule 6.1 – Public Comment – File List (pg. 2)

X-2010-492a LACBA Access to Justice Comm [6.1]

X-2010-493 Christina Hathaway [6.1]

X-2010-494 USF Law [6.1]

X-2010-496 Leonard Herr [6.1]

X-2010-497 Russ Hurley [6.1]

X-2010-498 Anne Fadenrecht [6.1]

X-2010-508 Public Interest Clearinghouse [6.1]

X-2010-510 Disability Rights Legal Center [6.1]

X-2010-514 Neighborhood Legal Svcs of LA [6.1]

X-2010-518 LA Center for Law and Justice [6.1]

X-2010-519 Clare Pastore [6.1]

X-2010-520 Asian Pacific Legal Center [6.1]

X-2010-521 Ugochi Anaebere [6.1]

X-2010-526 Michael Mills [6.1]

X-2010-527 Elizabeth Parker [6.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 – Voluntary Pro Bono Service. COPRAC understands that the Board intends to reconsider its decision to reject proposed Rule 6.1. We urge the Board to reconsider and to adopt the proposed rule. COPRAC previously reviewed the provisions of proposed Rule 6.1 and offered comments to the Commission for the Revision of the Rules of Professional Conduct. Attached hereto are the comments we offered in support of the proposed Rule.

As we commented to the Commission, COPRAC believes that the importance of our professional obligation to improve access to justice, as embodied in this rule, outweighs the objection that the rule is aspirational, and thus different from other rules that mandate or prohibit certain conduct.

COPRAC has suggested some minor language changes that would address some of the concerns that have been raised with proposed Rule 6.1. We ask that the Board consider those suggestions, found in the attached letter, when it reconsiders the proposed Rule.

The need for legal assistance for persons of limited means is enormous and well documented. COPRAC asks the Board to reconsider proposed Rule 6.1 which, if adopted, will imbed in our Rules the importance of our duty as attorneys to work to meet this need.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 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,

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

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

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

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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

February 12, 2010

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**

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel – a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.

The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.

3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."

In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.

4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."

Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."

(Emphasis added.)) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"

The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

~~attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."~~

~~Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.~~

6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.

   Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.

Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."

Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.

Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.

The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.

~~7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.~~

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form should be used to comment on rules and concepts considered by the Commission but are **not recommended for adoption**. Comments can be submitted by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Attorney

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

*** Name** M. Sue Talia

*** City** Danville

*** State** California

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

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

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

It is a sad day for California and its role as a leader in access to justice when it joins Texas (where reformers are still struggling to bring the legal system into the nineteenth century), North Carolina, and four other states in refusing to adopt a form of ABA Model Rule 6.1. The Rules Revision Commission got it right and unanimously recommended an aspirational rule. The Board of Governors was apparently hijacked by the CYLA, who, more concerned with protecting their client base than preserving and defending access to justice, strongly opposed the measure. The proposed rule would do NOTHING to their practices. They would not have been required to do a single thing by the proposed rule. It contained no mandatory conduct of any kind. Furthermore, they seem to have overlooked the fact that the people who are assisted by pro bono lawyers are nobody's clients: if they could afford lawyers, they wouldn't need pro bono assistance. The argument that this rule would somehow deprive them of paying clients is specious at best.

I travel all over the United States and Canada speaking to groups of lawyers on the

**ENTER COMMENTS HERE.**

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I travel all over the United States and Canada speaking to groups of lawyers on the subject of limited scope representation, and know first hand how backward some of our professional brothers and sisters are on access issues. Please don't allow California to join them. I urge reconsideration of the failure to recommend this rule.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** California Commission on Access to Justice

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

*** Name** Honorable Ronald B. Robie

*** City** Sacramento

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) ron.robie@jud.ca.gov

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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# 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**

HON. RONALD B. ROBIE
Chair
*Court of Appeal, Third Appellate District*
Sacramento

KENNETH W. BABCOCK
Vice Chair
*Public Law Center*
Santa Ana

HON. STEVEN K. AUSTIN
*Superior Court of Contra Costa County*
Pittsburg

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*Alvarez Lincoln/Mercury*
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*Law Office of Robin Crawford*
Pacifica

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*California State Automobile Association*
San Francisco

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*Central District of California*
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*Superior Court of Santa Barbara County*
Santa Maria

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*California Unemployment*
*Insurance Appeals Board*
Los Angeles

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*McDermott, will & Emery LLP*
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*Retired, Riverside Unified School District*
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San Luis Obispo

EDWARD THOMAS UNTERMAN
*Rustic Canyon Partners*
Santa Monica

ERIC WAYNE WRIGHT
*Santa Clara University School of Law*
Santa Clara

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MARY LAVERY FLYNN
*Acting Director, Office of Legal Services*
State Bar of California-San Francisco

June 11, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, Ca 94105

**Re: Request to Reconsider Proposed Rule 6.1, with recommended amendment**

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.

On May 19th, 2010, the Access to Justice Commission voted unanimously to urge the State Bar Board of Governors to recommend a pro bono rule as part of the Rule Revision process.

This is an issue of utmost concern to the Commission. We believe that it is imperative that our revised Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Rules Revision Commission and the Board of Governors to do everything in your power to ensure passage of this rule.

Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the first paragraph be amended to include the words “aspire to”, from the ABA’s Model Rule.

There were several reasons for the Commission’s unwavering support for this rule.

- We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono.

- It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave it out of the rules. The Bar’s ethics manual, “Pub 250”, does include the board resolution -- but it is on page 387 of a 387-page publication.

- At least 44 other states have included a similar provision in their ethics rules. According to the report of this Rule Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

- Other proposed rules are similar in nature – at least four other rules do not involve disciplinary consequences, but they permit or encourage certain behavior.

- We appreciate the effort the Rules Revision Commission put into its modification of ABA Model Rule 6.1, which it recommended unanimously. We particularly appreciated the language that strengthened the emphasis on activities that promoted access to justice. With the amendment recommended above, we hope that their proposed language is ultimately adopted.

- Some believe that the language describing pro bono work is too broad. However, the vast majority of work done pursuant to Rule 6.1 in other states is legal services for the poor, despite the language allowing other kinds of pro bono activity. And even if some work would be called "pro bono" that we would not consider true pro bono, that is not a reason to have NO ethics rule on the subject.

- Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact, last August, the Judicial Council, under the leadership of the Chief Justice, approved a special pro bono toolkit for judges to use to encourage lawyers to do pro bono. The toolkit can be found through the following link: http://www.courtinfo.ca.gov/programs/equalaccess/probonotoolkit.htm

- The Access Commission worked hard to establish the new pilot representation project that is being launched next year, and pro bono is a key part of the delivery system anticipated for those pilot projects. This new legislation is getting national attention, and to fail to adopt a pro bono rule at this point would be perceived as a giant step backward in our efforts to implement this new legislation and otherwise to improve access to justice.

Let me close by saying that the actual provisions are less important than our belief that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by this Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted, and Commission representatives are available to work with any and all parties to make sure that this Rule is ultimately adopted and recommended to the Supreme Court.

* * * * * * * * * * * * * * * * * * * * * * *

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,

Hon. Ronald B. Robie
Chair

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Alameda County Bar Association

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Ann Wassam

*** City** Oakland

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) ann@acbanet.org

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**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**

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**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

Thank you for the opportunity to comment on Proposed Rule 6.1 on voluntary pro bono service. Both the Alameda County Bar Association (ACBA,) a volunteer bar association of more than 2,000 members, and its Volunteer Legal Services Corporation (VLSC,) a separately incorporated pro bono program and IOLTA recipient, are in favor of the inclusion of Rule 6.1 in the Rules of Professional Conduct.

It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. In Alameda County, the need for pro bono legal services is critical. Although our VLSC has more than 330 volunteers and staff twenty-seven legal clinics each month, we must turn away clients every day. All efforts to increase pro bono service, and access to justice are welcome in Alameda County.

**ENTER COMMENTS HERE.**

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We urge the State Bar Board of Governors to reconsider the inclusion of Rule 6.1 in the Rules of Professional Conduct. Thank you again for the opportunity to comment.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Standing Committee on the Delivery of Legal Services

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Sharon Ngim, Staff Liaison

*** City** San Francisco

*** State** California

*** Email address** (You will receive a copy of your comment submission.) sharon.ngim@calbar.ca.gov

---

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Model Rule 6.1 Voluntary Pro Bono Serivce

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# 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


June 2, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, Ca 94105

Re: Unanimous SCDLS Resolution Urging Reconsideration of Proposed Rule 6.1

Dear Ms. Hollins:

The State Bar's Standing Committee on the Delivery of Legal Services (SCDLS) would like to thank the Rules Revision Commission for its careful analysis of Rule 6.1 and recommendation of the adoption of this rule. It is absolutely critical that California adopt an aspirational rule on pro bono to provide formal recognition that all attorneys have a professional responsibility to perform pro bono work. California is currently one of only six states that have not adopted a pro bono rule, and we believe that affirmatively declining to do so sends the wrong message to the bar as well as to the general public. A pro bono rule will have more far-reaching and sustained attention than a Board resolution, as the Rules are studied and referred to by lawyers and law students alike. And pro bono participation by attorneys is needed now more than ever - the need for legal services for those with limited means continues to expand in these challenging economic times.

In light of the Board of Governors' recent action not to recommend Rule 6.1, SCDLS voted unanimously to urge the Board of Governors to reconsider the adoption of Rule 6.1. SCDLS continues to support the Commission's proposed Rule 6.1, but would also support proposed Rule 6.1 with the insertion of the words "aspire to" in the second sentence of the introductory clause to emphasize the aspirational nature of the rule.

As an alternative to the version of Rule 6.1 recommended by the Rules Revision Commission (with or without the proposed amendment to insert the term "aspire to"), SCDLS would support the adoption of ABA Model Rule 6.1, or some combination of the Commission proposal and the ABA Model Rule. SCDLS members stand ready to work with the Rules Revision Commission and the Board of Governors on the rule language if it would be helpful, so that we can reach consensus on the adoption of a pro bono rule. The specific language of the rule is not as crucial as the adoption of a pro bono rule in some form, and SCDLS therefore strongly urges further discussion of this issue.

Thank you for this opportunity to comment and please do not hesitate to contact me at 650-843-5201 or malger@cooley.com if you have any questions.

Yours very truly,

Maureen Alger, Chair

Cc: Howard Miller, President
Michael Marcus, Chair and George Davis, Vice Chair, Board Committee on Regulation and Admissions

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form should be used to comment on rules and concepts considered by the Commission but are **not recommended for adoption**. Comments can be submitted by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** The Public Interest Law Project

**Commenting on behalf of an organization**
(•) Yes
( ) No

*** Name** The Public Interest Law Project

*** City** Oakland

*** State** California

*** Email address** (You will receive a copy of your comment submission.) mrawson@pilpca.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
(•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

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**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

· It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules.

· Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.

· There is a great need for legal services that is not now being filled,

**ENTER COMMENTS HERE.**

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At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

· It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules.

· Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.

· There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Public Advocates Inc.

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Jamienne Studley

*** City** San Francisco

*** State** California

***** Email address
(You will receive a copy of your comment submission.) jstudley@publicadvocates.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I encourage the committee to forward a recommendation to adopt Rule 6.1. It would be consistent with adoption in the great majority of states. The central professional responsibility of pro bono service and the value of giving as many poeple as possible the chance for legal representation in should be embedded formally in the core statement of values and rules, the California Rules of Professional Conduct. We need every possible reinforcement of our profession's and state's commitment to filling the serious legal services gap. This would be consistent with the Chief Justice's leadership on pro bono and legal services. While the statement would not create a specific requirement for any individual attorney, it would be completely appropriate to state the responsibility and aspiration in every appropriate setting.

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Mental Health Advocacy Services, Inc.

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Pamela Marx

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) pmarx@mhas-la.org

---

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---

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Mental Health Advocacy Services, Inc. (MHAS) writes to request reconsideration of the decision to not recommend Rule 6.1 Voluntary Pro Bono Publico Services for adoption by the State Bar Board of Governors. MHAS is a non-profit legal services agency serving adults and children with mental health disabilities in the greater Los Angeles area. Our clients are low-income individuals with disabilities; many of them survive on limited government benefits incomes. When they have legal problems, they must rely on legal services agencies and the pro bono resources those agencies are able to access.

Rule 6.1 is an aspirational, not mandatory, rule concerning attorneys' annual provision of pro bono legal services. As an aspirational rule, which would be included within the rules of professional responsibility, it provides guidance to attorneys that the provision of pro bono services and the financial support of legal services organizations and programs is consistent with the obligations of those licensed to practice law in California. Equal access to the law is a foundational

**ENTER COMMENTS HERE.**

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Mental Health Advocacy Services, Inc. (MHAS) writes to request reconsideration of the decision to not recommend Rule 6.1 Voluntary Pro Bono Publico Services for adoption by the State Bar Board of Governors. MHAS is a non-profit legal services agency serving adults and children with mental health disabilities in the greater Los Angeles area. Our clients are low-income individuals with disabilities; many of them survive on limited government benefits incomes. When they have legal problems, they must rely on legal services agencies and the pro bono resources those agencies are able to access.

Rule 6.1 is an aspirational, not mandatory, rule concerning attorneys' annual provision of pro bono legal services. As an aspirational rule, which would be included within the rules of professional responsibility, it provides guidance to attorneys that the provision of pro bono services and the financial support of legal services organizations and programs is consistent with the obligations of those licensed to practice law in California. Equal access to the law is a foundational concept in our constitutional society. Non-profit legal services providers meet only a fraction of the need for legal representation. Only with the provision of pro bono services by attorneys with expertise in much needed areas of representation such as litigation, real property transactions and family law can we hope to meet more of the need for services that exists.

No less authority that the "Pro Bono Opportunities" page of the State Bar website notes that, while California has made gains, our state's legal services programs are unable to provide even minimal legal assistance to as much as 67 percent of the legal needs of California's poor residents. The Brennan Center for Justice in a 2010 white paper supporting federal funding of legal services noted that the economic crisis has only increased the need for legal services for the poor.

In light of the continuing and rising need for legal services for the poor, including those with disabilities, MHAS respectfully requests that Rule 6.1 Voluntary Pro Bono Publico Service be submitted to the State Bar Board of Governors for approval and adoption.

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** On behalf of Public Counsel

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Elizabeth Bluestein

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) ebluestein@publiccounsel.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**

Model Rule 6.1 Voluntary Pro Bono Serivce

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- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

Public Counsel supports the adoption of the Commission's proposed Rule 6.1, and urges the Board of Governors to reconsider the adoption of Rule 6.1.

By way of background, Public Counsel is the largest public interest law firm specializing in delivering pro bono legal services to low-income communities. Public Counsel is dedicated to advancing equal justice under law by delivering pro bono legal services to indigent and underrepresented children and adults, ensuring that community-based organizations serving this population have legal support, mobilizing the volunteer resources of the private bar, and providing technical assistance to pro bono attorneys and projects throughout California. Public Counsel is also the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers Committee for Civil Rights Under Law.

We believe that it is very important for California to adopt an aspirational rule on

**ENTER COMMENTS HERE.**

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We believe that it is very important for California to adopt an aspirational rule on pro bono to provide formal recognition that all attorneys should aspire to perform pro bono work. We believe that it is important to have a Rule that addresses pro bono, in addition to the existing Board resolution, because legal education and law practice routinely focus on the Rules of Professional Conduct. Pro bono is an important value within the legal profession, and should be included in the Rules. This is especially true because California is currently one of only six states that have not adopted some version of the ABA Model Rule on pro bono. We believe that affirmatively declining to do so sends the wrong message to the bar as well as to the general public.

Pro bono participation by attorneys is needed now more than ever - the need for legal services for those with limited means continues to expand in these challenging economic times. On behalf of our clients and the many low-income individuals and families we are forced to turn away due to lack of pro bono resources, we strongly urge you to reconsider the adoption of Rule 6.1.

RICHARD W. ODGERS
50 FREMONT STREET
P.O. BOX 7880
richard.odgers@pillsburylaw.com
SAN FRANCISCO, CA 94120-7880
(415) 983-1202

June 9, 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 Revisions to the Rules of Professional Conduct;
Proposed Rule 6.1, Voluntary *Pro Bono* Service

Dear Ms. Hollins:

I am writing to urge that the Board include the amended version of ABA Model Rule 6.1 with respect to voluntary *pro bono* service in its proposed revisions to the Rules of Professional Conduct. The version I support is the one unanimously recommended by the Rules Revision Commission, with the addition of the words "aspire to" in the first sentence of the Rule.

I have a deep interest in establishing the obligation of California lawyers to provide legal services to those who cannot pay for legal help. My interest has been inspired in part by serving for many years as a director (and over five years as Chair) of San Francisco's Legal Aid Society - Employment Law Center and long service as a director of the Immigrant Legal Resource Center. In addition, I am currently Co-Chair of California's Justice Gap Fund Committee, a member of the California's Legal Services Trust Fund Commission, and Co-Chair of the Bar Association of San Francisco's Task Force on Charitable Giving.

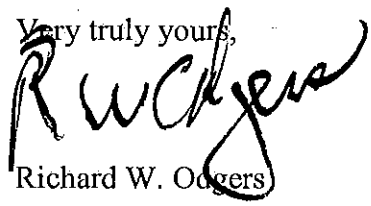
The Rules Revision Commission unanimously recommended that an amended version of ABA Model Rule 6.1 be adopted in California as it has been in almost every other state. And my experience has taught me that in today's world, where the profession of law is in danger of becoming the business of law, it is vital that California, long a leader in providing *pro bono* legal services, make very clear that every one of its lawyers is expected to make a serious *pro bono* commitment.

What has come to be called California's Justice Gap is enormous and growing. At the same time financial support for *pro bono* services is shrinking - all because of the

current recession. The current crisis in the provision of legal services to those who can't afford them cries out for California's State Bar to take a strong stand to make clear that all California lawyers are expected to do their part to provide and financially to support *pro bono* services.

If my understanding is correct, one of the reasons that the Committee on Regulation and Admissions did not recommend inclusion of Proposed Rule 6.1 is that the rule is hortatory but would not carry disciplinary sanctions, whereas the other rules that aren't supported by sanctions are permissive. If I am correct, this is a very thin basis on which to refuse strongly to encourage California lawyers to step up to what all acknowledge is a desperate need. We need to do whatever we can to encourage the provision of *pro bono* services in California. Please include Rule 6.1 in the proposed Rules of Professional Conduct.

Very truly yours,



Richard W. Odgers

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Bet Tzedek Legal Services & Legal Aid Association of C

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Mitchell Kamin

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) mkamin@bettzedek.org

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**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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Please see my testimony, given in Los Angeles on June 10, 2010, attached below.

Testimony in Support of Proposed Rule 6.1,
California Rules of Professional Conduct
By Mitchell A. Kamin -- President/CEO, Bet Tzedek Legal Services;
Past President, Legal Aid Association of California
June 10, 2010, State Bar of California

Bet Tzedek Legal Services represents more than 12,000 low-income, elderly and disabled Angelenos each year on a wide range of civil legal matters. Our 65 person staff is leveraged by pro bono attorneys whose donated services last year were valued at $16mm. We also founded and run the Bet Tzedek Justice Network, a collaboration with more than 150 law firms and corporate law departments that currently delivers free legal services to Holocaust survivors and low-income seniors in more than 30 cities across North America.

The Legal Aid Association of California ("LAAC") represents almost 100 legal services non-profits in California, and advocates for expanded access to justice for low-income and underrepresented Californians

I would like to echo and adopt the comments of Toby Rothschild from LAFLA concerning the value of Rule 6.1 to our ongoing ability to recruit pro bono support.

The importance of 6.1 extends beyond our individual programs in Los Angeles and other parts of the state. In so many ways, California is a leader on Access to Justice Issues: the Access Commission; AB 590; a Chief Justice profoundly committed to access in general and pro bono in particular. At the same time, low-income Californians face a daunting Justice Gap, with approximately 2/3 of eligible legal aid clients being denied services due to lack of resources.

The adoption of Rule 6.1 will maintain California's status as an access leader. Moreover, it will help organizations – including those in rural parts of the state – recruit help to close the Justice Gap.

There hasn't been a formal study of the Justice Gap since the economic downturn, but LAAC members uniformly report cuts in funding coupled with increases in demand for services. At Bet Tzedek, we reduced our budget by 15% while calls for assistance increased by 40%. Access to pro bono support is vital to help our organizations manage through these rough times – Indeed, we are concerned that not approving 6.1 could send exactly the wrong message – that pro bono is not a key aspect of all lawyers' professional responsibility – precisely when our organizations, and clients, need pro bono the most.

Adoption of 6.1 will help small and rural programs reinforce their message that pro bono matters. Many programs lack resources to get this word out, and having it come from the bar lends great credibility.

I will end by noting that I don't believe 6.1 is a step toward mandatory pro bono and that I would oppose a mandatory pro bono requirement in California. We are fortunate to have firms and companies with a well founded commitment to pro bono and making it mandatory would be contradictory and counterproductive. But having 6.1 as a Rule of Professional Conduct will send a very positive message and reinforce our efforts to involve more and more private attorneys in making California a leader in access to justice for all.

Thank you.

GOLDEN GATE UNIVERSITY | School of Law

June 11, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Request to Reconsider Proposed Rule 6.1, with Recommended Amendment

Dear Ms. Hollins,

I am writing on behalf of Golden Gate University School of Law to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.

This issue is of the highest importance to pro bono supporters across the state, and, given California's historic leadership on public service and pro bono legal services, across the nation. We at Golden Gate believe that it is vital that the revised California Rules of Professional Conduct include a rule addressing the integral role of pro bono. We respectfully urge the Board of Governors to do everything in its power to ensure passage of this rule.

Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to" from the ABA's Model Rule, be added to the first paragraph, which would then read, "...A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono public legal services per year..."

We recognize that the decision of the Board Committee not to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the members of the California State Bar.

In order to have the maximum impact on the lawyers in our community, it is crucial to have a pro bono rule, in addition to a Board resolution and statutory language. Pro bono is too essential a value within the legal profession to leave it out of the rules. As the Dean of Golden Gate, a law school with a thriving pro bono program, and as the former Executive Director of the Bar Association of San Francisco, whose VLSP has long served as a national leader in the provision of comprehensive pro bono services, I feel strongly that we need this rule to inculcate in our students, and in the entire legal community, a profound respect and appreciation for the vital importance of pro bono service.

**Office of the Dean**

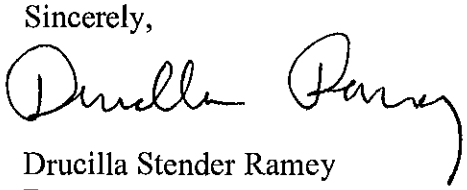
536 Mission Street
San Francisco, CA
94105-2968
tel: 415-442-6600
fax: 415-442-6609
www.ggu.edu/law

At least 44 other states have included a similar provision in their ethics rules.

While the exact wording of the new rule is important, it is even more important that a meaningful rule in this area be passed in the first instance. Whether you choose the ABA's Model Rule, or the rule as modified by the Rules Revision Commission, or a modification of either that achieves our shared goal, we in the progressive law school community believe that adoption of a rule promoting pro bono work is absolutely critical to our efforts to ensure access to justice for all.

We greatly appreciate the opportunity to file comments on this seminal area of professional responsibility. Please do not hesitate to contact me if I can provide you with any further information or clarification of our views.

Sincerely,



Drucilla Stender Ramey
Dean

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Legal Aid of Marin

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Paul S. Cohen

*** City** San Rafael

*** State** California

***** Email address
(You will receive a copy of your comment submission.) pcohen@legalaidmarin.org

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**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

Our agency is the beneficiary of over $1.5 million each year in pro bono or in kind services. Our volunteer attorneys make the difference between clients receiving services or going without. Many of our volunteers serve each year with distiction and recieve the Wiley M. Manuel Award. A rule encouraging a favorable pro bono commitment should be the mandate of the State Bar of California and I urge its full consideration and adoption.

It is long overdue.

# THE STATE BAR OF CALIFORNIA

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## Your Information

**Professional Affiliation** HIV & AIDS Legal Services Alliance

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Margaret (Peg) Brewer

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) mbrewer@halsalegal.org

---

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Almost 88% of other states have adopted a similar provision in their Rules of Professional Conduct, and it seems a glaring omission for California to leave out this important value from the rules.

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** UC Irvine School of Law

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Erwin Chemerinsky

*** City** Irvine

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rrc.publiccoments@calbar.ca.gov

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

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Erwin Chemerinsky
Dean and Distinguished Professor of Law

School of Law
401 E. Peltason Drive, Suite 1000
Irvine, CA 92697-8000
(949) 824-7722
(949) 824-7336 Fax

June 14, 2010

Board of Governors
California State Bar

Dear Board of Governors,

I am writing to strongly recommend the approval of Proposed Rule 6.1 on Pro Bono Services. As the dean of a California law school, I think it is essential that the Rules of Professional Conduct clearly communicate the importance of lawyers doing pro bono work. The proposed Rule would not require pro bono work, but it would express the view that this is something all lawyers should aspire to do.

Forty-four other states have adopted this Rule. Because of its aspirational nature, it has posed no problems.

There is an urgent need for lawyers to do more pro bono work to help fulfill the great unmet needs for legal services. Proposed Rule 6.1 sends a message to law students and lawyers that this is every attorney's responsibility.

Thank you for considering my views.

Sincerely,

Erwin Chemerinsky

**WALTER K. PYLE**
ATTORNEY AT LAW
2039 SHATTUCK AVENUE, SUITE 202
BERKELEY, CA 94704-1116

Civil and Criminal
Trials and Appeals

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FAX: (510) 849-4741

June 10, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comment: Proposed State Bar Rule 1.5

Dear Ms. Hollins::

I am a lawyer who has handled (and tried) many criminal cases and many civil cases. I have represented thousands of clients, and I have experience with both flat fees, hourly fees, and "true" retainers. I have also sat as a fee arbitrator on a number of fee disputes between attorney and client.

I have a couple of comments to make about the above proposed rule, particularly subparagraph (e).

**[Flat Fees]** Traditionally, criminal cases are handled on a flat fee basis (although in recent years I have seen variants or hybrids that involve flat fees). I suspect the tradition started because criminal lawyers did not like to keep timesheets, because in 9 out of 10 flat fee contracts, the lawyer makes less money—oftentimes quite a bit less money—than she would by charging an hourly rate.

The proposed rule says that a flat fee is the lawyer's property on receipt, but then in the last subpart says the agreement must say "that the client may be entitled to a refund of a portion of the fees if the agreed-upon legal services have not been completed."

First, I think this is ambiguous. For example, if I agree with a client to represent him for $15,000 through preliminary examination, with an additional fee to be charged if an information is filed in superior court ( a common flat fee arrangement), but I talk to the district attorney a week after the arraignment and I settle the case on very favorable terms, have I not "completed" the agreed-upon services, because there was no preliminary examination? What if I have to

withdraw from the case because the client has told me he intends to commit perjury? What if the client fires me for no good reason? In my opinion I have fulfilled the contract in the first instance, and the client has breached the agreement in the second. The third situation is not a "breach," because the client always has the right to terminate the services of the lawyer, but in none of these cases should the client be entitled to a refund.

Second, you should remember that I have to pay income taxes on that full $15,000. I only get a deduction if I refund part of the money.

Third, requiring a refund of a fee that has already been fully earned actually means that the fee has not really been earned after all, or means that the fee is not really the lawyer's property, doesn't it? The only time that I can think of where the client is entitled to a refund of a flat fee is if the lawyer breaches the contract.

Finally, a general comment about flat fees and the way lawyers who have only civil experience look at them. I think that many lawyers, including those who have sat on fee arbitration panels with me, have a very difficult time understanding that a flat fee is not related to the number of hours the lawyer puts in. What you look at is what the lawyer obligated herself to do. If she puts in far more hours than she believed she would when she quoted the fee (which happens fairly often), she does not get to charge an additional fee. By the same token, if she puts in far less hours than she believed she would (which happens far less often), the client should not get a refund. And with a flat fee contract, the client (and the lawyer) know exactly what the fee will be. This certainty has much more value than many lawyers recognize. In the example where I settled the case shortly after I took it on, if you had approached the client *before* he hired me and said, "Suppose Mr. Pyle could get such-and-such a settlement of the case. Would you pay $15,000 for that result?" the client would almost certainly say, "Yes, of course, if I could get a result like that!" That is a good indication that the lawyer's effort was truly worth $15,000. But many lawyers (and arbitrators, too) want to say, "But he only put in 8 hours on the case!" Well, would you say the same thing to the heart surgeon who spent only 8 hours working to repair your heart for a $15,000 fee? No, you'd say "Great job! I feel great!" and think the doctor earned his fee.

Okay, sorry to go on so much, but I wanted to get that off my chest, and emphasize the difference between flat and hourly fees.

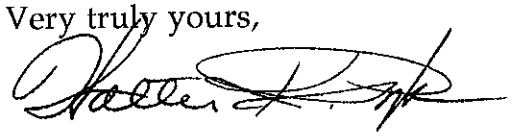
**["True" Retainers]** I have always treated a true retainer (usually in an hourly fee case) the way the rule does—it makes me available, period. Other lawyers believe that they should be able to apply hourly credits against such a retainer.

I think the other lawyers have the better argument, and that my method results in the client paying too much. One of the most important concerns of a lawyer is whether he will get paid. In a complex case I might want to ensure I receive $150,000, so I'm going to ask for that up front. I don't mind working for my fees, but I want to make sure I get paid. But under the rule, I would have to charge $150,000 to be available, and then charge a further fee on top of that as I work on the case. If client could not pay the additional fee, a lawyer would have a right to withdraw from the case. I think it is more equitable to allow hourly credits to that $150,000 (or a part of it), and I think the rule should allow that. It is common practice for my expert witnesses to charge a non-refundable "minimum fee" like that (and give hourly credits), and I think lawyers should be able to, too. I see no way, in actual practice, that the rule's true retainer provision "protects" the client any more than a non-refundable minimum fee. Don't forget that clients are already protected by the unconscionable fee limitation in the first part of the rule.

Finally, while it does not happen often, criminal lawyers are concerned that they will take on a complex case but the government will seek to seize the fee as the property of the client. A non-refundable retainer (with hourly credits), which becomes the property of the lawyer upon receipt, would prevent this.

Thank you very much for your consideration of my views.

Very truly yours,



Walter K. Pyle

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**Shauna I. Marshall**
**Academic Dean**
**Professor of Law**

June 10, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, Ca 94105

**Re: Request to Reconsider Proposed Rule 6.1, with recommended amendment**

Dear Ms. Hollins:

We write to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.

This is an issue of utmost concern to pro bono supporters across the state and particularly to law schools who are uniquely situated to instill, foster and promote a commitment to pro bono in future lawyers. In order to ensure greater involvement in pro bono throughout the legal profession, it is imperative that the revised California Rules of Professional Conduct include a rule directly addressing the important role of pro bono. We urge the Board of Governors to do everything in its power to ensure passage of this rule.

We understand that there were concerns that the rule was not clearly aspirational in nature, therefore, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph. We also understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include an aspirational pro bono rule in the final vote of the Board of Governors undermines the efforts of the State Bar of California, County Bar Associations, the judiciary, law schools and others to engage all members of the legal profession in pro bono.

As legal educators, the inclusion of a formal pro bono rule communicates to students and the next generation of lawyers, the vast majority of whom will practice in CA, the importance of pro bono as well as the gravity of the unmet need for legal services in our state. Despite the current

Board resolution and statutory language encouraging pro bono, the need for pro bono services continues to outpace the number of attorneys seeking to meet it. The addition of a formal rule would further state unequivocally that pro bono is too important a value within the legal profession to leave it out of the rules.

At least 44 other states have included a similar provision in their ethics rules; the absence of such a provision in California sends the wrong message to current and future Bar members. The actual language of the provision is less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted.

Thank you for this opportunity to comment. Please feel free to contact us if we can be of further assistance.

Sincerely,

Shauna Marshall, Academic Dean
Leo Martinez, Chancellor and Dean
Nancy Stuart, Director of Externships and Pro Bono Programs

Legal Services of Northern California

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Email: auburn-office@lsnc.net Web: www.lsnc.net

June 9, 2010

Audrey Hollins
Office of Professional Compliance, Planning,
and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

I am writing to request the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend the Supreme Court adoption of the Rules Revision Commission's Proposed Rule 6.1 concerning pro bono service.

Rule 6.1 sets out the professional responsibility of lawyers to provide *pro bono publico* services to those otherwise unable to obtain access to the legal system and the courts. I have worked in a rural legal services office for many years and can personally attest to the difficulty of recruiting lawyers to provide pro bono services, especially in rural counties. Recently, as a result of my involvement with the Rural Task Force of the Access To Justice Commission, I have discussed this very issue with a large number of interested parties from all parts of the state. All agree that the recruitment of pro bono attorneys is both an incredible challenge and a partial solution to the problem of providing access to justice in rural communities. Based on the feed back that we received, the Rural Task Force contains a thorough discussion of this issue in its report, *Improving Civil Justice in Rural California*, and recommends that California lawyers, including urban lawyers, consider ways to provide pro bono services to under-served rural Californians. The report includes the following language among its core recommendations:

> "Because rural areas have fewer lawyers, law schools, and economic resources, urban bar associations and lawyers should consider partnering with rural organizations, of course being mindful that impoverished urban Californians are also underrepresented and need pro bono help as well. Attorneys who are precluded by ethics rules from representing some individuals should be made aware of all of the options for meeting the recommendation, such as devoting time or money to legal aid programs or otherwise furthering access to justice. "

The Proposed Rule 6.1 fits perfectly with our Rural Task Force recommendations. It would be an essential tool for judges, law schools, court self-help centers, local bar associations and referral services, legal services programs, and many others in their pro bono recruitment efforts.

Thank you for the opportunity to comment.

Sincerely,

W. H. Whitaker
Managing Attorney

Belzer & Carr, LLP

**Steven P. Belzer**
**Martin D. Carr**

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Sacramento, CA 95816

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marty@belzercarrlaw.com

June 10, 2010

Audrey Hollins
Office of Professional Compliance,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

I am writing to convey a small comment in regard to Proposed Rule 6.1 and the Committee on Regulations and Admissions' recent decision not to recommend its adoption.

The Commission for the Revision of the Rules of Professional Conduct's April 2010 Draft Following Consideration of Public Comment on the proposed rule states, "Although the Board of Governors' Resolution expresses this policy [encouraging pro bono work], many members of the bar are unaware of its existence."

In my experience, this could not be more true. I have been a director of Legal Services of Northern California for 2 years and have been involved in pro bono efforts in my community since becoming an attorney nearly ten years ago. Nonetheless, I had no idea that the State Bar had any interest in encouraging pro bono service until I recently received a copy of Mary Lavery Flynn's May 25th Memorandum to the Access to Justice Commission concerning Proposed Rule 6.1. I had never before heard of the Board of Governors' Resolution, and I would be amazed if many other attorneys have.

On the other hand, I am very familiar with the Rules of Professional Conduct. I think most California attorneys know precisely where to find the link to the Rules on the front page of the State Bar's website. Including a statement about pro bono service in the Rules would be a meaningful statement to the members of our State Bar. The little-known Board of Governors' Resolution is not.

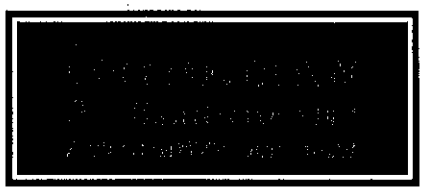
Our Rules of Professional Conduct should reflect our values as a legal community. If we care about pro bono services, the Rules should say so.

Very truly yours,

Martin D. Carr

MARTIN D. CARR

MDC:dtm



June 11, 2010

**Audrey Hollins**
**Office of Professional Compliance**
**State Bar of California**
**180 Howard Street**
**San Francisco, CA 94105**

RE: *Proposed CRPC 6-1*

Dear Ms. Hollins:

I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend to the Supreme Court the adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. Rule 6.1 promotes access to justice for all California citizens by explicitly making pro bono services a commitment for all California lawyers.

In enacting Rule 6.1, California will join 45 other states in expressly encompassing a commitment to pro bono services in its ethical rules. ABA Model Rule 6.1 is an essential foundation to a lawyer's commitment to the public. A lawyer's commitment to pro bono service is too important to leave out of the ethical rules. Adopting Rule 6.1 will encourage lawyers to provide legal services for the poor and will improve access to justice for all California citizens.

Providing pro bono services is a fundamental component of providing a *fair* and accessible justice system. With the current financial crises, never has the need been so great for assistance. Over the course of the past several years, I have provided hundreds of hours of pro bono assistance to individuals faced with the threat of losing their homes due to foreclosure arising out of predatory lending practices. Without my involvement, these victims of fraud and unethical practices would have lost their homes. I undertook these efforts because it was the "right thing to do."

In running for the State Bar Board of Governors District 2 seat this spring, my prime reason was a desire to improve access to justice for all Californians. Adopting 6.1 which expressly make a commitment to pro bono services an

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ethical requirement is a step in the right direction. I urge the Board of Governors to reconsider its Committee's recommendation and approve 6.1.

Please contact me if you have any questions or comments.

Sincerely,

Karen M. Goodman

BINGHAM

Peter H. Carson
Direct Phone: 415.393.2830
Direct Fax: 415.262.9215
peter.carson@bingham.com

June 10, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

**Re: Proposed California Rules of Professional Conduct/Request to Reconsideration of Proposed Rule 6.1 Relating to Voluntary *Pro Bono* Legal Service**

Dear Ms. Hollins:

I am writing to urge the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1, and instead include the amended version of ABA Model Rule 6.1 with respect to voluntary *pro bono* legal service in its proposed revisions to the California Rules of Professional Conduct.

This is an issue of utmost concern to pro bono providers, participants and supporters throughout the state of California and an issue that directly impacts the hugely underserved client communities of low income and disadvantaged people, communities that are particularly reeling in this current economic recession.

This also is an issue in which I have a deep personal interest, as I have committed significant amounts of my time, energy and passion over my twenty-five years of law practice to *pro bono* service and to the local, state and national *pro bono* delivery systems. In addition to being a finance partner in Bingham McCutchen's San Francisco office with a very active practice, I am presently a member of ABA Standing Committee on Pro Bono and Public Service (which is the author, sponsor and national overseer of ABA Model Rule 6.1) and Co-Chair of the California Legal Services Trust Fund Commission and well as the Co-Chair of my firm's global *pro bono* program. I also serve or have served on the boards of several legal services organizations, including Bay Area Legal Aid and the Bar Association of San Francisco Foundation, and have, through the years, provided substantial direct *pro bono* services in a great many matters throughout this state and country.

I believe that it is imperative that California, long a leader in providing *pro bono* legal services, encourage the provision of *pro bono* legal services in California by making very clear through its Rules of Professional Conduct that its lawyers are expected to make a serious *pro bono* commitment.

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I understand that the failure of the Committee on Regulation and Admissions to recommend Rule 6.1 does not reflect a lack of support for *pro bono* among board committee members. Nonetheless, an affirmative failure to include a *pro bono* rule in the final vote of the Board of Governors will invariably be perceived as a lack of support for *pro bono* by the State Bar of California, which would be unfortunate and a significant step backwards, and would contrast sharply with the at least forty-four other states that have adopted ABA Model Rule 6.1 or a close variant thereof as their own home ethical rule. Why should California purposefully leave itself behind?

Pro bono simply is too important a value within the legal profession to leave it out of California's ethical rules. I should hope that Board of Governors sees this as an imperative, over and beyond the existing 2002 resolutions. Please include Rule 6.1 in the proposed Rules of Professional Conduct to encourage the provision of *pro bono* services in California and underscore the core value of *pro bono* of the legal profession in California, a value already expressed with clarity and without reservation in the ethical rules of almost every other state and by the American Bar Association in its Model Rule 6.1 .

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Sincerely yours,

Peter H. Carson

**Ophelia H. Zeff, Esq.**
**2708 9th Avenue**
**Sacramento, CA 95818**
**(916) 736-1087**
June 10, 2010

Audrey Hollins
Office of Professional Compliance, Planning,
and Development
State Bar of California
189 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulation and Admissions not to recommend the Supreme Court adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. The Commission's proposal was the product of a long and thoughtful process which carefully reviewed the various issues raised by the proposed rule.

Rule 6.1 sets out the professional responsibility of lawyers to provide *pro bono publico* services to those otherwise unable to obtain access to the legal system and the courts. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it.

While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.

Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that laudable requirement by encouraging the provision of pro bono services to people who otherwise would have no legal voice.

The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send the Supreme Court a revision of the Rules of Professional Conduct that does not include this extremely important provision.

Thank you for the opportunity to comment on this rule.

Sincerely,
Ophelia H. Zeff
Ophelia H. Zeff

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form should be used to comment on rules and concepts considered by the Commission but are **not recommended for adoption**. Comments can be submitted by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Neighborhood Legal Services of Los Angeles County

**Commenting on behalf of an organization**
- Yes
- (●) No

*** Name** Derek Milosavljevic

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) derek.milosavljevic@kirkland.com

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**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**

Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (●) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

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**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

KIRKLAND & ELLIS LLP
AND AFFILIATED PARTNERSHIPS

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Derek Milosavljevic
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www.kirkland.com

Facsimile:
(213) 680-8500
Dir. Fax: (213) 808-8178

June 14, 2010

Dear Board of Governors,

As a Member of the Board of Directors of Neighborhood Legal Services of Los Angeles County, I am writing to encourage the Board of Governors to adopt the proposed Rule 6.1 in the Rules of Professional Conduct and ask that it be submitted to the Supreme Court.

NLS-LA continues to have a great unmet need for private attorneys to provide *pro bono publico* services to those otherwise unable to obtain access to the legal system and the courts. While Rule 6.1 will not enforceable by discipline, it will be a compelling tool in the ability of our Private Attorney Involvement (PAI) programs to successfully recruit volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.

For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility diminishes the status of our state and our legal community as leaders in the efforts to provide access for those unable to afford it.

Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 complements and reaffirms that requirement by encouraging the provision of pro bono services to people who otherwise would be defenseless.

The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send to the Supreme Court a recommendation that we substantially adopt the ABA Model Rules, while omitting such an important rule on one of the topics the Chief Justice most ardently supports.

Thank you for the opportunity to comment.

Sincerely,

Derek Milosavljevic

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Legal Services for Prisoners with Children

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Carol Strickman

*** City** San Francisco

*** State** California

***** Email address
(You will receive a copy of your comment submission.) carol@prisonerswithchildren.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

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**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

LSPC urges the adoption of Model Rule 6.1. We are acutely aware of the lack of legal representation for low income people in our society. In particular, we hear every day from prisoners who have received inadequate medical care, who have been sexually harrassed by correctional officers, or have other actionable claims. We are contacted by prisoners and formerly incarcerated people who need legal assistance in establishing visitation rights with their children. Federally funded legal aid programs are prohibited by law from representing incarcerated people. Yet these people retain certain civil and constitutional rights. California has over 170,000 people incarcerated in state prison, and many more in our county jails. This is a significant underserved population. Our courts and our laws offer the possibility of justice, but without legal representation, this possibility is slim. Model Rule 6.1 would encourage attorneys to perform pro bono legal services to individuals such as them. For these reasons, we urge the adoption of this rule.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form should be used to comment on rules and concepts considered by the Commission but are **not recommended for adoption**. Comments can be submitted by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Central California Legal Services

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Chris A. Schneider

*** City** Fresno

*** State** California

*** Email address** (You will receive a copy of your comment submission.) chris@centralcallegal.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**

Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I write in support of the Commission's Proposed Rule 6.1. I have served as the Executive Director of Central California Legal Services, Inc. (CCLS) for more than 17 years. We provide free civil legal assistance to low-income residents in Fresno, Kings, Mariposa, Merced, Tulare and Tuolumne Counties as well as to seniors in Madera County.

You are no doubt aware of the tremendous "Justice Gap" (the difference between the need for legal services and the amount of services available) throughout California. The Justice Gap is particularly pronounced in areas outside of the large urban centers. The reasons for the urban/rural disparities are numerous and beyond the scope of this letter. However, the disparities very real and our staff members and client communities see them on a daily basis.

Throughout California there are numerous efforts to promote pro-bono. Still, it is safe to say that a spirit of pro-bono services does not permeate the entire legal

**ENTER COMMENTS HERE.**

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Throughout California there are numerous efforts to promote pro-bono. Still, it is safe to say that a spirit of pro-bono services does not permeate the entire legal community. There cannot be a better time to work to promote a state-wide culture of pro-bono. As the economic crisis drags on, more and more applicants with meritorious cases find themselves being turned away from legal aid offices because there are insufficient resources. A true spirit of pro-bono could go a long way in alleviating this crisis.

California Chief Justice Ronald M. George constantly reminds the legal community of the great need to increase access to justice and to encourage pro-bono work The State Bar has also worked to promote pro-bona and passed resolutions to encourage pro-bono work by all attorneys. Despite these efforts, there still remains large numbers of attorneys who still do not take advantage of pro-bono opportunities that are available to them.

The State Bar needs to underscore the resolutions it has passed in support of pro-bono by incorporating this aspirational rule. All attorneys, and attorney applicants, refer to the Rules. The same cannot be said about resolutions passed by the State Bar, no matter how lofty those resolutions may be. By incorporating Rule 6.1 into its Rules, the State Bar would be not only be joining in with the vast majority of other state bars which have adopted similar rules but would be sending a clear message that pro-bono service should be the norm, not the exception.

I urge adoption of Rule 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: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Los Angeles County Bar Assn. Access to Justice Comn

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Toby Rothschild

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) trothschild@lafla.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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---

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**LACBA**

**LOS ANGELES COUNTY BAR ASSOCIATION**

MAILING ADDRESS:
P O Box 55020
Los Angeles CA 90055-2020

TELEPHONE: 213.627.2727
FACSIMILE: 213.833.6717
WEB SITE: www.lacba.org

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NORMA J. WILLIAMS
ROBIN L. YEAGER

June 14, 2001

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

The Access to Justice Committee (AJC) of the Los Angeles County Bar (LACBA) has the following comments on the importance of including proposed Rule 6.1 in the Rules of Professional Conduct to be submitted to the Supreme Court:

Rule 6.1

The AJC greatly appreciates the work of the Rule Revision Commission in recommending the adoption of Rule 6.1. We are extremely disappointed that the Board of Governors failed to send the rule out for comment.

Rule 6.1 sets out the professional responsibility of lawyers to provide *pro bono publico* services to those otherwise unable to obtain access to the legal system and the courts. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it.

While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.

Business and Professions Code section 6068 (h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that requirement by encouraging the provision of pro bono services to people who otherwise would be defenseless.

The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send to the Supreme Court a revision of the Rules of Professional Conduct that does not include this provision.

Thank you for the opportunity to comment on this rule.

Sincerely,

Toby Rothschild
Chair, Access to Justice Committee

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Christina Skaf Hathaway

*** City** Fresno

*** State** California

***** Email address
(You will receive a copy of your comment submission.) chathaway@centralcallegal.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I agree with the comments made on behalf of CCLS to support recommendation for adoption of RULE 6.1 for PRO BONO work.

On a personal level, I also urge the recommendation for adoption of RULE 6.1. The need for Pro Bono work is immense and will continue to grow. The adoption of RULE 6.1 will give greater opportunities for those in need to receive legal assistance. By coming together, the legal community can make a difference in their communities. RULE 6.1 furthers this goal. I urge adoption of RULE 6.1.

USF
UNIVERSITY of SAN FRANCISCO

Office of the Dean

School of Law
2130 Fulton Street
San Francisco, CA 94117-1080
TEL 415 422-6304
FAX 415 422-5443

June 14, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, Ca 94105

**Re: Request to Reconsider Proposed Rule 6.1, with recommended amendment**

Dear Ms. Hollins:

I am writing to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.

This is an issue of utmost concern to pro bono supporters across the state. We believe that it is imperative that the revised California Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Board of Governors to do everything in its power to ensure passage of this rule.

Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph.

We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the State Bar of California.

It is important to have a pro bono rule, in addition to a Board resolution and statutory language, and pro bono is too important a value within the legal profession to leave it out of the rules.

At least 44 other states have included a similar provision in their ethics rules.

The actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted.

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Jeffrey S. Brand
Dean and Professor of Law
University of San Francisco School of Law

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation**

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Leonard Herr

*** City** Visalia

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) lherr@dhlaw.net

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

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*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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---

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For the most part, the legal profession is highly regarded by the public as a whole. The practice of law is very time consuming and it is easy to lose sight of the importance of providing pro bono assistance to the public. Encouraging members of our profession to provide pro bono assistance to the public is helpful to our members and a positive image of lawyers.

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Board member of Central California Legal Services

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Russ Hurley

*** City** Visalai

*** State** California

***** Email address
(You will receive a copy of your comment submission.) russhurley@hurleylaird.com

---

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Model Rule 6.1 Voluntary Pro Bono Serivce

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---

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I join in the comments submitted on behalf of Central California Legal Services.

Russ Hurley

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Attorney in private practice

**Commenting on behalf of an organization**
- Yes
- (●) No

*** Name** Anne Fadenrecht

*** City** Fresno

*** State** California

*** Email address** (You will receive a copy of your comment submission.) rrc.publiccoments@calbar.ca.gov

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Model Rule 6.1 Voluntary Pro Bono Serivce

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Agree with proposed Rule 6.1 to encourage pro bono work... Support comments of Central California Legal Services as submitted by its Director.

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Public Interest Clearinghouse, Executive Director

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Julia R. Wilson

*** City** San Francisco

*** State** California

*** Email address** (You will receive a copy of your comment submission.) jwilson@pic.org

---

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Model Rule 6.1 Voluntary Pro Bono Serivce

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The Public Interest Clearinghouse (PIC) is a statewide nonprofit that increases access to legal help for underserved Californians by building infrastructure and partnerships in the legal community. PIC serves as the IOLTA-funded support center on pro bono efforts throughout the state, and its Pro Bono Initiative incubates and supports statewide and local pro bono projects in California. PIC administers the statewide pro bono website - www.CAProBono.org - and supports the Southern California legal services community in running www.SoCalProBono.org. PIC's REAL (Rural Education & Access to the Law) Project works to expand the pro bono resources available in rural areas of the state, including through our Justice Bus(TM) service learning trips that involve law students, firms, and lawyers in urban areas in pro bono legal assistance clinics for rural residents.

Tens of thousands of California attorneys volunteer each year to bring much-needed legal help to our most vulnerable residents. And yet, even with that level of commitment by our profession, there remains a terrible "justice gap" between the

**ENTER COMMENTS HERE.**

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Tens of thousands of California attorneys volunteer each year to bring much-needed legal help to our most vulnerable residents. And yet, even with that level of commitment by our profession, there remains a terrible "justice gap" between the overwhelming need for legal assistance and the limited resources to meet that need. There will never be sufficient state, federal or private funding to provide a nonprofit legal services attorney for all the low-income seniors, families and persons with disabilities who require legal help. Therefore, innovative partnerships between the private and nonprofit sectors are the only viable way to build a bridge across the justice gap.

Based on PIC's statewide expertise in working with both the nonprofit and for-profit segments of the legal profession, we strongly disagree with the recommendation to not adopt proposed Rule 6.1. A failure to adopt some version of an aspirational rule relating to pro bono would leave California on the outskirts of the national commitment in this area, exactly at the time when funding for legal services delivery is dropping dramatically. At least 44 other states have included a similar provision in their rules, and according to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

In our opinion, it is essential to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession for our rules to be completely silent on the issue. We are also deeply concerned about the unintentional but possible message if the rules are ultimately approved by the Supreme Court include most of the ABA Model Rules, but leave out the rule on pro bono entirely. If necessary for adoption, PIC would support the idea of adding language to emphasize that the rule's aspirational nature.

Based on the reasons above, the Public Interest Clearinghouse respectfully urges the recommendation that the Board of Governors adopt Proposed Rule 6.1.

Sincerely,

Julia R. Wilson
Executive Director
Public Interest Clearinghouse
433 California Street, Suite 815
San Francisco, CA 94104
415-834-0100
www.pic.org

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Disability Rights Legal Center

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Paula Pearlman

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) paula.pearlman@lls.edu

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Model Rule 6.1 Voluntary Pro Bono Serivce

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DRLC has uploaded two documents: one in .docx format, and the other in .pdf format to facilitate review. They are otherwise identical.

35th Anniversary 1975-2010

DRLC

Disability Rights Legal Center

www.disabilityrightslegalcenter.org

State Bar of California:

The Disability Rights Legal Center respectfully requests that proposed Rule 6.1 be submitted to the full State Bar Board of Governors for approval and adoption. DRLC promotes the rights of people with disabilities and public awareness by providing legal and related services through its Civil Rights Litigation Program, Education Advocacy Program, Cancer Legal Resource Center and Community Outreach Program. DRLC is a nonprofit charitable organization as defined under Section 501(c) (3) of the Internal Revenue Code. Much of DRLC's work is accomplished through partnering with pro bono lawyers. Proposed Rule 6.1 would not require that lawyers do pro bono work. Nonetheless, DRLC makes this request for the following reasons:

1. At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

2. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules.

3. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.

4. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. Proposed Rule 6.1 would encourage California lawyers to do more.

Paula Pearlman, Executive Director, Disability Rights Legal Center

# THE STATE BAR OF CALIFORNIA

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**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Neighborhood Legal Services of Los Angeles County

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Neal S. Dudovitz, Executive Director

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) ndudovitz@nls-la.org

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Model Rule 6.1 Voluntary Pro Bono Serivce

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---

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NEIGHBORHOOD LEGAL SERVICES
OF LOS ANGELES COUNTY

Executive Director's Office
(818) 834-7590
ndudovitz@nls-la.org

June 14, 2010

Board of Governors
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Revised Rules of Professional Conduct:
Rule 6.1 (Voluntary Pro Bono Publico Services)

Dear Members of the Board of Governors:

I am writing to express my strong support for including proposed Rule 6.1 in the Rules of Professional Conduct that will be recommended for adoption to the California Supreme Court. Rule 6.1 recognizes that the bar's commitment to provide pro bono assistance to the poor and disenfranchised is an essential, core value of our profession. I am confident from my 35+ years as a lawyer, including 17 years as the Executive Director of Neighborhood Legal Services of Los Angeles County (NLS-LA), that including Rule 6.1 in the revised rules will serve as an important value statement to the community and will result in increased levels of pro bono assistance from State Bar members.

Neighborhood Legal Services has worked tirelessly for more than 45 years to improve access to justice for low income communities in Los Angeles County. With a staff of 100+, including 45 lawyers and an annual operating budget of $12 million, NLS-LA provides legal assistance through offices in El Monte, Pacoima and Glendale, as well as 10 courthouse-based Self-Help Centers and 4 domestic violence clinics spread throughout Los Angeles County. In 2009, NLS-LA provided assistance on a variety of legal matters to more than 70,000 LA residents.

Although NLS-LA is one of California's largest legal services programs, with well over 1 million people financially eligible for our assistance, there is little doubt that we can only meet a small fraction of the legal needs of the communities we serve. The reality is that to truly begin to address the breadth of our clients legal needs we need the full support and assistance of the private bar – law firms, partnerships and sole practioners.

To that end, in 2009 the NLS-LA Board of Directors renewed its commitment to expand the availability of legal services to our clients through new and improved partnerships with the private bar. We are seeking additional help from private attorneys in Los Angeles on a broad array of new, innovative projects ranging from representing people seeking Supplemental

Security Income and Social Security Benefits before the Social Security Administration; assistance for the jobless as they seek Unemployment Insurance Benefits; critical support for domestic violence victims requiring restraining orders and protection from Violence Against Women Act petitions; and incorporating the private bar in our new, widely acclaimed Medical Legal Community Partnership programs located at LA-area community health centers.

Undoubtedly, Rule 6.1 will play an important role in making our pro bono campaign a success by helping to develop a renewed culture of pro bono commitment within the legal community. A culture that begins with the recognition in our Rules of Conduct of the importance of donating pro bono time in order to increase and improve access to justice for low-income Californians. Indeed, if California continues to be one of only a handful of states without a directive encouraging pro bono assistance in its Rules of Professional Responsibility, it will diminish the status of California as a national leader in providing access to justice for low income communities.

While Rule 6.1 is not enforceable by discipline, it will nevertheless be a compelling tool in the ability of legislative pro bono programs to increase the number of volunteers and to expand the numbers and types of cases for which help is provided. Moreover, Rule 6.1 gives important content to Business and Professions Code section 6068 (h) by encouraging the provision of pro bono services to people who would otherwise be defenseless.

In sum, Rule 6.1 is essential for access to justice to become a reality for California's poor.
I urge that the Board of Governors reconsider its initial ruling on Rule 6.1 and agree to include Rule 6.1 in its revision of the Rules of Professional Conduct that are sent to the California Supreme Court for adoption.

Thank you for your consideration.

Sincerely,

Neal S. Dudovitz
Executive Director

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form should be used to comment on rules and concepts considered by the Commission but are **not recommended for adoption**. Comments can be submitted by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Los Angeles Center for Law and Justice

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Hellen Hong

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) Hellen@laclj.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

As a free legal services provider to low income residents of Los Angeles County, we see the importance of having a model rule to encourage pro bono service in our legal community. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono.

It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact, at least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of

**ENTER COMMENTS HERE.**

---

As a free legal services provider to low income residents of Los Angeles County, we see the importance of having a model rule to encourage pro bono service in our legal community. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono.

It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact, at least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

A message from the Board of Governors to make a statement to encourage attorneys to provide pro bono is a powerful statement of the importance of pro bono in our profession. Language can be added to emphasize that this rule is only aspirational, to avoid any misperception that this rule would require attorneys to do pro bono.

Therefore we ask the subcommittee to reconsider proposed Rule 6.1 and urge the Board of Governors to adopt Model Rule 6.1

Thank you.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

**INSTRUCTIONS:** This form should be used to comment on rules and concepts considered by the Commission but are **not recommended for adoption**. Comments can be submitted by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on ***one*** Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** I teach Professional Responsibility at the USC Gould S

**Commenting on behalf of an organization**
- Yes
- (•) No

*** Name** Clare Pastore

*** City** Los Angeles, CA

*** State** California

***** Email address
(You will receive a copy of your comment submission.) cpastore@law.usc.edu

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". 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 the Recommendation to Not Adopt this Rule (Commenter supports the decision to not adopt a rule.)
- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

Please see attached letter.

USC
GOULD
SCHOOL OF
LAW

June 15, 2010

Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

**Clare Pastore**
Professor of the
Practice of Law

Re: Public comment on proposed rules of professional conduct
Rule 6.1

Dear President Miller and Members of the Board:

I teach professional responsibility at the USC Gould School of Law and am a member of the Los Angeles County Bar's Professional Responsibility and Ethics Committee, although I submit these comments strictly on my own behalf. In addition, as the co-chair of the Right to Counsel Task Committee of the California Commission on Access to Justice and a former longtime legal services attorney, I am well aware of the growing and urgent need for pro bono counsel for litigants who cannot afford to hire attorneys.

I urge you to reconsider your decision not to recommend adoption of proposed rule 6.1. According to the published materials explaining the decision, there appears to be no substantive opposition to the concept that providing pro bono services should be part of the professional duties of every lawyer in California and that the goal of providing 50 hours per year per attorney is a worthy one. Instead, the explanatory materials cite the opposition of one membership group (the California Young Lawyers Association) which felt that the proposed rule was duplicative of statements contained in statute and a Board of Governor's Resolution, and that rules which are aspirational rather than mandatory should not be included in the Rules of Professional Conduct. Neither is a sufficient reason to reject Rule 6.1.

First, the fact that proposed rule 6.1 reiterates an aspirational goal of 50 pro bono hours per year per attorney that is also contained in Business and Professions Code 6073 and a 1989 Resolution is a reason to include the rule, not to reject it. Just as statutes (like section 6073) can make important statements about the goals or values of our profession, so too can and should the Rules of Professional Conduct. Moreover, one need not look far to find Rules of Conduct which duplicate statutory measures. (See, for just one example, the rules implementing Business and Professions Code § 6068(e)'s exceptions to the duty of confidentiality). As a practical matter, including Rule 6.1 in the

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University of
Southern California
Los Angeles,
California 90089-0071
Tel: 213 821-4410
Fax: 213 740-5502
Email: cpastore@law.usc.edu

Rules of Professional Conduct will bring more attention to its concededly worthwhile goal. For example, I have never attended a training at which Resolutions were covered, but I regularly attend trainings which cover changes to the conduct rules. Including 6.1 will inevitably bring more attention to this important topic and elevate the importance of the bar's commitment to pro bono services.

Moreover, nearly every state has included some version of Rule 6.1 in its state rules of conduct. There is no reason for California to take a contrary position, which risks giving the impression that Rule 6.1 was unimportant to our bar leadership, or, worse yet, contrary to the ideals of the profession in this state.

Finally, it is simply not the case that all rules of conduct serve a disciplinary function and that there is no place for aspirational or hortatory rules. The same argument could have been made for statutes such as section 6073, and yet the Legislature chose to include this measure expressing the commitment and values of the profession. The Bar should do the same.

Sincerely,

/s/

Clare Pastore

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Asian Pacific American Legal Center

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Karin Wang

*** City** Los Angeles

*** State** California

***** Email address
(You will receive a copy of your comment submission.) kwang@apalc.org

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

**From the choices below, we ask that you indicate your position on the Rule "Not Recommended for Adoption". This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.**

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- (•) DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

To: Committee on Regulation and Admissions, Board of Governors, State Bar of California

RE: Comments on Proposed Rule 6.1 Voluntary Pro Bono Publico Services

To Whom It May Concern:

On behalf of the Asian Pacific American Legal Center (APALC), I am writing to ask the Committee to reconsider proposed Rule 6.1 and to urge the Board of Governors to adopt the rule. APALC was founded in 1983 and is now the nation's largest legal services and civil rights advocacy organization serving Asian Americans and Pacific Islanders. We are a nonprofit law office and rely on donations and pro bono assistance to do both direct services and education as well as impact litigation, and we believe that strong encouragement from the State Bar through the State Bars rules sends a strong message about the importance of pro bono.

**ENTER COMMENTS HERE.**

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To: Committee on Regulation and Admissions, Board of Governors, State Bar of California

RE: Comments on Proposed Rule 6.1 Voluntary Pro Bono Publico Services

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On behalf of the Asian Pacific American Legal Center (APALC), I am writing to ask the Committee to reconsider proposed Rule 6.1 and to urge the Board of Governors to adopt the rule. APALC was founded in 1983 and is now the nation's largest legal services and civil rights advocacy organization serving Asian Americans and Pacific Islanders. We are a nonprofit law office and rely on donations and pro bono assistance to do both direct services and education as well as impact litigation, and we believe that strong encouragement from the State Bar through the State Bars rules sends a strong message about the importance of pro bono.

The proposed Rule 6.1 is similar to ABA Model Rule 6.1, and encourages attorneys to provide or enable the direct delivery of pro bono services to persons of limited means, and, in essence, to improve the access to justice in the State of California.

There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.

It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to be left out of the rules.

Since the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.

Last, but not least, the proposed rule is not mandatory, and language can be added to emphasize that this rule is only aspirational, to avoid any misperception that this rule would require attorneys to do pro bono.

For all the aforementioned reasons, I respectfully request that the Committee reconsider its decision and recommend its adoption by the Board of Governors.

Very Truly Yours,

Karin Wang
Vice-President of Programs

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Supervising Attorney

**Commenting on behalf of an organization**
- Yes
- No

*** Name** Ugochi Anaebere

*** City** Fresno

*** State** California

***** Email address
(You will receive a copy of your comment submission.) ugochianaebere@yahoo.com

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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- DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

I am a California lawyer, originally from Los Angeles, California. I have been a lawyer for 6 years, 3 of which have been devoted to public interest law. I can speak about first hand how serving others has truly enhanced my practice as a lawyer. Before coming to public interest law, I was an associate at a small law firm. I was fortunate to have the support of the partners of my firm who allowed me to serve my community through a public interest law clinic with the Legal Aid Association of Los Angeles. It was through that clinic where the reasons why I attended law school became crystallized: service to others to ensure that equal access under the law is something that is achieved for all, regardless of income.

Fast forward about 3 years, I moved to the Central Valley to serve as Pro Bono Coordinator for a legal aid organization, and have been shocked at what I have seen, in terms of access to legal services. While we are fortunate to have small firm attorneys and solo practitioners who generously provide pro bono legal services, the good work of this relatively small group of attorneys does not translate to a

**ENTER COMMENTS HERE.**

---

I am a California lawyer, originally from Los Angeles, California. I have been a lawyer for 6 years, 3 of which have been devoted to public interest law. I can speak about first hand how serving others has truly enhanced my practice as a lawyer. Before coming to public interest law, I was an associate at a small law firm. I was fortunate to have the support of the partners of my firm who allowed me to serve my community through a public interest law clinic with the Legal Aid Association of Los Angeles. It was through that clinic where the reasons why I attended law school became crystallized: service to others to ensure that equal access under the law is something that is achieved for all, regardless of income.

Fast forward about 3 years, I moved to the Central Valley to serve as Pro Bono Coordinator for a legal aid organization, and have been shocked at what I have seen, in terms of access to legal services. While we are fortunate to have small firm attorneys and solo practitioners who generously provide pro bono legal services, the good work of this relatively small group of attorneys does not translate to a strong, widespread pro bono culture needed to begin to meet the demand of services that I knew while living in my hometown. Further, unlike urban areas where legal aid programs can recruit volunteer interns from numerous law schools, there is only one law school in our service area, and a significant number of the students hold full time positions as they pursue their legal studies. Moreover, there are very few large firms in our service area that can easily provide significant amounts of pro bono services.

When I heard that the State Bar was considering amending the Rules of Professional Conduct by strongly encouraging that attorneys volunteer at least 50 hours of pro bono services to a local legal aid agency, I was ecstatic! I thought to myself- finally, a real push towards encouraging lawyers (who are in a service profession) to give back to others. There are 1200 lawyers in the city where I practice, and the hours of service these individuals could provide to our clients completely doable- as they boil down to about 1 hour a week. The time spent with an individual who is unable to afford legal services, no matter how small, is invaluable, and is greatly appreciated. For many of our clients, they are looking for finality with their legal issues. They are looking for an avenue, a resource, a guide. As lawyers who have been trained and have legal knowledge, it is our responsibility to give to the least among us. For to whom much is given, much is required. Passing this amendment will do much to ease our state's huge justice gap. I urge the State Bar to pass this amendment.

STOEL RIVES LLP
ATTORNEYS AT LAW

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Sacramento, California 95814
main 916.447.0700
fax 916.447.4781
www.stoel.com

MICHAEL N. MILLS
*Direct (916) 319-4642*
mnmills@stoel.com

June 11, 2010

Audrey Hollins
Office of Professional Compliance, Planning, and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

As the immediate past President of the Sacramento County Bar Association, and a concerned member of the State Bar of California, I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions riot to recommend the Supreme Court adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. The Commission's proposal was the product of a long and thoughtful process which carefully reviewed the various issues raised by the proposed rule.

Rule 6.1 sets out the professional responsibility of lawyers to provide pro bono public° services to those otherwise unable to obtain access to the legal system and the courts. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it.

While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.

Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that laudable requirement by encouraging the provision of pro bono services to people who otherwise would have no legal voice.

The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send the Supreme Court a revision of the rules of Professional Conduct that does not include this extremely important provision.

Thank you for the opportunity to comment on this rule.

Sincerely,

Michael N. Mills

MNM:eyh

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

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*All information submitted is regarded as public record*.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Pacific McGeorge School of Law

**Commenting on behalf of an organization**
- ○ Yes
- ◉ No

*** Name** Elizabeth Rindskopf Parker

*** City** Sacramento

*** State** California

***** Email address
(You will receive a copy of your comment submission.) deanparker@pacific.edu

---

**Before commenting on any of these items, please read the Commission's summary of Rules and Concepts Considered but Not Recommended for Adoption.**

---

*** Select the Rule "Not Recommended for Adoption" from the drop down list below.**
Model Rule 6.1 Voluntary Pro Bono Serivce

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- ○ DISAGREE with the Recommendation to Not Adopt this Rule (Commenter opposes the decision to not adopt the rule.)

---

**ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.**

UNIVERSITY OF THE
PACIFIC
McGeorge School of Law

June 15, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, Ca 94105

***Re: Request to Reconsider Proposed Rule 6.1 with recommended amendment***

**Elizabeth Rindskopf Parker**
Dean

3200 Fifth Avenue
Sacramento, CA 95817
Tel 916.739.7151
Fax 916.739.7330

Dear Ms. Hollins:

I am writing to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.

This is an issue of utmost concern to pro bono supporters across the state. We believe that it is imperative that the revised California Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Board of Governors to do everything in its power to ensure passage of this rule.

Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words “aspire to”, from the ABA’s Model Rule, be added to the first paragraph.

We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the State bar of California.

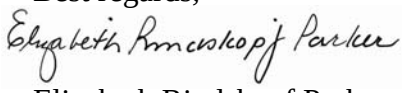
It is important to have a pro bono rule, in addition to a Board resolution and statutory language, and pro bono is too important a value within the legal profession to leave it out of the rules.

At least 44 other states have included a similar provision in their ethics rules.

The actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA’s Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted.

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Best regards,



Elizabeth Rindskopf Parker
Dean

# Rule 6.2 – Public Comment – File List

X-2010-421tt COPRAC [6.2]

X-2010-425-49ww SDCBA [6.2]

X-2010-469-6f OCBA [6.2]

X-2010-513-1 OCTC [6.2]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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. COPRAC supports the adoption of proposed Rule 6.2 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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**State Bar Board of Governors District Nine Representative**
Wells B. Lyman

**Conference of California Bar Associations District Nine Representative**
James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
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| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
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| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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**State Bar Board of Governors District Nine Representative**
Wells B. Lyman

**Conference of California Bar Associations District Nine Representative**
James W. Talley

February 12, 2010

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~~

OCBA

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: June 9, 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 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 comment concerning the subject proposed Rule:

The OCBA notes that Comment [1] to proposed Rule 6.2 contains reference to Rule 6.1, but we understand that Rule 6.1 has not been adopted. We simply express the concern that the Commission should revisit this citation in Comment [1], to conform, when a final decision has been made regarding the adoption of proposed Rule 6.1.

**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

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 6.2. Accepting Appointments.**

1. OCTC appreciates the intent of this rule, but is concerned that it is not enforceable. By allowing attorneys to avoid appointments by claiming that the representation or cause is repugnant to them it would appear to be impossible to enforce this rule.
2. OCTC finds Comments 1 and 2 more appropriately belongs in a treatise, law review article, or ethics opinion. Further, Comment 1 cites to proposed rule 6.1, which was deleted by the Board of Governors and is, thus, not currently part of the proposed rules.

# Rule 6.3 – Public Comment – File List

X-2010-421p COPRAC [6.3]

X-2010-425-50xx SDCBA [6.3]

X-2010-513-1 OCTC [6.3]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 6.3

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 6.3 - Legal Services Organizations. COPRAC supports the adoption of proposed Rule 6.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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**State Bar Board of Governors District Nine Representative**
Wells B. Lyman

**Conference of California Bar Associations District Nine Representative**
James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
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| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
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| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**SDCBA Legal Ethics Committee**
**Comments to Revisions to Rules of Professional Conduct (RPC)**
**BATCH #4, Comment Deadline October 23, 2009**
**SDCBA Legal Ethics Committee Deadline September 22, 2009**
**Subcommittee Deadline August 31, 2009**

LEC Rule Volunteer Name(s): Gina Dronet

Old Rule No./Title: None

Proposed New Rule No./ Title: 6.3 Membership in Legal Service Organizations

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [ X ] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ X ] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ X ] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Proposed Rule 6.3 deals with a subject not specifically addressed by the existing California Rules of Professional Conduct: a lawyer's participation in a "legal service organization". Unfortunately, the proposed rule does not define "legal service organization(s)". I could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules, or the Model Rules. (In addition, the term is confusingly similar to other terms of art such as "legal service corporations" governed by federal law to provide legal services to the poor, qualified employer

sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501 (c) 20, and lawyer referral services, which are not intended to be included in the proposed rule.)

Therefore, the proposed rule should be modified to include the intended definition of "legal service organization" by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows:

(c) The term "legal service organization" means those defined in section(s) _____ of _____ [and/or the case of _____].

OR

(c) The term "legal service organization" means . . .

NOTE: Absent the intended definition, I cannot provide the proposed language for the modification. I believe a starting point is California Business & Professions Code section 6213 – 6215, which describe the organizations entitled to receive IOLTA funds under B&P sections 6210 – 6228, (legal service for the poor paid by interest earned on client trust accounts). For convenience, the relevant sections are set forth in the attachment. However, it is unclear whether the drafters intended to include those organizations that currently fall outside these sections because they are not subject to State Bar regulation but may be in the future. See, e.g., Frye v. Tenderloin Housing Clinic, Inc, (2006) 38 Cal.4th 23,40, which held that nonprofit public benefit corporations providing legal services to the public are not subject to existing regulations governing the practice of law by professional law corporations. The Supreme Court directed the State Bar to investigate such organizations and propose appropriate rules in 2006, which are being considered in the rules revision process.

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

[ X ] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

Continuation Pages; Dronet Comments
Proposed Rule 6.3 Membership in Legal Service Organization
Batch #4, Proposed Amendments to CRPC

Business & Professions Code sections describing intended legal service organizations:

6213. As used in this article:
(a) "Qualified legal services project" means either of the following:
(1) A nonprofit project incorporated and operated exclusively in California which provides as its primary purpose and function legal services without charge to indigent persons and which has quality control procedures approved by the State Bar of California.
(2) A program operated exclusively in California by a nonprofit law school accredited by the State Bar of California which meets the requirements of subparagraphs (A) and (B).
(A) The program shall have operated for at least two years at a cost of at least twenty thousand dollars ($20,000) per year as an identifiable law school unit with a primary purpose and function of providing legal services without charge to indigent persons.
(B) The program shall have quality control procedures approved by the State Bar of California.
(b) "Qualified support center" means an incorporated nonprofit legal services center that has as its primary purpose and function the provision of legal training, legal technical assistance, or advocacy support without charge and which actually provides through an office in California a significant level of legal training, legal technical assistance, or advocacy support without charge to qualified legal services projects on a statewide basis in California.
(c) "Recipient" means a qualified legal services project or support center receiving financial assistance under this article.
(d) "Indigent person" means a person whose income is (1) 125 percent or less of the current poverty threshold established by the United States Office of Management and Budget, or (2) who is eligible for Supplemental Security Income or free services under the Older Americans Act or Developmentally Disabled Assistance Act. With regard to a project that provides free services of attorneys in private practice without compensation, "indigent person" also means a person whose income is 75 percent or less of the maximum levels of income for lower income households as defined in Section 50079.5 of the Health and Safety Code. For the purpose of this subdivision, the income of a person who is disabled shall be determined after deducting the costs of medical and other disability-related special expenses.
(e) "Fee generating case" means a case or matter that, if undertaken on behalf of an indigent person by an attorney in private practice, reasonably may be expected to result in payment of a fee for legal services from an award to a client, from public funds, or from the opposing party. A case shall not be considered fee generating if adequate representation is unavailable and any of the following circumstances exist:
(1) The recipient has determined that free referral is not possible because of any of the following reasons:
(A) The case has been rejected by the local lawyer referral service, or if there is no such service, by two attorneys in private practice who have experience in the subject matter of the case.

(B) Neither the referral service nor any attorney will consider the case without payment of a consultation fee.

(C) The case is of the type that attorneys in private practice in the area ordinarily do not accept, or do not accept without prepayment of a fee.

(D) Emergency circumstances compel immediate action before referral can be made, but the client is advised that, if appropriate and consistent with professional responsibility, referral will be attempted at a later time.

(2) Recovery of damages is not the principal object of the case and a request for damages is merely ancillary to an action for equitable or other nonpecuniary relief, or inclusion of a counterclaim requesting damages is necessary for effective defense or because of applicable rules governing joinder of counterclaims.

(3) A court has appointed a recipient or an employee of a recipient pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction.

(4) The case involves the rights of a claimant under a publicly supported benefit program for which entitlement to benefit is based on need.

(f) "Legal Services Corporation" means the Legal Services Corporation established under the Legal Services Corporation Act of 1974 (P.L. 93-355; 42 U.S.C. Sec. 2996 et seq.).

(g) "Older Americans Act" means the Older Americans Act of 1965, as amended (P.L. 89-73; 42 U.S.C. Sec. 3001 et seq.).

(h) "Developmentally Disabled Assistance Act" means the Developmentally Disabled Assistance and Bill of Rights Act, as amended (P.L. 94-103; 42 U.S.C. Sec. 6001 et seq.).

(i) "Supplemental security income recipient" means an individual receiving or eligible to receive payments under Title XVI of the federal Social Security Act, or payments under Chapter 3 (commencing with Section 12000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(j) "IOLTA account" means an account or investment product established and maintained pursuant to subdivision (a) of Section 6211 that is any of the following:

(1) An interest-bearing checking account.

(2) An investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(3) An investment product authorized by California Supreme Court rule or order.

A daily financial institution repurchase agreement shall be fully collateralized by United States Government Securities or other comparably conservative debt securities, and may be established only with any eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities or other comparably conservative debt securities, shall hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.), and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(k) "Eligible institution" means a bank or any other type of financial institution authorized by the Supreme Court.

6214. (a) Projects meeting the requirements of subdivision (a) of Section 6213 which are funded either in whole or part by the Legal Services Corporation or with Older American Act funds shall be presumed qualified legal services projects for the purpose of this article.

(b) Projects meeting the requirements of subdivision (a) of Section 6213 but not qualifying under the presumption specified in subdivision (a) shall qualify for funds under this article if they meet all of the following additional criteria:

(1) They receive cash funds from other sources in the amount of at least twenty thousand dollars ($20,000) per year to support free legal representation to indigent persons.

(2) They have demonstrated community support for the operation of a viable ongoing program.

(3) They provide one or both of the following special services:

(A) The coordination of the recruitment of substantial numbers of attorneys in private practice to provide free legal representation to indigent persons or to qualified legal services projects in California.

(B) The provision of legal representation, training, or technical assistance on matters concerning special client groups, including the elderly, the disabled, juveniles, and non-English-speaking groups, or on matters of specialized substantive law important to the special client groups.

6214.5. A law school program that meets the definition of a "qualified legal services project" as defined in paragraph (2) of subdivision (a) of Section 6213, and that applied to the State Bar for funding under this article not later than February 17, 1984, shall be deemed eligible for all distributions of funds made under Section 6216.

6215. (a) Support centers satisfying the qualifications specified in subdivision (b) of Section 6213 which were operating an office and providing services in California on December 31, 1980, shall be presumed to be qualified support centers for the purposes of this article.

(b) Support centers not qualifying under the presumption specified in subdivision (a) may qualify as a support center by meeting both of the following additional criteria:

(1) Meeting quality control standards established by the State Bar.

(2) Being deemed to be of special need by a majority of the qualified legal services projects.

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 6.3. Membership in Legal Services Organization.**

1. OCTC supports this rule, but the Comments are more appropriate for treatises, law review articles, and ethics opinions.

# Rule 6.4 – Public Comment – File List

X-2010-421q COPRAC [6.4]

X-2010-425-51yy SDCBA [6.4]

X-2010-513-1 OCTC [6.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 6.4

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 6.4 - Law Reform Activities. COPRAC supports the adoption of proposed Rule 6.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**SDCBA Legal Ethics Committee**
**Comments to Revisions to Rules of Professional Conduct (RPC)**
**BATCH #4, Comment Deadline October 23, 2009**
**SDCBA Legal Ethics Committee Deadline September 22, 2009**
**Subcommittee Deadline August 31, 2009**

LEC Rule Volunteer Name(s): Erin Penning

Old Rule No./Title: None

Proposed New Rule No./ Title: Rule 6.4. Law Reform Activities Affecting Client Interests

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [XX] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [XX]

In some instances, it would be impossible for a lawyer to comply with Proposed Rule 6.4 without revealing client confidences in violation of Rule 1.6 and Cal. Bus & Prof. Code § 6068(e).

California Proposed Rule 6.4 recites in relevant part: "When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, **the lawyer shall disclose that fact but need not identify the client.**" (Emphasis added.)

However, it is foreseeable that a lawyer involved in law reform will not always be able to disclose that a client's interests may be materially benefitted or adversely affected without disclosing client confidences. The mere fact that a client need not be identified does not solve the problem. Hiding the client's identity does not permit the lawyer to reveal the client's confidences. In addition, a lawyer's record of representing certain clients may be enough in some instances for others to correctly infer the client whose interests would be materially benefitted or adversely affected.

In such instances when a lawyer could not make the disclosure required by Proposed Rule 6.4 without disclosing client confidences, an option must be permitted. Proposed Rule 6.4 should explicitly provide that option, either in the text of the rule or in a comment, by stating that, if disclosure is not permitted by the lawyer's obligations to clients under other Rules and statutes,

the lawyer should instead recuse himself or herself from participating in the decision that may materially benefit or adversely affect the client.

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ XX ]

In accordance with the comments under section (2), above, Proposed Rule 6.4 could be worded as follows (addition in **bold, underline text**):

> A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted or adversely affected by a decision in which the lawyer participates, the lawyer shall disclose that fact**, if not prohibited by the lawyer's obligations to clients under other Rules and statutes,** but need not identify the client. **If disclosure is prohibited, the lawyer shall not participate in any decision that may materially benefit or adversely affect the interests of his or her client.**

In the alternative, Proposed Rule 6.4 could remain worded as currently proposed but be accompanied by a second Comment worded as follows:

> Comment [2]
>
> If disclosure is prohibited by the lawyer's obligations to any client under other Rules and statutes, then a lawyer cannot provide the disclosure required. If disclosure is prohibited, or if the lawyer chooses not to disclose in accordance with Rule 6.4 for any other reason, the lawyer shall not participate in any decision that the lawyer knows may materially benefit or adversely affect the interests of a client.

The addition of "Comment [2]" may be sufficient to rectify the problem here, given that Rule 6.4 begins, "A lawyer **may** serve as a director, officer or member of an organization involved in reform of the law… ." The Rule is not unequivocally permissive. "May" implies that there could be limits, and those limits could be spelled out in the comments.

Another concern is the impact this rule will have on members who participate in organizations such as the California Conference of Delegates. The addition of another Comment to address this issue is encouraged. It is hard to imagine that the drafters intended all the delegates to make such disclosures to the Conference but including "members" within the ambit or the proposed rule, rather than limiting it to officers and directors of the Conference leads to a questionable outcome.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]

N/A

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

See comments in Section (2), above.

**CONCLUSIONS (pick one):**

[ ] We approve the new rule in its entirety.

[XX] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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

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**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 6.4. Law Reform Activities Affecting Client Interests.**

1. OCTC supports encouraging law reform activities but is concerned that there is no requirement to advise the lawyer's clients when the reform may affect the interests of the clients.

# Rule 6.5 – Public Comment – File List

X-2010-425-52zz SDCBA [6.5]

X-2010-430g Glenn Alex [6.5]

X-2010-513-1 OCTC [6.5]

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James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

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**Conference of California Bar Associations District Nine Representative**
James W. Talley

February 12, 2010

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

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.~~

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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 new or amended rules of Professional Conduct: adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.

   Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel – a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The

conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an "informed" consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.

The first question in these situations is, who is the attorney's client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?

These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities – for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential "masters," each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act "on the record"; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.

While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.

2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.

Not all governmental agencies in California are subject to "whistleblower" statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.

3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term "a representation."

In-house governmental attorneys are sometimes pushed, by their own entities or by "control agencies" into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: "making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.") The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from "a representation" in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney's full-time career employment with his or her agency. In other words, the term "a representation" should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.

4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term "proceeding."

Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . ." Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . ."

(Emphasis added.)) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).

5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.

Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not "communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . ." Subdivision (C)(1) provides an exception for "Communications with a public officer, board, committee, or body[.]" Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.

Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that "a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . ." Subdivision (c) states that the rule "shall not prohibit: (1) Communications with a public official, board, committee or body[.]" Unlike the existing rule, which does not define "public officer," the proposed rule then defines "public official" in subdivision (g) as a "public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1)." Subdivision (b), in turn, identifies a "person" as: "(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]"

The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-

attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."

Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.

6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.

Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.

~~Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private-interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."~~

~~Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.~~

~~Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.~~

~~The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.~~

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,

Glenn C. Alex

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 6.5. Limited Legal Services Programs.**

1. OCTC finds Comments 1-4 more appropriate for treatises, law review articles, and ethics opinions. It supports Comment 5.

# Rule 7.1 – Public Comment – File List

X-2010-421r COPRAC [7.1]

X-2010-425-53aaa SDCBA [7.1]

X-2010-469-7g OCBA [7.1]

X-2010-513-1 OCTC [7.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 7.1

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 7.1 - Communications Concerning the Availability of Legal Services. COPRAC supports the adoption of proposed Rule 7.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 7.1: Communications Concerning the Availability of Legal Services**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.1:

* * * * *

Comment 1:

The Commission should reinsert the words "tends to" in Rule 7.1 (c)(3). Current Rule 1-400(D)(2) states that matters presented or arranged in a manner or format that tends to confuse, deceive or mislead the public are prohibited. Proposed rule 7.1 (c) (3) deletes the words "tends to."

Rationale For Comment 1:

This deletion would seem to heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide. Therefore, we recommend the words "tends to" be reinserted. We otherwise approve the proposed rule.

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 7.1 – Communications Concerning the Availability of Legal Services**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA recommends that Comments [2] and [3] be re-numbered to [2] and [2] (a) in order to provide internal consistency, as Comment [3] is really an explanation of Comment [2]. The OCBA also recommends that more examples of truthful statements that are misleading be provided, as that term by its very nature is confusing.

The OCBA believes that the portion of Comment [3] which states, "[t]he inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client" is vague and ambiguous and could be perceived as a safety net and permission to misstate all manner of things to a prospective client, provided the disclaimer is given. The OCBA believes the problem may be solved by changing the language to the following (or similar language): "The inclusion of an appropriate disclaimer or qualifying language *may be used in an attempt to* avoid creating unjustified expectations or otherwise misleading a prospective client, *but such inclusion shall not be determinative on the issue of whether the Communication, as a whole, is misleading.*"

The OCBA recommends that in Comment [5] the word "intentionally" be removed as redundant, internally inconsistent, and confusing. It might be read as requiring an intent to mislead whereas the rules have been construed to require only that the act be intentional.

The OCBA further recommends that the "Standards" be made part of the new rule itself so that the difficulty in navigating Rule 1-400 that now exists can and will be avoided. The reasons for including a separate "Standards" section in Rule 1-400 simply do not exist in this re-written 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

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

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[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

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**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

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[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

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We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 7.1. Communications Concerning the Availability of Legal Services.**

1. OCTC supports this rule, but finds many of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the first sentence of comment 2. We believe Comment 4 should be in the rule. We would strike the second sentence of Comment 5.
2. OCTC supports the Standards attached to this rule.

# Rule 7.2 – Public Comment – File List

X-2010-421s COPRAC [7.2]

X-2010-425-54bbb SDCBA [7.2]

X-2010-427 Myles Berman [7.2]

X-2010-513-58 OCTC [7.2]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 7.2

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 7.2 - Advertising. COPRAC supports the adoption of proposed Rule 7.2 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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**Conference of California Bar Associations District Nine Representative**
James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
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| | |
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| Rule 3.8 | Special Responsibilities of a Prosecutor |
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| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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**Conference of Delegates of California Bar Associations District Nine Representative**
Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 7.2: Advertising**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.2:

* * * * *

Comment 1:

We propose retaining the ABA Model Rule definitions in Comment 6 for "legal services plan" and "lawyer referral service."

Rationale For Comment 1:

This proposed retention would result in keeping the second, third and fourth sentences of Comment 6 to the ABA Model Rule 7.2. We otherwise approve the proposed rule.

MYLES L. BERMAN

MICHAEL D. GRAHN
OBIE OZOBU

OF COUNSEL
DEREK A. DANIELSON
DAVID T. KAYE

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**(805) 650-9501**

May 12, 2010

Audrey Hollins, Esq.
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 7.2 (c)

Dear Ms. Hollis:

I recognize the committee to revise the State Bar Rules has been meeting for many years and has done a tremendous job in taking on an extremely laborious task. I have attended at least one of these meetings and have been receiving email comments from the committee for many years. I know how hard the committee members have labored. There is one proposed new rule I would like to comment on at the present time. My comments are below.

Proposed Rule 7.2(c) states:

"Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content."

My comments focus on the language that requires an office address. I was present at a revision committee meeting when this issue was discussed. My recollection is that the purpose of including the address of one lawyer or law firm responsible for its content was to protect the legal business interests (client base) of local lawyers to the exclusion of lawyers who don't have an office in the potential client's city and not to protect California consumers. I don't think this is a reasonable basis for the proposed change.

While it is extremely important for the responsible advertising attorney to be identified in any advertisement, this goal can be accomplished by requiring the naming of one lawyer or law firm with a telephone number instead of an address who is responsible for the ads content.

Further, mass advertising in print media such as newspapers is read by millions of California consumers in hundreds of different cities and numerous counties. The same is true for radio and TV ads. Print advertising space and radio/TV ads are often times limited in space and time. In addition, many law practices have more than one location. Once a potential client contacts an attorney, the client will then automatically know the exact office location of the attorney called. Clients often times are looking for good quality attorneys who advertise. Requiring an office address to be included in legal ads serves no legitimate consumer protection.

In addition, the fact that the comments to the proposed rule states no basis for forcing advertising attorneys to include an office address in their ads supports the position that there is no need to require an address in attorney ads.

Finally, I have not heard of any case where a client was harmed because the client did not know the address of the attorney or attorneys hired.

Very truly yours,

Myles L Berman

MYLES L. BERMAN

MLB/cl
cc: Board of Governors:
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Cheryl L. Hicks, Esq.
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Wells B. Lyman, Esq.
Gwen Moore, Esq.
Jon Streeter, Esq.
Michael Tenenbaum, Esq.

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 7.2. Advertising.**

1. OCTC supports this rule, but many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. It supports Comments 6, 9, and the first two sentences of Comment 7 and the last sentence of Comment 7.

# Rule 7.3 – Public Comment – File List

X-2010-425-55ccc SDCBA [7.3]

X-2010-469-8h OCBA [7.3]

X-2010-511f State Bar LPMT [7.3]

X-2010-513-1 OCTC [7.3]

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May 6, 2010

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The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Raymond G. Aragon

**CYLA District Nine Representative**
Matthew B. Butler

**Conference of Delegates of California Bar Associations District Nine Representative**
Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 7.3: Direct Contact with Prospective Clients**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.3:

* * * * *

Comment 1:

The changes in the new rule regarding streamlining and modernizing the standards result in greater clarity.

Rationale For Comment 1:

The new rule deals only with "solicitations," whereas the old rule also dealt with "communications" and the number of standards promulgated to carry out the rule is reduced from sixteen (16) to one (1). There are also changes to accommodate technological advances in methods of communication (from in person or by telephone to now include real-time electronic contact or electronic communications).

Comment 2:

The proposed changes regarding the specifics of acceptable "Advertising Material" on attorney promotional material may promote misleading advertisements.

Rationale For Comment 2:

The standards of former Rule 1-400 required that the word "Advertisement", "Newsletter" "or words of similar import" be in 12 point font on the first page of the document. This has been deleted in the new rule and all that remains is the requirement that the words "Advertising Material" or "words of similar import" be on the outside envelope, "if any . . . unless it is apparent from the context that the communication is an advertisement." This change may cause attorney advertising to be misleading and deceptive to the public regarding whether the recipient is actually receiving an official document or one that is a solicitation. Further, it leaves open to interpretation what is an "apparent" advertising communication.

OCBA

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BAR ASSOCIATION

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OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 7.3 – Direct Contact with Prospective Clients**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small 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:

In short, proposed Rule 7.3(b)(2) prohibits a lawyer from soliciting professional employment from a prospective client where the solicitation "is transmitted in any manner which involves *intrusion*, compulsion, intimidation, threats, or vexatious or harassing conduct" (emphasis added). The OCBA concurs with the minority comments of the Commission that the word "intrusion," which is not included in the corresponding ABA Model Rule, should be stricken from the rule because arguably any manner in which a lawyer solicits professional employment from a prospective client may be perceived as intrusive, and thus unfairly may subject that lawyer to unnecessary and unwarranted discipline.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 7.3 Direct Contact with Prospective Clients

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

---

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached 6 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 7.3 [RPC 1-400]**
**"DIRECT CONTACT WITH PROSPECTIVE CLIENTS"**
**(DRAFT #8, 10/2/09)**

***INTRODUCTION***

The Law Practice Management & Technology (LPMT) Section's comment on Proposed Rule 7.3 concerns paragraph (a):

> "(a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:
>
> > "(1) is a lawyer; or
> >
> > "(2) has a family, close personal, or prior professional relationship with the lawyer."

We are disappointed that the State Bar still wants to muzzle lawyers from telling the truth directly to potential clients and from explaining how a lawyer's services might be of value to a particular member of the public.

***ANALYSIS***

**I. Chilling Effect on First Amendment Rights**

No longer do we live in an age when in-person or real-time electronic communication is the exception. Thus, in the twenty-first century, we cannot think

of any other professional or tradesperson who must be prohibited from offering services to the public. One would think the opposite more virtuous: that lawyers be fully engaged in informing citizens of their rights as opposed to the State Bar's position, which appears to find the First Amendment suitable only for accountants and the Police Athletic League.

The gift of the First Amendment is its insight that the remedy for speech that some would disallow is not censorship but more speech. Yet Proposed Rule 7.3 would continue "to inhibit the free flow of commercial information and to keep the public in ignorance," *Bates v. State Bar of Arizona*, 433 U.S. 350, 365 (1977).

Rule 7.3(a)'s putative "savings clause" saves nothing: A lawyer may not directly offer his or her services "unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California . . .." We should hope the Bill of Rights supersedes the CRPC. Of course, such would be the case even if the "savings clause" were omitted.

Rather than offer the illusion of liberty, the State Bar has the opportunity to go beyond what is minimally required by the First Amendment. It would benefit all if the State Bar at least would list which types of speech are in and which are out. As the rule now stands, a lawyer can only guess at where the State Bar believes the line should be drawn – unless, as appears from 7.3(a), we should understand that the State Bar would not affirmatively permit any such speech.

We respectfully urge the Commission to reconsider promulgating such an outright ban on direct conversations between a lawyer and a member of the public who might benefit from legal services.

## II. The Proposed Rule Overreaches and is Superfluous

Nor need the State Bar worry that uninformed clients will be signed up willy-nilly given the plethora of protections provided to potential clients by other disciplinary rules, including many requiring written disclosure and formal, informed assent. Once again, we speak only of allowing statements that are:

- truthful and not misleading; and
- that involve no intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

The language of the Comments is loaded with intimations of deception and coercion, even though that kind of communication is clearly prohibited by the existing California Rules of Professional Conduct (CRPC). Examples of such insinuations include:

- the "overwhelmed" prospective client;
- "subject the lay person to the private importuning of the trained advocate"; and
- a situation "fraught with the possibility of undue influence, intimidation, and over reaching".

Such a hyperbolic approach seems unwarranted.

In considering the potential for abuse, *compare*, for example, Proposed Rule 7.3 *with* Proposed Rule 1.15 Handling Funds and Property of Clients and Other Persons. When it comes to a client's money, the potential for abuse, one would think, is even greater: A dollar in the hand is worth the hope of two on the phone. Yet the State Bar does not prohibit a lawyer from handling client funds. Rather it prohibits certain acts that we all may agree are unethical, as does Rule 7.3. Talking on the phone is not one of them.[1]

The proposed rule implies that, among "respectable lawyers," certain things are just not done, and seeking to help a specific person with her or his legal problems for money is beneath the dignity of the pillars of the profession. The various state bars of the Union do not have the cleanest of hands or the most impartial judgment when it comes to regulating attorney speech. They have resisted practically every attempt to enlarge attorney speech rights. We are part of the most prominent of those state bars. Let us lead the way.

We should not assume that most lawyers are crooks. For those that are, the CRPC and the Penal Code are there.

[1] We also do not agree with Comment [2]'s endorsement of "recorded communications which may be mailed or autodialed" – better known as SPAM and junk calls. We prefer live conversations with human beings.

***CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE***

**ALTERNATIVE # 1 (PREFERRED):**

For the foregoing reasons, we recommend that Proposed Rule 7.3(a) be amended as set forth below. If the Commission adopts our proposed amended version, we also recommend the deletion of Comments [1] through [4]. [Indeed, the apparent necessity for 469 words to justify 79 might also lead one to question the defensibility of Proposed Rule 7.3(a).]

> (a) A lawyer ~~shall not~~ may by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is dishonest or misleading, or it involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct. ~~protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:~~
>
> ~~(1) is a lawyer; or~~
>
> ~~(2) has a family, close personal, or prior professional relationship with the lawyer.~~

Clean version of amended Proposed Rule 7.3(a):

> (a) A lawyer may by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is dishonest or misleading, or it involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

*(c't'd)*

**ALTERNATIVE # 2 (MUCH LESS DESIRABLE):**

To the extent the Commission retains the prohibitions on a lawyer's speech, we recommend two specific circumstances that should still be addressed.

The first is the circumstance in which a prospective client is the one who initiates the contact with the attorney, regardless of medium. A potential client seeking legal assistance cannot be said to have been intruded upon by the lawyer with whom he seeks to communicate.

The second is the circumstance in which a prospective client is a business, at least one over a certain size. The president of a company is hardly the sort of vulnerable person likely to be "overwhelmed by the circumstances giving rise to the need for legal services" (Comment [1] at 18). Yet, a lawyer should be able to speak as one business person to another. The CEO or CFO can call a lawyer. Why shouldn't a lawyer be able to call the CEO or the CFO?

If the Commission chooses to adopt only these last two considerations, we recommend that Proposed Rule 7.3(a) be amended as follows:

> (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:
>
> (1) is a lawyer; ~~or~~
>
> (2) has a family, close personal, or prior professional relationship with the lawyer~~.~~;
>
> (3) has first contacted the lawyer; or
>
> (4) is an executive or senior manager of a prospective client.

*(c't'd)*

**ALTERNATIVE # 2 (MUCH LESS DESIRABLE)** ***(c't'd)*****:**

Clean version of amended (as limited) Proposed Rule 7.3(a):

> (a) A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for doing so is the lawyer's pecuniary gain, unless the communication is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California, or unless the person contacted:
>
> > (1) is a lawyer;
> >
> > (2) has a family, close personal, or prior professional relationship with the lawyer;
> >
> > (3) has first contacted the lawyer; or
> >
> > (4) is an executive or senior manager of a prospective client.

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 7.3. Direct Contact with Prospective Clients.**

1. OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the last two sentences of Comment 8.

# Rule 7.4 – Public Comment – File List

X-2010-421t COPRAC [7.4]

X-2010-425-56ddd SDCBA [7.4]

X-2010-513-1 OCTC [7.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 7.4

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 7.4 - Communication of Fields of Practice and Specialization. COPRAC supports the adoption of proposed Rule 7.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
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| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 7.4: Communications of Fields of Practice and Specialization**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.4:

* * * * *

Comment 1:

The second sentence of proposed rule 7.4(a) should be reworded.

Rationale For Comment 1:

The second sentence of 7.4(a) states "A lawyer may also communicate that his or her practice is limited to or concentrated in a particular field of law, *if such communication does not imply an unwarranted expertise in the field so as to be false or misleading under Rule 7.1.*" (italics added).

It appears that what the drafters are getting at is the situation in which the claim isn't true. But the wording seems to suggest that even accurately claiming a concentration can be false and misleading. This problem could be eliminated by replacing the italicized words with "subject to the requirements of Rule 7.1."

Comment 2:

The second sentence of proposed rule 7.4(b) should be reworded.

Rationale For Comment 2:

Rule 7.4(d) forbids a claim of specialist certification "*unless (1) the lawyer holds a current certificate issued by . . .*" We would propose replacing the words "a current certificate" with "current certification" to make clear that the rule isn't talking about a piece of paper. (italics added).

Comment 3

If the committee is so inclined, we would propose it consider choosing one of two options to deal with the issue of the specialist claim by an uncertified lawyer:

(i) add 7.4(e) as follows: "A lawyer who has not been certified as a specialist pursuant to Rule 7.4(d) may not state or imply that he or she is a specialist in a particular field of law"; or

(ii) add 7.4(e) as follows: "A lawyer who has not been certified as a specialist pursuant to Rule 7.4(d) may not state or imply that he or she is a specialist in a particular field of law unless he or she accompanies the statement or implication with an express statement to the effect that lawyers can be certified as specialists by state-approved institutions and that he or she has not been so certified."

Rationale For Comment 3:

N/A

**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
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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 7.4. Communication of Fields of Practice and Specialization.**

1. OCTC is not sure this rule is necessary but has no objection.

# Rule 7.5 – Public Comment – File List

X-2010-421u COPRAC [7.5]

X-2010-425-57eee SDCBA [7.5]

X-2010-469-9i OCBA [7.5]

X-2010-492b LACBA Access to Justice Comm [7.5]

X-2010-513-1 OCTC [7.5]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 7.5

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 7.5 - Firm Names and Letterheads. COPRAC supports the adoption of proposed Rule 7.5 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
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| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

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The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

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Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 7.5: Firm Names and Letterheads**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule 7.5:

* * * * *

We approve the proposed new rule in its entirety.

OCBA

ORANGE COUNTY
BAR ASSOCIATION

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 7.5 – Firm Names and Letterheads**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

Proposed Rule 7.5 governs the use of firm names and letterheads by lawyers. The proposed Rule is derived from current Rule 1-400 and the ABA Model Rules.

The OCBA supports the adoption of proposed Rule 7.5, but suggests the following changes and additions to the Comments:

- The words "all or some" in the second line of Comment [1] should be changed to "one or more."

  *Reason*: Some firms use the name of only one lawyer as the firm name.

- An additional sentence should be added at the end of Comment [2] stating:

  "It is permissible to use the name of a lawyer who has a proper 'of counsel' relationship with a law firm in the name of the firm."

  *Reason*: Adding such a sentence eliminates any confusion on this question and would reconcile two ethics opinions that are currently inconsistent in this regard. Los Angeles County Bar Association Formal Opinion No. 421 (1983), addressing then applicable Rule 2-101 (Rule 1-400's predecessor), determined that using an "of counsel" lawyer's name in a firm name was improper. California State Bar Formal Opinion 1986-90, also addressing Rule 2-101, implies that the use of a lawyer's name who is "of counsel' to the firm in a firm name is permissible if the lawyer's actual relationship and true role is properly communicated.

- A new Comment [3] should be added stating:

  "Also with regard to paragraph (d), a lawyer may not denominate a firm name as, for example, "Smith & Associates" or "Smith, Jones & Associates," if Smith or Smith and Jones do not in fact practice with associates."

  *Reason*: The OCBA believes that this is a sufficiently common practice among some sole practitioners or small firms such that it should be specifically addressed. The OCBA also believes that the practice is misleading.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** Los Angeles County Bar Access to Justice Committee

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** Toby Rothschild

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) trothschild@lafla.org

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 7.5 Firm Names and Letterheads

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- (•) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

**LACBA**

**LOS ANGELES COUNTY BAR ASSOCIATION**

MAILING ADDRESS:
P O Box 55020
Los Angeles CA 90055-2020

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FACSIMILE: 213.833.6717
WEB SITE: www.lacba.org

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June 14, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Ms. Hollins:

The Access to Justice Committee (AJC) of the Los Angeles County Bar (LACBA) has the following comments on Proposed Rule 7.5:

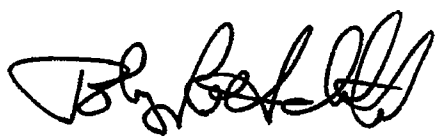
Rule 7.5 (a)

The AJC greatly appreciates the recommendation of the Rule Revision Commission to include this section in the proposed rules. The use of the name "legal aid" or other similar designation which implies that the user is a non-profit legal services provider is a common problem in California. While the existing rule covers this situation, moving the prohibition from the Board of Governors-adopted standards to the rule itself gives it increased credibility and strength.

The "phony legal aid" problem is obtaining increased attention in recent months. On January 1, 2010 a new law went into effect prohibiting the use of the name "legal aid" or "confusingly similar" names by anyone except a legitimate legal aid program. Several providers, including both lawyers and non-lawyer operations, have agreed to cease and desist from using the improper names. Having this language in a rule adopted by the Supreme Court, with comment [1] giving it added strength, may assist courts in interpreting the language of the new statute.

Thank you for the opportunity to comment on this rule.

Sincerely,



Toby Rothschild
Chair, Access to Justice Committee

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

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[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 7.5. Firm Names and Letterheads.**

1. OCTC supports this rule. Comments 1 and 2 should be broken down into several comments so that the ideas do not get buried. Also, a Comment should refer attorneys to section 6132 of the Business and Profession Code regarding their duty to remove the names of disbarred and resigned attorneys from their law firms.

# Rule 8.1 – Public Comment – File List

X-2010-421uu COPRAC [8.1]

X-2010-425-58fff SDCBA [8.1]

X-2010-513-1 OCTC [8.1]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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 8.1

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 8.1 – False Statement Regarding Application for Admission to Practice. COPRAC supports the adoption of proposed Rule 8.1 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

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Wells B. Lyman

**Conference of California Bar Associations District Nine Representative**
James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 8.1 False Statement Regarding Application for Admission to Practice Law**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The Rule should be adopted as written.

Rationale For Comment 1:

The Rule restates some existing case law (*In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483; *Spears v. The State Bar* (1930) 211 Cal. 183, 187) and the current Rule 1-200. New section 8.1 (c) appropriately expands the scope of the Rule to pro hac vice admissions, in house counsel and the limited scope admissions under the new California Rules of Court.

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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FACSIMILE: (415) 538-2220
http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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

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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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

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[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

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In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

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[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

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[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 8.1. False Statement Regarding Application for Admission to Practice Law.**

1. OCTC has the same objection to the use of the term knowingly in proposed rule 8.1 as to proposed rule 3.3. False statements made with reckless disregard are disciplinable.
2. There are too many comments and some are more appropriate for treatises, law review articles, and ethics opinions. Further, Comment 1, should advise that attorneys may be either disciplined (*In the Matter of Pasyanos* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 746) or their license cancelled. (*Goldstein v. State Bar* (1989) 47 Cal.3d 937.)

# Rule 8.1.1 – Public Comment – File List

X-2010-425-59ggg SDCBA [8.1.1]

X-2010-513-1 OCTC [8.1.1]

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**Conference of California Bar Associations District Nine Representative**
James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
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| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
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| Rule 1.16 | Declining or Terminating Representation |
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| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
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| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
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| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
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| Rule 6.3 | Legal Services Organizations |
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| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 8.1.1 Compliance with Conditions of Discipline and Agreements In Lieu of Discipline**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The proposed Rule should be adopted as written

Rationale For Comment 1:

The proposed Rule essentially restates existing California law (current Rule of Professional Conduct 1-110) and reflects sound public policy.

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

**Rule 8.1.1. Compliance with conditions of Discipline and Agreements in Lieu of Discipline.**

1. OCTC supports this rule.

# Rule 8.2 – Public Comment – File List

X-2010-421ww COPRAC [8.2]

X-2010-425-60hhh SDCBA [8.2]

X-2010-513-1 OCTC [8.2]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

June 15, 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–Judicial and Legal Officials; Lawyer as Candidate or Applicant for Judicial Office. COPRAC supports the adoption of proposed Rule 8.2 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
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| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
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| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
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| Rule 2.1 | Advisor |
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| Rule 3.8 | Special Responsibilities of a Prosecutor |
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| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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James W. Talley

February 12, 2010

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:**

~~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**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 8.2. Judicial and Legal Officials.**

1. OCTC supports this rule. However, Comment 1 is more appropriate for treatises, law review articles, and ethics opinions. Comment 2 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. OCTC thanks the Commission for its change of Comment 3.

# Rule 8.3 – Public Comment – File List

X-2010-425-61iii SDCBA [8.3]

X-2010-469-10j OCBA [8.3]

X-2010-511g State Bar LPMT [8.3]

X-2010-513-1 OCTC [8.3]

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May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

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**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 8.3: Reporting Professional Misconduct**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

Comment #2 to the Rule should be re-written to be cleaner and more comprehensible.

Rationale For Comment 1:

Suggested language for Comment #2
This Rule is not intended to allow a lawyer to report a violation of these Rules or the State Bar Act if doing so would:
(a) violate the lawyer's duty of protecting confidential information of a lawyer's client as provided in Business and Professions Code section 6068, subdivision (e);
(b) prejudice the interests of the lawyer's client;
(c) involve the unauthorized disclosure of information received by the lawyer in the course of participating in an approved lawyer's assistance program.

Comment 2:

Proposed Rule 8.3 seems to eliminate all references to reporting judicial misconduct. Comment #1 of the original rule stated, "Lawyers have a similar obligation with respect to judicial misconduct." Barring any significant purpose for omitting the reference, we think it would only be advantageous to include it in the proposed rule as well

OCBA

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OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

June 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 New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

| | |
|---|---|
| 1.2 | Scope of Representation |
| 1.5 | Fees for Legal Services |
| 1.13 | Organization as a Client |
| 1.18 | Duties to Prospective Client |
| 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| 6.2 | Accepting Appointments |
| 7.1 | Communications Concerning the Availability of Legal Services |
| 7.3 | Direct Contact with Prospective Clients |
| 7.5 | Firm Names and Letterheads |
| 8.3 | Reporting Professional Misconduct |

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

P.O. BOX 6130
NEWPORT BEACH, CA 92658
TELEPHONE 949/440-6700
FACSIMILE 949/440-6710
WWW.OCBAR.ORG

**MEMORANDUM**

Date: May 26, 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 8.3 – Reporting Professional Misconduct**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA agrees with paragraph (c), which states that a lawyer who knows that a judge or other adjudicative officer has committed a violation of applicable rules of judicial conduct that raises a substantial question as to that person's fitness for office may, but is not required to, report the violation to the appropriate authority. The OCBA recommends, however, that the words "or to hear a matter" be added after the phrase "fitness for office," as "fitness for office" appears to be too restrictive a term and would not include situations where the judge or judicial officer has acted or threatens to act improperly on only one occasion and only on a specific matter, but may still be otherwise fit for office.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 8.3 Reporting Professional Misconduct [1-500(B)]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

---

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached 6 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

# PROPOSED RULE 8.3 [1-120 & 1-500(B)]
# "REPORTING PROFESSIONAL MISCONDUCT"
# (DRAFT #6, 12/14/09)

***INTRODUCTION***

***Law Practice Management & Technology Section's (LPMT's) comment on Proposed Rule 8.3 concerns paragraph (a):***

> "(a) A lawyer who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall inform the appropriate disciplinary authority."

We recommend that the mandatory reporting requirement be removed. We set forth below our reasons for our recommendation. We also offer proposed alternative language to paragraph (a) and to paragraph (b) to conform it to the proposed changes to paragraph (a).

***ANALYSIS***

## I. Vagueness and Riskiness of the "Know" Standard

The State Bar should not predicate a rule on the assumption that a lawyer should be able to "know" when "a felonious criminal act" has been committed.[1]

In our system of jurisprudence, only a jury can "know" whether someone has committed a felonious criminal act. The Commission has recognized the importance of this principle by noting that: Before recognizing that unlawful conduct has occurred, a tribunal of competent jurisdiction shall have first adjudicated the allegation of unlawful conduct and found that such unlawful conduct occurred.

[1] We assume that Proposed Rule 8.3(a) is not directed to those circumstances in which the accused lawyer has been convicted of a felony, yet no one has notified the State Bar of that conviction.

*Compare* the standard in Proposed Rule 8.3(a) *with* the below-quoted language from Proposed Rule 8.4.1 [2-400] "Prohibited Discrimination in Law Practice Management and Operation" at Rule 8.4.1(c) and Comment [3]:

> "(c) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or nonoccurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed."
>
> Comment [3]
> "In order for discriminatory conduct to be sanctionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule."

Note also that Proposed Rule 8.4.1 concerns adjudication of allegations generally emanating from a *civil* complaint. A verdict in a civil matter requires a much lower standard of proof than the standard implicated by the context to which Proposed Rule 8.3 would apply, namely guilt beyond a reasonable doubt on a *criminal* felony charge.

Even if a lawyer might be said to "know" that another lawyer has committed a certain act, for a number of reasons, the lawyer may not know whether the act was a felony, or even a crime. The typical lawyer may be expected to know other types of rules or principles, for example the proper methods for preserving the identity of funds and property of a client (CRPC Rule 4-100). Knowledge of criminal law, however, should not be imputed to all lawyers.

A lack of certainty could result, for example, because California may treat certain acts as felonies but federal law does not, or vice versa. Consider the law regarding marijuana. A conviction for a drug offense "raises a substantial question as to that lawyer's . . . fitness." Yet, whether a lawyer's possession of a certain quantity of marijuana is a felony – or even a crime – in California depends on who arrests him. If it is the FBI, possession of any amount of marijuana is punishable by 1-20 years in

prison pursuant to 21 USC § 801 *et seq.* and, hence, is a felony. The People of California, however, have decreed that if one has the required prescription, one is not a felon but an invalid. California Health & Safety Code § 11362.5.[2]

A lawyer – who has not committed any offense – should not risk being charged with a violation of the Rules of Professional Conduct because the State Bar alleges that he or she knew or should have known (beyond a reasonable doubt) that

1. Another lawyer committed a specific act.

2. The criminal law of California and/or of the United States has deemed commission of that act a felony.

3. There are no surrounding circumstances or defenses that would lessen the seriousness of the offense.

4. A jury would reach the same conclusion.

## II. Where's The Fire the Bar is So Eager to Put Out?

Although we laud the Commission's goal, it may be proposing a solution where the problem – if it exists at all – is *de minimis*. The Commission proffers no evidence – and we are aware of none – to suggest that there is an underreporting by lawyers of other lawyers' felonious criminal acts. Indeed, "the Commission is not aware of any evidence of an underreporting of lawyer misconduct in California." Introduction at 4, ¶ b. Furthermore, if the goal of imposing such a duty on a lawyer is preventing "substantial harm to the public" (*Id.* at 4, ¶ a), should not the lawyer call the police instead? Disciplining the "lawyer who knows" offers scant "additional public protection" (*id.*). Proposed Rule 8.4(a) is unlikely to deter a lawyer bent on committing a felonious criminal act. We also do not want to mislead the people of California into thinking that the State Bar has now provided them substantial protection against felons posing as lawyers – namely protection beyond the reach of the California Penal Code.[3]

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[2] Proposition 215 was the basis for the Compassionate Use Act of 1996, or CUA. Under the CUA, there is no specific maximum/minimum amount of marijuana prohibited from possession because the amount depends on the patient's illness and what the physician prescribes.

[3] We appreciate the goal, a lawyer's "fitness", however, is too vague for any disciplinary rule. Any felonious criminal act committed by a lawyer may – let alone *does* – raise a substantial question as to that lawyer's fitness as a lawyer. Nor are we helped much by the qualifiers "honesty" and "trustworthiness" (assuming the two concepts differ materially). Any lawyer who has committed a felonious criminal act is already dishonest in his or her obligations to the State Bar. In addition, unless the felonious criminal act

## III. Mandatory Nature of Reporting Requirement Could Prejudice the Client

Even if we did not have the above concerns, we would still urge the removal of any mandatory reporting requirement because of its potential to prejudice the client and to damage the attorney-client relationship. The California Supreme Court recently reaffirmed the central importance of protecting the attorney-client relationship. *Costco Wholesale Corp. v. Superior Court* (November 30, 2009) 47 Cal. 4th 725 [decided just before the final draft of this rule was approved]. "[T]he fundamental purpose of the attorney-client privilege is the preservation of the confidential relationship between attorney and client . . . ." *Id.*, 2009 Cal. LEXIS 12375 at 8.

We agree with the Commission's reluctance to impose on a California lawyer that which befell James H. Himmel, Esq. *See In re Himmel*, 533 N.E.2d 790 (Ill. 1988) [lawyer suspended who abided by client's directive not to report her former counsel's misconduct]. In particular, the Commission has acknowledged that:

> "As exemplified by *Himmel*, mandatory lawyer reporting compels the client to be a participant in the disciplinary process without the client's consent and even over the client's objections. The Commission considers the client loyalty issue paramount. Broadly mandating reporting of another lawyer's misconduct could prejudice the reporting lawyer's client, e.g., by: (i) disclosing the client's confidential information; (ii) interfering with the pursuit of the client's legitimate objectives; (iii) implicating the client in wrongdoing; and (iv) as mentioned below (see ¶. 9 of this Introduction), embroiling the client as a witness in the disciplinary proceedings."

Introduction at 4, ¶ a.

*(c't'd)*

---

requires proof of dishonesty – and all the other requirements of 8.4(a) are met – it would be unfair to expect each lawyer in the state to conclude fairly that another attorney has been dishonest.

***CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE***

For the foregoing reasons, we recommend that Proposed Rule 8.3(a) & (b) and Comments [1] – [3] be amended as follows:

> (a) A lawyer ~~who knows that another lawyer has committed a felonious criminal act that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall~~ may, but is not required to, inform the appropriate disciplinary authority that another lawyer has committed a felonious criminal act.
>
> (b) ~~Except as required by paragraph (a), a~~ A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.
>
> COMMENT
>
> [1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act ~~that is not required by paragraph (a)~~, a lawyer should consider, [insert comma] among other things, [insert comma] whether the violation raises a substantial question as to another lawyer's honesty, trustworthiness, [insert comma] or fitness as a lawyer.
>
> [2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. *See, e.g.,* Business and Professions Code section 6068(o). ~~In addition, a lawyer is not obligated to report a felonious criminal act under paragraph (a) committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.~~ In addition, under paragraph (a), a lawyer should not report a felonious criminal act committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.
>
> [3] Even if a lawyer is permitted ~~or required~~ to report under this Rule, the lawyer must not threaten to file criminal, administrative, [insert comma] or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.

*(c't'd)*

Clean version of amended Proposed Rule 8.3(a) & (b) and Comments [1] – [3]:

(a) A lawyer may, but is not required to, inform the appropriate disciplinary authority that another lawyer has committed a felonious criminal act.

(b) A lawyer may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act.

COMMENT

[1] In deciding whether to report another lawyer's violation of these Rules or the State Bar Act, a lawyer should consider, among other things, whether the violation raises a substantial question as to another lawyer's honesty, trustworthiness, or fitness as a lawyer.

[2] This Rule does not abrogate a lawyer's obligations to report the lawyer's own conduct as required under the State Bar Act. *See, e.g.,* Business and Professions Code section 6068(o). In addition, under paragraph (a), a lawyer should not report a felonious criminal act committed by another lawyer if doing so would infringe on the reporting lawyer's privilege against self-incrimination.

[3] Even if a lawyer is permitted to report under this Rule, the lawyer must not threaten to file criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute in violation of Rule 3.10.

**THE STATE BAR OF CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 8.3. Reporting Professional Misconduct.**

1. OCTC believes that Comments 1, 3, and 4 are more appropriate for treatises, law review articles, and ethics opinions.

# Rule 8.4 – Public Comment – File List

X-2010-421hh COPRAC [8.4]

X-2010-425-62jjj SDCBA [8.4]

X-2010-512c US Attorney [8.4]

X-2010-513-1 OCTC [8.4]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2161

June 11, 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 8.4

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 8.4 - Misconduct. COPRAC generally supports the adoption of proposed Rule 8.4 and the Comments to the Rule. Further, COPRAC disagrees with the minority position expressed in the Explanation to paragraph (d) of the Rule, and agrees that the addition of the phrase "in connection with the practice of law" is appropriate.

However, with respect to Comment [3], COPRAC agrees with the minority position expressed in the Introduction to the Rule: this comment may have the effect of chilling protected speech under both the First Amendment and the California Constitution. Further, the language of the comment goes beyond the black letter rule of paragraph (d) and, by implication, suggests that such protected speech (and related conduct) could be the basis for attorney discipline. COPRAC submits that discipline for such conduct is more appropriately addressed in proposed Rule 8.4.1, where discipline may be imposed only after a separate tribunal has found that the attorney has engaged in discriminatory conduct that is unlawful. As a result, we respectfully suggest that Comment [3] be deleted from the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
| Rule 4.3 | Dealing with Unrepresented Person |
| Rule 4.4 | Respect for Rights of Third Persons *BATCH 6* |
| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
| Rule 5.2 | Responsibilities of a Subordinate Lawyer |
| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

October 10, 2006

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Lilys D. McCoy

Audry Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,

Andrew S. Albert, President
San Diego County Bar Association

Enclosures

● 1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.338.0042 | bar@sdcba.org | sdcba.org

**MEMORANDUM**

Date: October 16, 2006

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California

From: San Diego County Bar Association ("SDCBA")

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 8.4: Misconduct**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The Rule should be adopted as written.

Rationale For Comment 1:

The Rule is wholly new. It does something new in California law, draw parameters around the concept of "professional misconduct." Except for the section that deals with criminal conduct as a basis for discipline (where it tracks existing California statutory law, Bus. & Prof. Code §6101(a)) it eliminates the fuzzy moral turpitude concept. Comment [8] acknowledges that this makes no practical difference in light of Bus. & Prof Code section 6106 (providing that acts of moral turpitude provide cause for disbarment of suspension). But it is step in the right direction.

Proposed section (e) is not present in the corresponding ABA Model Rule. This section is intended to replace current Rule of Professional Conduct 2-400(B). The proposed Rule is narrower is scope and would only apply where the conduct has a prejudicial impact on the administration of justice, however, it does not require a finding of discrimination. The Commission's notes on the proposed section note that the prohibition against offensive personality in Business & Professions Code section 6068(f) was found unconstitutional (*U.S. v. Wunsch* (9th Cir.. 1996) 84 F.3d 110).

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** United States Attorney's Offices for the Central, Eastern

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** George S. Cardona

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) george.s.cardona@usdoj.gov

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 8.4 Misconduct [1-120]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

TO: Board of Governors
State Bar of California

FROM: André Birotte Jr.
United States Attorney
Central District of California

Laura E. Duffy
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 1.11, 3.8(g) and (h), 8.4(c), and 8.5(b)

DATE: June 14, 2010

We want to thank the Rules Revision Commission ("the Commission") and the Board of Governors for all the hard work that has been done on the proposed revisions to the California Rules of Professional Conduct; for the willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors; and, in a number of instances, for changes to the proposed rules based on consideration of these views. We believe the proposed rules that are before the Board of Governors include a number of modifications made during the revision process that address many of the concerns we have previously expressed. We write to provide comments on portions of four rules, Proposed Rules 1.11, 3.8(g) & (h), 8.4(c), and 8.5(b), that we continue to believe, in their current form, could have a substantial negative impact on the work of the prosecutors in our offices and the United States Department of Justice.

A. Proposed Rule 1.11

We appreciate the decision not to adopt the previously-proposed paragraph (e), which would have imputed conflicts within government agencies, and instead to recognize that both the imputation of conflicts within government agencies and the effectiveness of screening to avoid such imputation are matters better left to development by the case law. We are concerned, however, that the proposed comments addressing this topic, the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is

appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we would suggest that the Proposed Comments be modified as follows.

First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of the Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comments closer to the ABA Model Rule comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Proposed Comment [2] would read:

> [2] Paragraphs (a)(1), and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. This Rule does not impute a current government lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law.

Second, we would suggest that proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to Younger (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read:

> This Rule Not Determinative Of Disqualification
>
> [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *In re Charlisse C.*, 45 Cal. 4th 145 [84 Cal.Rptr.3d 597] (2008); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424.

B. Proposed Rule 3.8(g), (h)

As you know, our offices prosecute all federal crimes in California. As prosecutors, we support the goal of Proposed Rule 3.8(g), (h). We have always held our attorneys to the highest standard of professional conduct and expect, when exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed promptly after its discovery. Moreover, we would not countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant's innocence, therefore, we expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.

Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, and, accordingly, feel obligated to object to the Proposed Rule as drafted, for the following reasons:

1. **Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.

2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Department previously provided to the ABA and the Commission modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently address this issue. We respectfully disagree. If a prosecutor in jurisdiction A learns of evidence tending to show the innocence of a defendant previously convicted by a prosecutor's office in jurisdiction B, in which the prosecutor in jurisdiction A has never served, then the prosecutor in jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in jurisdiction A will not know what evidence was presented at the trial in jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in jurisdiction B. The prosecutor in jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for

assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.

3. **Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.** Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure loses all signaling capacity it might have had – the disclosure will be interpreted not as representing a prosecutor's judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor's decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.

4. **Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein.** First, the term "knows" is undefined in the proposed rule. It is defined elsewhere in the Proposed Rules to mean "actual knowledge of the fact in question." Proposed Rule 1.0.1(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings relating to the conviction and asserting prosecutorial misconduct, often based on claims that the prosecutor concealed clear exculpatory evidence of which the defendant has just become aware. For example, a common claim is that an inmate has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant's asserted alibi for the time of the crime. Would a prosecutor receiving a letter making this claim "know" of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor would be on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant's asserted alibi.

But we submit that, without further investigation, the prosecutor simply cannot "know" whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant's alibi.

Second, we are concerned by the use of the term "material" without a correlating definition. While not defined in Proposed Rule 3.8 or its comments, or in the general terminology definitions in Proposed Rule 1.0.1, the term "material" or "materiality" is used elsewhere in the Proposed Rules and the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Proposed Rules 1.7(a)(2), 3.3(a)(1); ABA Model Rules 1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer's duty to correct material false statements made to court, "materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation."). This meaning of "material" appears to be referenced in Proposed Comment [6A], which cross-references to Proposed Rule 3.3. In the criminal context, however, the term "material" is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). In the context of Rule 3.8(g), that "materiality" should be subject to this latter interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]" We believe this is the proper interpretation of "material" for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term "material" is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.

Third, we believe the proposed rule's use of the term "promptly" is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule's ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is "new, credible, and material." Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently "promptly."

Fourth, we are concerned with the mandate that a prosecutor "undertake further investigation" or "make reasonable efforts to cause an investigation." Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of "new, credible and material" evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. **Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein.** First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps <u>may include</u> disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post-conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures

that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. **Proposed Comment [9]'s "good faith" exception.** We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. We agree with the standard chosen, that is, a quasi-subjective standard that looks to the individual prosecutor's belief, but asks whether that belief is "reasonable" ("judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted"), but believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to "know" of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not "know" of such evidence. Without some guidance on these points, it will be impossible for a prosecutor to determine whether his actions in evaluating evidence will be deemed sufficiently "reasonable" to bring the good faith exception into play should the prosecutor's judgment subsequently be second guessed.

7. **Potential conflict with other Rules of Professional Conduct and other applicable laws.** The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors' obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and Proposed Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidential information. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Alternatively, if the obligations under Proposed Rule 3.8(g), (h) are not intended to override this duty, the proposed rule should make this clear. In response to our earlier comment on this point, the Commission has suggested that conflicts of this type are not uncommon, noting in particular that "conflicts between a duty of confidentiality and a duty of candor can implicate the conduct of any lawyer," and stating that "[a] one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules." We note, however, that other proposed rules do in fact resolve disputes between specific duties of disclosure and the general duty of confidentiality. Thus, for example, Rule 3.3 (b) makes clear that a lawyer is required to take "reasonable remedial measures" only "to the extent permitted by Business and Professions Code 6068(e)." See also Rule 3.3, Comment 10 (required remedial measures "do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code Section 6068(e)").

Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(l), and the Department of Justice to civil liability, 5 U.S.C. §

552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws. Accordingly, we suggest that, if these subsections are adopted, the comments should make clear that the obligations they impose are subject to a prosecutor's compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.

8. **Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.** Prosecutors and their limited resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction) will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to ensure that they do not run afoul of this rule. The Board of Governors should understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of "new" evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted "new" witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.

C. Proposed Rule 8.4(c)

As drafted, Proposed Rule 8.4(c) defines it to be professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation." There is no comment discussing or limiting this prohibition. It is well established, however, that government attorneys may supervise investigations that require informants and agents to engage in deceit and misrepresentation in order to infiltrate criminal organizations or uncover criminal activity. See, e.g., United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers). A standard Ninth Circuit jury instruction advises juries of the propriety of such conduct. See Ninth Circuit Model Criminal Jury Instruction 4.13 (Government's Use of Undercover Agents And Informants). Government attorneys engaged in civil enforcement investigations involving consumer frauds or civil rights violations also may use individuals who misrepresent themselves to be customers or renters to uncover evidence of violations of law. Oregon has adopted a rule specifically stating that such activity by attorneys will not be deemed misconduct:

> . . . it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor of supervisor only when the 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.

Oregon Rule of Professional Conduct 8.4(b).

We believe that guidance along the lines of the Oregon model would be appropriate to ensure that government attorneys overseeing these types of investigations do not run the risk of discipline based on conduct recognized to be appropriate that serves valid public interests. To accomplish this, we propose that the following new comment be added in connection with Proposed Rule 8.4(c):

> [#] Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct, where a lawyer advises clients or others about or assists or supervises lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the 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. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful.

We recommend the addition of the last sentence above to ensure that private attorneys are not misled by the balance of the comment 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. The last sentence of this proposed comment will avoid any suggestion that it is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions.

D. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over lawyers admitted to practice in California, regardless of where their conduct occurs, and over lawyers not admitted to practice in California if they "provide[] or offer to provide any legal services in California." As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney's Offices, even if not admitted in California, may be subject to discipline in California even if only a small part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California). We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we think it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing rules of professional conduct. Otherwise, lawyers working multi-jurisdictional investigations will be put in the often impossible position of reconciling different rules of professional conduct that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)'s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts Department of Justice and other attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconciliable. We urge the Commission to adopt ABA Model Rule 8.5(b)(2), or a similarly-worded provision, to provide consistency and predicability in the choice of law rules so that lawyers working multi-jurisdictional investigations may reasonably determine what rules will apply and conform their conduct to those rules.

Although Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) to provide a consistent choice of law rule when a multi-jurisdictional matter is pending before a tribunal – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal's own rules provide otherwise – there is no similarly consistency in the choice of law rule applied when a lawyer is involved in a multi-jurisdictional investigation that is not yet pending before a tribunal, that is, before the filing of a civil complaint or criminal charge. This is because Proposed Rule 8.5(b)(2) rejects the

"predominant effect of the conduct" standard and the "safe harbor" provision of the Model Rule, substituting instead a rule that, for matters not yet before a tribunal, a lawyer is subject to the California rules unless "specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from" the California rules. See also Proposed Comment [4] (explaining that this rule is intended to apply even to those cases in which lawyer's conduct is in anticipation of proceeding that is likely to be, but not yet before a tribunal). If this rule is adopted, it will mean that a Department of Justice lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-complaint investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct during the investigation, even though the case has no nexus to California and no California resident's interests are at stake. As soon as an indictment or complaint is filed in Pennsylvania, however, the Pennsylvania Rules will apply to that same lawyer's conduct. In contrast, this lawyer's colleague, licensed in a state (such as Pennsylvania) that has adopted the ABA Model Rule "predominant effect" test, will likely be bound by the Pennsylvania rules during the investigation. The California-admitted federal government lawyer, practicing outside California, therefore, would have to tailor her investigation, including the supervision of law enforcement officers or investigators, differently than her non-California licensed colleagues in the same case, merely because she is licensed in California.[1] Moreover, the lawyer may have to change her conduct during the investigation, merely because an indictment or complaint has been filed. The opportunities for confusion and litigation are limited only by the imagination. For example, what rules will goven the lawyer's conduct if a complaint is filed that names only some, but not all of the potential defendants? If the lawyer continues her investigation, should she follow the Pennsylvania Rules only as to the named defendants while continuing to follow the California Rules as to the the unnamed defendants? What rules will govern her conduct with respect to witnesses who may provide information relating to both named and unnamed defendants? It is difficult to understand how the interests of either California or its residents are served by subjecting lawyers overseeing multi-jurisdictional investigations to the confusion resulting from different choice of law rules that may render applicable different rules of professional conduct, if California's interests are not at issue.[2]

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[1] The difficulties posed may be particularly significant in those instances where California's Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California's Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another") and 1.6(b)(3) ("to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used") or where an issue concerning the lawyer's implied authority for disclosure is at issue, a concept that has also been rejected in California's Proposed Rule 1.6.

[2] The Commission rejected our previous comment along these same lines based on its conclusion that, "The detailed explanation provided in support of this Comment argues, in effect,

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

**Conclusion**

For the foregoing reasons, we request a modification of the comments to Proposed Rule 1.11 to make more clear that the rule does not impute conflicts within government agencies. We also oppose the adoption of Proposed Rule 3.8(g), (h); if the Board of Governors ultimately concludes that adoption of some variation of these provisions is warranted, we believe that they should be substantially redrafted along the lines we previously proposed. In addition, we propose the addition of a comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

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that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions." Respectfully, we disagree. We do not believe the situations posed by the discussion above will be so rare given the growing frequency of multi-jurisdictional investigations conducted by DOJ attorneys, and we see no reason why the choice of law rules applicable to attorneys conducting such investigations should apply completely differently based solely on the timing of the filing that puts a case before a particular tribunal when it is known all along where that filing will ultimately occur. We seek not uncertainty, but the certainty that will come with a lawyer's ability to know which set of rules will apply, to know that those rules will apply both pre- and post-filing, and to conform conduct to those rules.

**Exhibit A**

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

(g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:

(1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:

(i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or

(ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).

(2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

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[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.

**U.S. Department of Justice**

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained – pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows[1] "new, credible and material" exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is "new, credible and material." Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is "new, credible and material." We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor's subjective intent should be used in determining adherence to this rule.

"Material"

Secondly, we are concerned with the use of the term "material" in the rule. . Neither the proposed Rule nor the Comments defines the term "material." In a criminal context, the term "material" is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

However, the term "material" or "materially" is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be "materially limited" by the lawyer's own interests or the interests of a third person); ABA Model Rules of Prof'l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct "material" false statements made to a court); ABA Model Rules of Prof'l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a "material" false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term "material" may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer's duty to correct material false statements made to a court, "materiality encompasses matters represented to a tribunal that the judge would

[1] The term "know" is defined in the Model Rules to mean "actual knowledge of the fact in question[,]" Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.").

We would believe that this confusion could be remedied by making clear that the term "material" is used in the Brady sense of the term.

"Promptly"

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must "promptly" disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor must "promptly" disclose the evidence to the defendant and undertake further investigation. Although the term "promptly" is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.4(a) (2007) (requiring a lawyer to "promptly" consult with clients about certain matters and "promptly" comply with a client's reasonable request for information); ABA Model Rules of Prof'l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to "promptly" notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof'l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to "promptly" notify the sender). Based upon the construction of the term "promptly" when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel's firm "promptly"; the attorney was not screened until ten days after he started working at the new firm; court discounted firm's description of administrative delays in light of the fact that the firm knew prior to the attorney's arrival that he was working as opposing counsel on the case).

When the term "promptly" is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is "new, credible and material," particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term "promptly" was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and "know" that the evidence is "new, credible and material."

"Seek to remedy the conviction"

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor "shall seek to remedy the conviction." Proposed Comment [8] states,

> Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to "seek to remedy the conviction" may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. See, e.g., Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);[1] Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to "remedy" a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

> Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

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[1]Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a)("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.[2] Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to "remedy" a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people's desire for finality of criminal convictions is an equally compelling interest to be served. "[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

> A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

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[2]Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion "[n]otwithstanding any law that would bar a motion under this paragraph as untimely." 18 U.S.C. § 3600(g)(1) (Supp. 2007).

> languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

David Margolis
Associate Deputy Attorney General

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 8.4. Misconduct.**

1. OCTC supports this rule. However, OCTC believes that the Model Rules version of subparagraph (a) is clearer and better. The Model Rules also prohibit an attorney from violating or attempting to violate the Rules of Professional Conduct. There is no sound reason to exclude this language.
2. OCTC believes that subparagraph (f) should include solicit or induce a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. This would be the same as in subparagraph (a) for violations of these rules or the State Bar Act. While this is not in the Model Rules, there is no reason for the differences between (a) and (f).
3. Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. OCTC supports Comments 2A, 2B and 6.
4. OCTC has concerns about Comment 3. It seems overly broad and the last sentence is confusing. It appears to venture into an area of evidence and may incorrectly state the law. If the finding is made by clear and convincing evidence or beyond a reasonable doubt, collateral estoppel would appear to apply. If the finding is not by those standards, then the decision is given great weight but is rebuttable. (See *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112.) OCTC recommends that this Comment be stricken or clarified.
5. OCTC is very concerned about the last sentence of Comment 6, which states "This Rule is not intended to provide a basis for duplicative charging of misconduct for a single illegal act." This is beyond the scope of the Rules and Comments. This Comment invades the prosecutory discretion of OCTC and the independence of the Chief Trial Counsel. There are often very valid reasons for duplicative charging, if for no other reason than the elements of the various charges may be different and the State Bar Court is very reluctant to find a lesser included offense. In fact, the Supreme Court rejected the notion that it objected to duplicative charging. (See *Furey v. Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1307 fn. 2 ["We do not wish to intimate that we object to the bringing of potentially overlapping charges; obviously, the Commission may make any charges justified by the evidence."]) Further, in disciplinary cases, the State Bar Court sometimes dismisses duplicative charges, but other times it does not, although it gives them no additional weight. (See *In the Matter of Wolf* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 10-11; *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 919, fn. 11; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175.) OCTC asks that this sentence be stricken.

# Rule 8.4.1 – Public Comment – File List

X-2010-425-63kkk SDCBA [8.4.1]

X-2010-511h State Bar LPMT [8.4.1]

X-2010-513-1 OCTC [8.4.1]

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May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
| Rule 3.4 | Fairness to Opposing Party and Counsel |
| Rule 3.5 | Impartiality and Decorum of the Tribunal |
| Rule 3.6 | Trial Publicity |
| Rule 3.7 | Lawyer As A Witness |

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| | |
|---|---|
| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
| Rule 3.10 | Threatening Criminal, Administrative, or Disciplinary Charges |
| Rule 4.1 | Truthfulness in Statements to Others *BATCH 6* |
| Rule 4.2 | Communication with a Person Represented by Counsel |
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| Rule 5.1 | Responsibilities of Partners, Managers, and Supervisory Lawyers |
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| Rule 5.3 | Responsibilities Regarding Nonlawyer Assistants |
| Rule 5.3.1 | Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member |
| Rule 5.4 | Duty to Avoid Interference with a Lawyer's Professional Independence |
| Rule 5.5 | Unauthorized Practice of Law; Multijurisdictional Practice |
| Rule 5.6 | Restrictions on Right to Practice |
| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
| Rule 6.2 | Accepting Appointments *BATCH 6* |
| Rule 6.3 | Legal Services Organizations |
| Rule 6.4 | Law Reform Activities |
| Rule 6.5 | Limited Legal Services Programs *BATCH 6* |
| Rule 7.1 | Communications Concerning the Availability of Legal Services |
| Rule 7.2 | Advertising |
| Rule 7.3 | Direct Contact with Prospective Clients |
| Rule 7.4 | Communication of Fields of Practice and Specialization |
| Rule 7.5 | Firm Names and Letterheads |
| Rule 8.1 | False Statement Regarding Application for Admission to Practice |
| Rule 8.1.1 | Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

## Hollins, Audrey

**From:** Ross G. Simmons [ross@rblaw.com]
**Sent:** Friday, November 16, 2007 11:43 AM
**To:** Hollins, Audrey
**Cc:** McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
**Subject:** SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
**THE SIMMONS FIRM, ALC**
Suite 390 The Promontory
11440 West Bernardo Court
San Diego, CA 92127-1655
v - (858) 676-1668 x304
f - (858) 676-1839
ross@rblaw.com
www.rblaw.com

U.S. Treasury Circular 230 Notice: Any U.S. federal tax advice included in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding U.S. federal tax-related penalties, or (ii) promoting, marketing, or recommending to another party any tax-related matter addressed herein.

**MEMORANDUM**

Date: November 16, 2007

To: Special Commission for the Revision of the Rules of Professional Conduct
The State Bar of California ("Commission")

From: San Diego County Bar Association ("SDCBA")

Re: "2nd PC Batch," Proposed New or Amended Rules of Professional Conduct of the State Bar of California

**Subj: Proposed Rule 8.4.1** Prohibited Discrimination in Law Practice Management and Operation [2-400]

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

The SDCBA respectfully submits the following concerning the subject proposed Rule:

* * * * *

Comment 1:

The modified rule is approved as proposed.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

---

The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

---

***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation [2-400]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

---

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Please see attached 2 page .pdf.

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 8.4.1 [2-400]**
**"PROHIBITED DISCRIMINATION IN**
**LAW PRACTICE MANAGEMENT AND OPERATION"**

***INTRODUCTION***

The Law Practice Management & Technology (LPMT) Section applauds the State Bar's noble intentions in reiterating the principles present in the current Rule of Professional Conduct Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice. Discrimination has no place in our society, least of all among those charged with realizing the promise of the Declaration of Independence: that all are equal.

We fear, however, that, given the lightness of the remedies available to the State Bar, this Proposed Rule would not be useful.

***ANALYSIS***

The State Bar may act only after a final judgment in an arena where settlement is the rule, and final judgments are rare. In terms of what the State Bar will do pursuant to the Rules of Professional Conduct, we have come no further than what has been in place under current Rules of Professional Conduct, Rule 2-400.

We agree with the Minority Position:

> "A minority of the Commission has dissented from this provision on the ground that its inclusion renders the Rule unenforceable because it provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct."

*Explanation of Changes to the California Rule 2-400*, at 7.

***CONCLUSION***

We therefore request the State Bar and, where appropriate, the Commission to explore more innovative approaches. Instead of putting the issue adrift on ice while being studied, however, please engage members of the bar and bench to grapple with perhaps the defining legal and moral issue in American history. Indeed, this honorable principle is one that runs from before the founding of the Republic to this very day.

**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
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http://www.calbar.ca.gov

DIRECT DIAL: (415) 538-2063

June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

---

[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 8.4.1. Prohibited Discrimination in Law Practice Management and Operation.**

1. Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. We would support Comment 2.

# Rule 8.5 – Public Comment – File List

X-2010-421v COPRAC [8.5]

X-2010-425-64lll SDCBA [8.5]

X-2010-511i State Bar LPMT [8.5]

X-2010-512d US Attorney [8.5]

X-2010-513-68 OCTC [8.5]

**THE STATE BAR OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639 TELEPHONE: (415) 538-2161

May 6, 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 8.5

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 8.5 - Disciplinary Authority; Choice of Law. COPRAC supports the adoption of proposed Rule 8.5 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of California Bar Associations District Nine Representative**
James W. Talley

May 6, 2010

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re:

| RULE | TITLE |
|---|---|
| Rule 1.0 | Purpose and Scope of the Rules of Professional Conduct |
| Rule 1.0.1 | Terminology *BATCH 6* |
| Rule 1.1 | Competence |
| Rule 1.2 | Scope of Representation and Allocation of Authority Between Client and Lawyer |
| Rule 1.4 | Communication |
| Rule 1.4.1 | Disclosure of Professional Liability Insurance *BATCH 6* |
| Rule 1.5 | Fee for Legal Services |
| Rule 1.5.1 | Financial Arrangements Among Lawyers |
| Rule 1.6 | Confidential Information of a Client |
| Rule 1.7 | Conflict of Interests: Current Clients |
| Rule 1.8.1 | Business Transactions with a Client and Acquiring Interests Adverse to the Client |
| Rule 1.8.2 | Use of a Current Client's Confidential Information |
| Rule 1.8.3 | Gifts from Client |
| Rule 1.8.5 | Payment of Personal or Business Expenses Incurred by or for a Client |
| Rule 1.8.6 | Payments Not From Client |
| Rule 1.8.7 | Aggregate Settlements |
| Rule 1.8.8 | Limiting Liability to Client |
| Rule 1.8.9 | Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review |
| Rule 1.8.10 | Sexual Relations with Client |
| Rule 1.8.11 | Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) |
| Rule 1.9 | Duties to Former Clients |
| Rule 1.11 | Special Conflicts for Former and Current Government Officers and Employees *BATCH 6* |
| Rule 1.12 | Former Judge, Arbitrator, Mediator or Other Third-Party Neutral |
| Rule 1.13 | Organization as Client |
| Rule 1.14 | Client with Diminished Capacity |
| Rule 1.15 | Handling Funds and Property of Clients and Other Persons |
| Rule 1.16 | Declining or Terminating Representation |
| Rule 1.17 | Purchase and Sale of a Law Practice *BATCH 6* |
| Rule 1.18 | Duties to Prospective Clients *BATCH 6* |
| Rule 2.1 | Advisor |
| Rule 2.4 | Lawyer as a Third-Party Neutral |
| Rule 2.4.1 | Lawyer as a Temporary Judge |
| Rule 3.1 | Meritorious Claims |
| Rule 3.3 | Candor Toward the Tribunal |
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| | |
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| Rule 3.8 | Special Responsibilities of a Prosecutor |
| Rule 3.9 | Advocate in Non-adjudicative Proceedings *BATCH 6* |
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| Rule 6.1 | Voluntary Pro Bono Publico Service *BATCH 6* |
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| Rule 6.3 | Legal Services Organizations |
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| Rule 8.2 | Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6* |
| Rule 8.3 | Reporting Professional Misconduct |
| Rule 8.4 | Misconduct |
| Rule 8.4.1 | Prohibited Discrimination in Law Practice Management and Operation |
| Rule 8.5 | Disciplinary Authority; Choice of Law |

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,

Patrick L. Hosey /RL

Patrick L. Hosey, President
San Diego County Bar Association

SAN DIEGO COUNTY BAR ASSOCIATION

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**Conference of Delegates of California Bar Associations District Nine Representative**
James W. Talley

November 11, 2009

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 5 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

1333 Seventh Avenue, San Diego, CA 92101 | P 619.231.0781 | F 619.233.3949 | ...

SDCBA Legal Ethics Committee
Subcommittee for Responses to Requests for Public Comment
Coversheet to Recommendations on State Bar of California Rules Revision Commission
Batch 5

Rule 1.2 Scope of Representation [N/A]
APPROVE

Rule 1.6 Confidentiality of Information [3-100, B&P 6068(e)]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.8.2 Use of Confidential Information [3-100, 3-310]
APPROVE

Rule 1.8.13 Imputation of Personal Conflicts [N/A]
APPROVE

Rule 1.9 Duties to Former Clients [3-310]
APPROVE

Rule 1.10 Imputation of Conflicts: General Rule [N/A]
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)

Rule 1.12 Former Judge, Arbitrator, Mediator [N/A]
APPROVE WITH MODIFICATIONS – see comments

Rule 1.14 Client with Diminished Capacity [N/A]
APPROVE

Rule 2.1 Advisor [N/A]
APPROVE

Rule 3.8 Responsibilities of a Prosecutor [5-110]
NO POSITION TAKEN – see comments

Rule 8.5 Choice of Law [1-100(D)] SIMMONS
APPROVE

**SDCBA Legal Ethics Committee**
**Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5**
**SDCBA Legal Ethics Committee Deadline October 8, 2009**
**Subcommittee Deadline October 26, 2009**
**State Bar Comment Deadline November 13, 2009**

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: CRPC 1-100(D) Geographic Scope of Rules

Proposed New Rule No./ Title: Rule 8.5 Disciplinary Authority; Choice of Law

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [ X ] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X ] No [ ]

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

**The essence of the Commission's proposal is to retain the California rule, and yet modify it to fit the Model Rule format, minimizing disruption in modification. Succinctly stated, the California Rules apply to all lawyers licensed to practice in California, without regard to the situs of conduct, and can only be preempted where a lawyer is specifically required by a foreign jurisdiction to follow a different rule.**

**This differs from the Model Rule, which determines applicable rules by the jurisdiction of "predominant effect" of the lawyer's conduct. As a safe harbor, it allows the lawyer to apply "the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." The "predominant effect" was removed as ambiguous and unnecessary.**

**CONCLUSIONS (pick one):**

[ X] We approve the new rule in its entirety.

[ ] We approve the new rule with modifications.*

[ ] We disapprove the new rule and support keeping the old rule.

[ ] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[ ] We abstain from voting on the new rule but submit comments for your consideration.*

* If you select one of the * options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT
## PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on *one* Rule per form submission and that you choose the proposed Rule from the drop-down box below.
*All information submitted is regarded as public record.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** State Bar of California Law Practice Management & Te

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** William E. Hoffman, Esq.

*** City** Pacific Palisades

*** State** California

*** Email address** (You will receive a copy of your comment submission.) willhoffman@verizon.net

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The following proposed rules can be viewed by clicking on the following link: **Proposed Rules of Professional Conduct.**

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***** Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: Rules Not Recommended Public Comment Form.

Rule 8.5 Disciplinary Authority; Choice of Law [1-100(D)]

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- ( ) AGREE with this proposed Rule
- ( ) DISAGREE with this proposed Rule
- (•) AGREE ONLY IF MODIFIED

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LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION
THE STATE BAR OF CALIFORNIA

**PROPOSED RULE 8.5 [RPC 1-100(D)]**
**"DISCIPLINARY AUTHORITY; CHOICE OF LAW"**
**(DRAFT #4, 2/26/10)**

***INTRODUCTION***

The Law Practice Management & Technology (LPMT) Section's comment on Proposed Rule 8.5 concerns paragraph (b):

> (b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
>
> > (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and
> >
> > (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules."

LPMT should like to highlight a potential difficulty present in Proposed Rule 8.5, much like CRPC 1-100(D) before it -- yet a difficulty much less obvious than its analogue that existed in years past. That difficulty arises from the extraterritorial reach of the California Code of Professional Conduct. With the rise of multijurisdictional practice, such reach may easily put lawyers of good faith in a bind. (We shall set aside the conundrum of where one may be said to be "practicing" if physically present in one jurisdiction, lawfully advising a client in another jurisdiction, regarding a matter in a third jurisdiction.)

***ANALYSIS***

## I. Diverse Types of Proscribed Conduct

It may be that the difficulty increases the more the Rules of Professional Conduct diverge from what may be called acts that are *malum in se* to those that are merely *malum prohibitum*. Of course, some of the latter are critical to protect clients from the former. For example, one method of accounting for client funds may not be inherently more ethical than certain others. Nonetheless, there is an inherent need for a uniform method to protect clients from acts that are clearly *malum prohibitum*. Lawyers must keep their books in a specified way to shield clients from acts of fraud and theft.

## II. Tricky Conflicts Between Sister States' Respective Rules

### A. Conflict # 1 – Permissive vs. Mandatory

The difficulty arises most prominently where one jurisdiction's rule is permissive but California's is mandatory. For example, consider Proposed Rule 4.4 [n/a] "Duties Concerning Inadvertently Transmitted Writings":

> "A lawyer who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine, and where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender."

Using the conduct described in Proposed Rule 4.4 as an example, certain jurisdictions *allow* an attorney to notify the sender *but do not require it*. In faith to that jurisdiction's rule, notification is optional. A lawyer properly practicing in such a jurisdiction, whether or not also admitted in California, should not be disciplined for following the common, allowed practice of the jurisdiction. Proposed Rule 8.5, however, maintains that a member of the California State Bar, wherever she or he may be, can only practice as others do in that foreign jurisdiction if giving notice is *forbidden*.

For example, Maryland does not require the receiving attorney to notify the sending attorney in circumstances in which California would require it. See Maryland State Bar Association - Committee on Ethics Docket No. 2007-09:

> Maryland's Rules of Professional Conduct "do not require the receiving attorney to notify the sending attorney that there may have been an inadvertent transmittal of privileged (or, for that matter, work product) materials." Nevertheless, the Committee stated that "the receiving attorney can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate."

Excerpted from the ABA Web page "*Metadata Ethics Opinions Around the U.S.*" (last updated September 29, 2009). Thus, Maryland's Rules do not "specifically require[] a different standard of conduct" (*quoting* Proposed Rule 8.5, Explanation of Changes to the ABA Model Rule at 5).

It is critical to emphasize that we do not speak of acts of moral turpitude or other egregious or dishonest conduct. Rather, our concern is with conduct perfectly acceptable and morally correct in one or more of our sister states.

### B. Conflict # 2 – Express Prohibition vs. Silence

An even harder case is that in which the foreign jurisdiction is silent. Should California impose its rule on that jurisdiction, a rule to which other lawyers in that jurisdiction working on the same matter are not beholden?

Consider, for example, the Federal Rules of Civil Procedure and the Federal Rules of Evidence. One may say such rules do not conflict with 8.3(b) because they relate to "conduct in connection with a matter pending before a tribunal, [and, thus,] the rules of the jurisdiction in which the tribunal sits apply. . . ." Proposed CRPC 8.3(b)(1).

Nevertheless, the comparison is instructive. Unlike Proposed Rule 4.4, the federal rules place no notification requirement on a lawyer "who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine" and inadvertently sent. Indeed, all the federal procedural rules provide is that the *sending* lawyer *may* notify the *recipient*. *See* F.R.C.P. 26(b)(5)(B), which allows *the disclosing party* to notify the recipient ("If information produced in

discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. . . .").[1] *See also* Federal Rule of Evidence 502 (placing any obligation of notification on the holder of the privilege, *i.e.,* the sender, not the recipient).

Thus, the federal rules do not "specifically require[] a different standard of conduct." Proposed Rule 8.5, Explanation of Changes to the ABA Model Rule. We offer this example solely to highlight that different jurisdictions may *reasonably* treat certain lawyer conduct as unobjectionable. Indeed, as the Commission itself has stated in Comment [2], "A lawyer may potentially be subject to more than one set of rules of professional conduct which impose different obligations."

In addition, we agree with the Commission's accompanying premise, as stated in Comment [3], namely that:

> "minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions."

Where we part company with the Commission is in regard to those situations in which a lawyer may be *permitted* different conduct by another jurisdiction in which the lawyer is lawfully practicing. To be unable to practice as do other lawyers do in that other jurisdiction would cripple the lawyer's fulfillment of his or her obligations to the client.

Perhaps, even at this late date, may we respectfully suggest the Commission consider an additional round of review of its excellent product? In so doing, the Commission could determine if it has included any proscriptions based more on California case law interpretations of what is mostly procedural law and less on the basic tenets and intent of a set of universal rules to govern a lawyer's professional conduct?

[1] As to information produced by non-party subpoena recipients, F.R.C.P. Rule 45(d)(2)(B) provides equivalent language.

***CONCLUSION – AND SUGGESTED EDITS TO THE PROPOSED RULE***

For the foregoing reasons, we recommend that Proposed Rule 8.5(b)(2) be amended as follows:

> (b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:
>
> > (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and
> >
> > (2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Additionally, we recommend that Comment [4] be similarly amended, as shown below. Moreover, the last sentence of Comment [4] (italicized below) appears redundant and should thus be deleted. If the sentence expresses a nuance that has escaped our reading, we respectfully suggest that the nuance be made more explicit. Finally, if the last sentence of Comment [4] is retained, we recommend the additional insertion of "or permits" as shown.

> Comment [4]:
>
> [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required or permitted specifically by a jurisdiction in which he or she is practicing to follow rules of

professional conduct different from these rules. *In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, these rules apply, unless the tribunal is in a jurisdiction in which the lawyer is lawfully practicing and that jurisdiction requires or permits different conduct.*

Clean version of amended Proposed Rule 8.5(b) and Comments [4] (preferred edit):

(b) Choice of Law. In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits apply, unless the rules of the tribunal provide otherwise; and

(2) these rules apply to any other conduct, in and outside this state, except where a lawyer admitted to practice in California, who is lawfully practicing in another jurisdiction, is required or permitted specifically by the jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

Comment [4]

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to these rules, unless a lawyer admitted in California is lawfully practicing in another jurisdiction, and may be required or permitted specifically by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from these rules.

# 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.*

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

**DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010**

## Your Information

**Professional Affiliation** United States Attorney's Offices for the Central, Eastern

**Commenting on behalf of an organization**
- (•) Yes
- ( ) No

*** Name** George S. Cardona

*** City** Los Angeles

*** State** California

*** Email address** (You will receive a copy of your comment submission.) george.s.cardona@usdoj.gov

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Rule 8.5 Disciplinary Authority; Choice of Law [1-100(D)]

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- ( ) AGREE with this proposed Rule
- (•) DISAGREE with this proposed Rule
- ( ) AGREE ONLY IF MODIFIED

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TO: Board of Governors
State Bar of California

FROM: André Birotte Jr.
United States Attorney
Central District of California

Laura E. Duffy
United States Attorney
Southern District of California

Joseph P. Russoniello
United States Attorney
Northern District of California

Benjamin B. Wagner
United States Attorney
Eastern District of California

RE: Proposed California Rules of Professional Conduct 1.11, 3.8(g) and (h), 8.4(c), and 8.5(b)

DATE: June 14, 2010

We want to thank the Rules Revision Commission ("the Commission") and the Board of Governors for all the hard work that has been done on the proposed revisions to the California Rules of Professional Conduct; for the willingness to hear and meaningfully consider views expressed regarding certain of these rules by state, local, and federal prosecutors; and, in a number of instances, for changes to the proposed rules based on consideration of these views. We believe the proposed rules that are before the Board of Governors include a number of modifications made during the revision process that address many of the concerns we have previously expressed. We write to provide comments on portions of four rules, Proposed Rules 1.11, 3.8(g) & (h), 8.4(c), and 8.5(b), that we continue to believe, in their current form, could have a substantial negative impact on the work of the prosecutors in our offices and the United States Department of Justice.

A. Proposed Rule 1.11

We appreciate the decision not to adopt the previously-proposed paragraph (e), which would have imputed conflicts within government agencies, and instead to recognize that both the imputation of conflicts within government agencies and the effectiveness of screening to avoid such imputation are matters better left to development by the case law. We are concerned, however, that the proposed comments addressing this topic, the last sentence of Proposed Comment [2] and new Proposed Comments [9B] and [9C], intermingle two distinct concepts, imputation and disqualification, and as a result create the impression that disqualification as the result of imputed conflicts is not unusual, when in fact it is only in extraordinary cases that imputation is

appropriate, and only in even more unusual circumstances that disqualification as the result of such imputation is found appropriate. Accordingly, we would suggest that the Proposed Comments be modified as follows.

First, we suggest that the text of Proposed Comment [9C], which addresses only imputation and screening for purposes of the Rule, and not disqualification, be modified to make more clear that the Rule does not itself impute conflicts within government agencies, and moved to replace the last sentence in Proposed Comment [2]. This would avoid an unnecessary cross-reference, and bring the Proposed Comments closer to the ABA Model Rule comments, which include in their Comment [2] the discussion of imputation and screening for current government lawyers. The resulting Proposed Comment [2] would read:

> [2] Paragraphs (a)(1), and (a)(2) restate the obligations of an individual lawyer toward a former government client, whether the lawyer currently is in private practice or nongovernmental employment or the lawyer currently serves as an officer or employee of a different government agency. See Comment [5]. Paragraph (d)(1) restates the obligations to a former private client of an individual lawyer who is currently serving as an officer or employee of the government. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. This Rule does not impute a current government lawyer's conflict under paragraph (d) to other lawyers serving in the same governmental agency; whether such imputation will occur and whether the use of a timely screen will avoid that imputation are matters of case law.

Second, we would suggest that proposed Comment [9B], which makes clear that this Rule does not govern disqualification, be modified to make more clear the distinction between criminal and civil cases, remove the citation to Younger (which applied to a criminal case a disqualification standard that has since been displaced by statute), and cite additional case law that has limited the circumstances in which disqualification on the basis of imputed conflicts may be appropriate. The resulting Proposed Comment [9B] would read:

> This Rule Not Determinative Of Disqualification
>
> [9B] This Rule does not address whether a lawyer or law firm will be disqualified from a representation. The policies underlying discipline and disqualification are different. See, e.g., *Hollywood v. Superior Court* (2008) 43 Cal.4th 721 [76 Cal.Rptr.3d 264]. Whether a lawyer or law firm will or will not be disqualified is a matter to be determined by an appropriate tribunal. See, e.g., *In re Charlisse C.*, 45 Cal. 4th 145 [84 Cal.Rptr.3d 597] (2008); *City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 [43 Cal.Rptr.3d 771] (2006). Standards for disqualification of criminal prosecutors are set forth in Penal Code Section 1424.

B. Proposed Rule 3.8(g), (h)

As you know, our offices prosecute all federal crimes in California. As prosecutors, we support the goal of Proposed Rule 3.8(g), (h). We have always held our attorneys to the highest standard of professional conduct and expect, when exculpatory evidence is obtained by our prosecutors, that this evidence will be disclosed promptly after its discovery. Moreover, we would not countenance the continued incarceration of someone who was convicted but later found to be innocent. When confronted with credible evidence of a defendant's innocence, therefore, we expect our attorneys promptly to disclose this information to the defendant and/or the court, whether the information is obtained pre-trial, during trial, or after conviction.

Though we thus agree with the principle underlying Proposed Rule 3.8(g), (h), we take issue with its text, and, accordingly, feel obligated to object to the Proposed Rule as drafted, for the following reasons:

1. **Few states have followed the ABA's lead in adopting Model Rule 3.8(g), (h).** Based on the information we have, it appears that since the ABA promulgated Model Rule 3.8(g), (h), only two states have adopted new rules based on it: Wisconsin and Delaware. The New York Court of Appeals recently conclusively rejected a proposal to adopt a rule based on Model Rule 3.8(g), (h). Even more recently, on October 2, 2009, the North Carolina State Bar Ethics Subcommittee voted to recommend to the Ethics Committee that its proposed version of Rule 3.8(g) be rejected entirely. ABA Model Rule 3.8(g), (h) is likely meeting with a lack of acceptance because state bar disciplinary authorities regard it as lacking precision, unnecessary, and addressing a subject matter more appropriately addressed by legislatures and courts handling criminal cases.

2. **There should not be a special rule for prosecutors that applies in cases to which the prosecutor is a complete stranger.** There is no reason why the rules of professional conduct should treat a prosecutor who is a stranger to a case any differently than any other member of the bar who is similarly a stranger to the case. The Department previously provided to the ABA and the Commission modifications to the text of Model Rule 3.8(g) that we believed would avoid the issue correctly recognized by the minority objectors, namely, the impossibility of a prosecutor in a jurisdiction different from the jurisdiction of conviction meaningfully evaluating whether evidence of which that prosecutor becomes aware is "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted." (Copies of the letter and draft language we provided to the ABA and the Commission are attached as Exhibit A.) The Commission has indicated that it believes the language of and comments to Proposed Rule 3.8(g) sufficiently address this issue. We respectfully disagree. If a prosecutor in jurisdiction A learns of evidence tending to show the innocence of a defendant previously convicted by a prosecutor's office in jurisdiction B, in which the prosecutor in jurisdiction A has never served, then the prosecutor in jurisdiction A is in the same position as any other lawyer who learns such information. As with any other lawyer who is a stranger to the case, the prosecutor in jurisdiction A will not know what evidence was presented at the trial in jurisdiction B, what credibility issues were posed by the witnesses who testified at that trial, or what issues have already been ruled on by the court in jurisdiction B. The prosecutor in jurisdiction A, therefore, will have no more meaningful basis than any other lawyer for

assessing whether the evidence is new, credible, material, and creates a reasonable likelihood that the defendant convicted in jurisdiction B did not commit the offense of conviction. Yet, Proposed Rule 3.8(g) would impose the obligation of making this assessment only on this prosecutor, and not on any other member of the bar who came to learn of the same evidence.

3. **Proposed Rule 3.8(g) encourages unnecessary disclosures that may cast unwarranted doubt on the actual guilt of correctly convicted defendants.** Because prosecutors who are strangers to a case will not be in a position to make any meaningful assessment as to whether evidence is new, credible, and material, they will likely err on the side of disclosing all evidence other than that apparently frivolous on its face as a means of avoiding any potential for discipline that might arise from a failure to disclose. This poses two related issues. First, to the extent a chief prosecutor or court receiving such a disclosure recognizes this likelihood, the disclosure loses all signaling capacity it might have had – the disclosure will be interpreted not as representing a prosecutor's judgment that the particular evidence is significant in any way, but rather as a rote step taken to avoid discipline without any independent assessment of the weight of the evidence. Second, to the extent a chief prosecutor or court receiving such a disclosure fails to recognize this likelihood, the disclosure will inappropriately be interpreted as signaling that a prosecutor has actually passed some judgment that the evidence is in fact credible and material, and puts in doubt the actual guilt of the convicted defendant when in fact this is not the case. The over breadth of the obligation imposed by Proposed Rule 3.8(g) thus threatens alternatively to under- or over- value the weight to be given a prosecutor's decision to disclose, neither of which accomplishes what should be the goal of the rule, namely, focusing limited resources on those instances in which there is a real and meaningful possibility that a defendant has been wrongfully convicted.

4. **Proposed Rule 3.8(g) is unclear in many respects that affect the obligations set forth therein.** First, the term "knows" is undefined in the proposed rule. It is defined elsewhere in the Proposed Rules to mean "actual knowledge of the fact in question." Proposed Rule 1.0.1(f). But this is singularly unhelpful in the context of Proposed Rule 3.8(g), (h). Does "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" require that the prosecutor know of the possible existence of such evidence or that she know that such evidence actually exist? This is not a meaningless distinction given the most common scenario in which we believe this proposed rule will come into play. Most often, prosecutors become aware of claims that such evidence exists through letters or other communications from incarcerated inmates. Often, these are letters addressed by an inmate convicted in one jurisdiction to a series of prosecutors in other jurisdictions complaining about the unfairness of the proceedings relating to the conviction and asserting prosecutorial misconduct, often based on claims that the prosecutor concealed clear exculpatory evidence of which the defendant has just become aware. For example, a common claim is that an inmate has told the defendant that yet another inmate has asserted that he told the police that he could corroborate the defendant's asserted alibi for the time of the crime. Would a prosecutor receiving a letter making this claim "know" of evidence that could trigger an obligation within the scope of Proposed Rule 3.8(g)? The prosecutor would be on notice that if everything the defendant claims is true, another inmate has asserted that there is yet another inmate witness who would provide testimony that would be relevant to defendant's asserted alibi.

But we submit that, without further investigation, the prosecutor simply cannot "know" whether there actually exists either the inmate who purportedly spoke to the defendant or the inmate witness who purportedly would corroborate the defendant's alibi.

Second, we are concerned by the use of the term "material" without a correlating definition. While not defined in Proposed Rule 3.8 or its comments, or in the general terminology definitions in Proposed Rule 1.0.1, the term "material" or "materiality" is used elsewhere in the Proposed Rules and the ABA Model Rules and has been construed broadly to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Proposed Rules 1.7(a)(2), 3.3(a)(1); ABA Model Rules 1.7(a)(2), 3.3(a)(1), 4.1(a); Cohn v. Commission for Lawyer Discipline, 979 S.W. 2d 694, 698 (Tex. App. 1998) (in reference to lawyer's duty to correct material false statements made to court, "materiality encompasses matters represented to a tribunal that the judge would attach importance to and would be induced to act in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the cost of litigation."). This meaning of "material" appears to be referenced in Proposed Comment [6A], which cross-references to Proposed Rule 3.3. In the criminal context, however, the term "material" is most often understood as defined in the Brady/Giglio jurisprudence, the case law incorporated by reference by paragraph (d) of the proposed rule. These cases define evidence as being "material" only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); see also Kyles v. Whitley, 514 U.S. 419, 434 (1995) (favorable evidence "material" if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict"). In the context of Rule 3.8(g), that "materiality" should be subject to this latter interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted[.]" We believe this is the proper interpretation of "material" for purposes of Proposed Rule 3.8(g). Neither the rule nor the comments, however, make this clear. Given that the term "material" is subject to differing interpretations, the use of the term in the proposed rule, without further definition, would leave a prosecutor uncertain about when disclosure would be required.

Third, we believe the proposed rule's use of the term "promptly" is problematic because it may subject prosecutors, particularly those who have no previous familiarity with the case of conviction, to being second guessed about the amount of time they take to assess whether particular evidence of which they become aware triggers a disclosure obligation. The problem is compounded by the proposed rule's ambiguity and lack of direction regarding how much, if any, inquiry or investigation is anticipated before a prosecutor makes the initial determination whether evidence is "new, credible, and material." Particularly for a prosecutor unfamiliar with a case, the investigation necessary to make this determination could take substantial time. Moreover, for federal prosecutors, certain disclosures may require them to obtain various supervisory approvals within their own offices or from the Department of Justice in Washington, D.C., or may require them to seek a court order. Certain disclosures may also require a prosecutor to take steps related to the security of a witness or informant prior to disclosure. All of these steps can take time, time that may put a prosecutor at risk of being second guessed as to whether his or her disclosure has been made sufficiently "promptly."

Fourth, we are concerned with the mandate that a prosecutor "undertake further investigation" or "make reasonable efforts to cause an investigation." Prosecutors do not have general investigative powers (such as the power to issue subpoenas post-trial) nor do they have the staff or monetary resources to investigate thousands of claims of "new, credible and material" evidence. Moreover, in the federal system, prosecuting offices generally do not have access to their own investigators, and would have the ability only to request that a federal investigatory agency (for example, the FBI) undertake an investigation. And, again in the federal system, mandating that prosecutors expend, or request that an investigatory agency expend, available resources in this fashion, may violate separation of powers principles by permitting the judicial branch to direct the executive branch on how to allocate and expend resources. Generally, we believe that production to the court and the defendant with notice that a prosecutor in the jurisdiction of conviction has determined that disclosure is required under the standards set forth in this proposed rule should satisfy a prosecutor's obligations, as the defendant and the court are then in position, by appointing counsel and permitting the retention of investigators, to ensure that appropriate investigation, if any, is undertaken.

5. **Proposed Rule 3.8(h) is also unclear in many respects that affect the obligations set forth therein.** First, similar concerns regarding the use of "knows" in Proposed Rule 3.8(g) apply to Proposed Rule 3.8(h). Though Proposed Rule 3.8(h) applies only to prosecutors in the jurisdiction of the case of conviction, even these prosecutors, when confronted with a claim by a defendant that evidence satisfying the standard set forth in this proposed rule exists, cannot "know" whether that claim is valid without engaging in further investigation, yet run the risk of running afoul of this proposed rule if they, for what they perceive to be valid reasons (which may include factoring the costs of engaging in such investigation), reject the defendant's assertion and elect not to pursue such investigation.

Second, and perhaps most troubling, is Proposed Rule 3.8(h)'s mandate that a prosecutor "shall seek to remedy the conviction." This phrase is so vague that it utterly fails to give notice of what a prosecutor is required to do to protect his or her license. Proposed Comment 8 (which is taken verbatim from ABA Comment 8) attempts to clarify this mandate but falls short. Proposed Comment 8 states that "[n]ecessary steps <u>may include</u> disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted." The use of the phrase "may include" renders the effort at clarification useless, as it implies that a prosecutor faced with what that prosecutor believes to be clear and convincing evidence of a defendant's innocence will in some circumstances be required to do more, with no guidance as to what this more is. We are particularly troubled because the suggestion that a prosecutor must do more fails to respect the balance struck by existing law regarding post-conviction challenges. Both California and federal statutes and rules allocate to the defendant the burden of investigating and raising claims of newly discovered evidence, and to the court the burden of crafting an appropriate remedy for such a claim that is found to have merit. In light of this law, it is unclear to us what more a prosecutor can do to "remedy" a conviction beyond making the required disclosures. For these reasons in particular, we continue to believe that Proposed Rule 3.8(h) is unnecessary if Proposed Rule 3.8(g) is appropriately drafted to require disclosures to the defendant and the court, disclosures

that will provide those parties with the information necessary to invoke recognized and existing procedures intended to ensure that any wrongful conviction is promptly corrected.

6. **Proposed Comment [9]'s "good faith" exception.** We appreciate the inclusion of a good faith exception, and we appreciate the modification to Proposed Comment [9] to attempt to define the standard under which this good faith exception will apply. We agree with the standard chosen, that is, a quasi-subjective standard that looks to the individual prosecutor's belief, but asks whether that belief is "reasonable" ("judgment is made in good faith if the prosecutor reasonably believes that the new evidence does not create a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted"), but believe that application of this standard remains problematic given the ambiguities, discussed above, as to what it means to "know" of evidence triggering obligations under the proposed rule and whether any investigation is required before a prosecutor makes the determination that he or she does or does not "know" of such evidence. Without some guidance on these points, it will be impossible for a prosecutor to determine whether his actions in evaluating evidence will be deemed sufficiently "reasonable" to bring the good faith exception into play should the prosecutor's judgment subsequently be second guessed.

7. **Potential conflict with other Rules of Professional Conduct and other applicable laws.** The duties imposed by Proposed Rule 3.8(g), (h) may also conflict with prosecutors' obligations under other rules and, for federal prosecutors, under other federal laws. For example, Business & Professions Code § 6068(e) and Proposed Rule 1.6 may be implicated in that prosecutors, like all other attorneys, have a client, and are obligated to preserve their client's confidential information. If, as we suspect, the obligations under Proposed Rule 3.8(g), (h) are intended to override this duty, the proposed rule needs to make this clear. Alternatively, if the obligations under Proposed Rule 3.8(g), (h) are not intended to override this duty, the proposed rule should make this clear. In response to our earlier comment on this point, the Commission has suggested that conflicts of this type are not uncommon, noting in particular that "conflicts between a duty of confidentiality and a duty of candor can implicate the conduct of any lawyer," and stating that "[a] one-size fits all resolution of all possible inconsistent duties tailored for this rule is not practical and is not done in other rules." We note, however, that other proposed rules do in fact resolve disputes between specific duties of disclosure and the general duty of confidentiality. Thus, for example, Rule 3.3 (b) makes clear that a lawyer is required to take "reasonable remedial measures" only "to the extent permitted by Business and Professions Code 6068(e)." See also Rule 3.3, Comment 10 (required remedial measures "do not include disclosure of client confidential information, which the lawyer is required to maintain inviolate under Business and Professions Code Section 6068(e)").

Federal prosecutors are also governed by a host of other confidentiality requirements imposed by federal rules and statutes that may limit, or at least require that prosecutors obtain agency approvals or court orders authorizing, disclosures of information required by Proposed Rule 3.8(g), (h). See, e.g., 5 U.S.C. § 552 (Privacy Act); Fed. R. Crim. P. 6(e) (grand jury secrecy); 21 U.S.C. § 6103 (confidentiality of taxpayer information). For example, with respect to records protected by the Privacy Act, 5 U.S.C. § 552a, disclosure could subject an AUSA to criminal penalties, 5 U.S.C. § 552a(i)(l), and the Department of Justice to civil liability, 5 U.S.C. §

552(g)(1). Similarly, Rule 6(e) mandates non-disclosure of grand jury information absent review and approval by a federal court. And, 5 U.S.C. § 301 provides that federal agency records are owned by the agency and cannot be disclosed without agency approval. See Touhy v. Ragan, 340 U.S. 462 (1951); United States v. Williams, 170 F.3d 431 (4th Cir. 1999) (defendant in state murder prosecution required to comply with Justice Department regulation governing production of information to obtain disclosure of FBI files). Proposed Rule 3.8(g), (h) cannot override these federal laws. Accordingly, we suggest that, if these subsections are adopted, the comments should make clear that the obligations they impose are subject to a prosecutor's compliance with the steps required to authorize disclosures under these federal laws, or similar laws that may apply to state and local prosecutors.

8. **Adopting Proposed Rule 3.8(g), (h) would likely cause a flood of complaints from prisoners with time on their hands and animosity toward prosecutors.** Prosecutors and their limited resources (particularly those in jurisdictions outside the jurisdiction of the case of conviction) will be diverted from prosecuting crime to investigating convicts' claims of "new" evidence in order to ensure that they do not run afoul of this rule. The Board of Governors should understand that within both state and federal prisons, there is a substantial cottage industry devoted to generating all manner of post-conviction claims of innocence in the form of "new" evidence claims, including in particular claims of perjured testimony and claims of ineffective assistance of counsel premised on the discovery of asserted "new" witnesses. Jail house lawyers spend many hours pandering to their fellow inmates with visions of post-conviction assertions of innocence. Only prosecutors, defense attorneys, and judges and their staffs see this cottage industry in action. Despite the good intentions that underlie it, the proposed rule as drafted will hand prisoners and their families and friends a new vehicle with which to take out their frustrations on prosecutors in general. The Board of Governors should carefully consider whether it wants to create such a mechanism for disgruntled prisoners to use the threat of attorney discipline to vent their frustrations and divert limited prosecutorial and law enforcement resources from the investigation and prosecution of ongoing criminal conduct to responding to a potential flood of frivolous claims.

C. Proposed Rule 8.4(c)

As drafted, Proposed Rule 8.4(c) defines it to be professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit, or intentional misrepresentation." There is no comment discussing or limiting this prohibition. It is well established, however, that government attorneys may supervise investigations that require informants and agents to engage in deceit and misrepresentation in order to infiltrate criminal organizations or uncover criminal activity. See, e.g., United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (permissible for undercover agents to deny they are police officers). A standard Ninth Circuit jury instruction advises juries of the propriety of such conduct. See Ninth Circuit Model Criminal Jury Instruction 4.13 (Government's Use of Undercover Agents And Informants). Government attorneys engaged in civil enforcement investigations involving consumer frauds or civil rights violations also may use individuals who misrepresent themselves to be customers or renters to uncover evidence of violations of law. Oregon has adopted a rule specifically stating that such activity by attorneys will not be deemed misconduct:

> . . . it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor of supervisor only when the 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.

Oregon Rule of Professional Conduct 8.4(b).

We believe that guidance along the lines of the Oregon model would be appropriate to ensure that government attorneys overseeing these types of investigations do not run the risk of discipline based on conduct recognized to be appropriate that serves valid public interests. To accomplish this, we propose that the following new comment be added in connection with Proposed Rule 8.4(c):

> [#] Paragraph (c) of this Rule does not apply, and it shall not be professional misconduct, where a lawyer advises clients or others about or assists or supervises lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the 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. This comment is not intended to broaden the areas in which covert activity by non-government lawyers is recognized as lawful.

We recommend the addition of the last sentence above to ensure that private attorneys are not misled by the balance of the comment 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. The last sentence of this proposed comment will avoid any suggestion that it is intended to broaden the areas in which private attorneys may authorize or engage in misrepresentations and deceptions.

D. Proposed Rule 8.5(b)(2).

Proposed Rule 8.5(a) establishes California disciplinary authority over lawyers admitted to practice in California, regardless of where their conduct occurs, and over lawyers not admitted to practice in California if they "provide[] or offer to provide any legal services in California." As a result, lawyers in our offices, who are virtually all members of the California bar, and any Department of Justice attorney who is admitted in California, will be subject to discipline in California not only for the cases and investigations they work in California but for the investigations and cases they work in other jurisdictions. And, Department of Justice lawyers, or lawyers from other United States Attorney's Offices, even if not admitted in California, may be subject to discipline in California even if only a small part of the case or investigation on which they are working requires them to take action in California (for example, by serving a subpoena on or interviewing an employee of an internet service provider based in California). We understand this broad extension of disciplinary authority, which mirrors the ABA Model Rule, but we think it makes sense only if the choice of law rule and safe harbor set forth in ABA Model Rule 8.5(b)(2), or some similar provision, are also adopted as a means of avoiding potential conflicts between differing rules of professional conduct. Otherwise, lawyers working multi-jurisdictional investigations will be put in the often impossible position of reconciling different rules of professional conduct that may apply depending on whether their conduct occurs before or after the investigation coalesces into a case pending before a tribunal. By rejecting ABA Model Rule 8.5(b)(2)'s choice of law rule and safe harbor provision, Proposed Rule 8.5(b)(2) puts Department of Justice and other attorneys working multi-jurisdictional investigations in the potentially impossible position of having to comply with two different sets of rules that may, particularly given differences between key California Proposed Rules and the ABA Model Rules, be irreconciliable. We urge the Commission to adopt ABA Model Rule 8.5(b)(2), or a similarly-worded provision, to provide consistency and predicability in the choice of law rules so that lawyers working multi-jurisdictional investigations may reasonably determine what rules will apply and conform their conduct to those rules.

Although Proposed Rule 8.5(b)(1) follows ABA Model Rule 8.5(b)(1) to provide a consistent choice of law rule when a multi-jurisdictional matter is pending before a tribunal – the rules of the jurisdiction in which the tribunal sits apply, unless that tribunal's own rules provide otherwise – there is no similarly consistency in the choice of law rule applied when a lawyer is involved in a multi-jurisdictional investigation that is not yet pending before a tribunal, that is, before the filing of a civil complaint or criminal charge. This is because Proposed Rule 8.5(b)(2) rejects the

"predominant effect of the conduct" standard and the "safe harbor" provision of the Model Rule, substituting instead a rule that, for matters not yet before a tribunal, a lawyer is subject to the California rules unless "specifically required by a jurisdiction in which he or she is practicing to follow rules of professional conduct different from" the California rules. See also Proposed Comment [4] (explaining that this rule is intended to apply even to those cases in which lawyer's conduct is in anticipation of proceeding that is likely to be, but not yet before a tribunal). If this rule is adopted, it will mean that a Department of Justice lawyer, who is licensed in California, but based in Washington, D.C., and who is engaged in a pre-indictment or pre-complaint investigation in Pennsylvania, will be subject to the California Rules of Professional Conduct during the investigation, even though the case has no nexus to California and no California resident's interests are at stake. As soon as an indictment or complaint is filed in Pennsylvania, however, the Pennsylvania Rules will apply to that same lawyer's conduct. In contrast, this lawyer's colleague, licensed in a state (such as Pennsylvania) that has adopted the ABA Model Rule "predominant effect" test, will likely be bound by the Pennsylvania rules during the investigation. The California-admitted federal government lawyer, practicing outside California, therefore, would have to tailor her investigation, including the supervision of law enforcement officers or investigators, differently than her non-California licensed colleagues in the same case, merely because she is licensed in California.[1] Moreover, the lawyer may have to change her conduct during the investigation, merely because an indictment or complaint has been filed. The opportunities for confusion and litigation are limited only by the imagination. For example, what rules will goven the lawyer's conduct if a complaint is filed that names only some, but not all of the potential defendants? If the lawyer continues her investigation, should she follow the Pennsylvania Rules only as to the named defendants while continuing to follow the California Rules as to the the unnamed defendants? What rules will govern her conduct with respect to witnesses who may provide information relating to both named and unnamed defendants? It is difficult to understand how the interests of either California or its residents are served by subjecting lawyers overseeing multi-jurisdictional investigations to the confusion resulting from different choice of law rules that may render applicable different rules of professional conduct, if California's interests are not at issue.[2]

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[1] The difficulties posed may be particularly significant in those instances where California's Proposed Rules of Professional Conduct and related rules governing the conduct of lawyers in California differ significantly from the rules of the jurisdiction in which the case is likely filed. For example, the permissible exceptions to non-disclosure of client confidences under California's Proposed Rule 1.6 (interpreted to be consistent with California Business and Professions Code § 6068) are substantially narrower than those exceptions recognized in Pennsylvania, which has adopted Model Rule 1.6 (b)(2) ("to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another") and 1.6(b)(3) ("to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used") or where an issue concerning the lawyer's implied authority for disclosure is at issue, a concept that has also been rejected in California's Proposed Rule 1.6.

[2] The Commission rejected our previous comment along these same lines based on its conclusion that, "The detailed explanation provided in support of this Comment argues, in effect,

For these reasons, we request that Proposed Rule 8.5(b)(2) and Proposed Comment [4] not be adopted as presently drafted and that either ABA Model Rule 8.5(b)(2) and its accompanying comments be adopted or, alternatively, that Proposed Rule 8.5(b)(2) be modified to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California, in which case the rules of the anticipated tribunal should apply.

**Conclusion**

For the foregoing reasons, we request a modification of the comments to Proposed Rule 1.11 to make more clear that the rule does not impute conflicts within government agencies. We also oppose the adoption of Proposed Rule 3.8(g), (h); if the Board of Governors ultimately concludes that adoption of some variation of these provisions is warranted, we believe that they should be substantially redrafted along the lines we previously proposed. In addition, we propose the addition of a comment to Proposed Rule 8.4(c) to make clear that it is not misconduct for government lawyers to advise about or assist or supervise lawful covert activity that may involve misrepresentations or other subterfuge. Finally, we oppose the adoption of Proposed Rule 8.5(b)(2) and Proposed Comment [4], and request that the Board of Governors either adopt ABA Model Rule 8.5(b)(2) and its accompanying comments or modify Proposed Rule 8.5(b)(2) to include an exemption to application of the California rules for cases investigated in anticipation of litigation in which the likely site of the tribunal for the litigation will be outside California.

Thank you for this opportunity to comment.

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that more uncertainty is better because it allows a clearer excuse for noncompliance in certain extremely rare situations where the actor initially has a choice between compliance with the rules of two different jurisdictions." Respectfully, we disagree. We do not believe the situations posed by the discussion above will be so rare given the growing frequency of multi-jurisdictional investigations conducted by DOJ attorneys, and we see no reason why the choice of law rules applicable to attorneys conducting such investigations should apply completely differently based solely on the timing of the filing that puts a case before a particular tribunal when it is known all along where that filing will ultimately occur. We seek not uncertainty, but the certainty that will come with a lawyer's ability to know which set of rules will apply, to know that those rules will apply both pre- and post-filing, and to conform conduct to those rules.

**Exhibit A**

Department of Justice
Proposal to Amend ABA Model Rule 3.8(g) and (h)

DRAFT July 16, 2008

(g) upon receipt of evidence that purportedly shows a defendant did not commit an offense of which the defendant was convicted:

(1) if the prosecutor prosecuted defendant for the offense, is still employed in the prosecuting jurisdiction, and knows that the evidence is new and credible and creates a reasonable probability that a defendant did not commit an offense of which the defendant was convicted:

(i) the prosecutor shall disclose that evidence to the defendant and an appropriate court or other authority, or

(ii) undertake further investigation or review, or make reasonable efforts to cause an investigation to occur. If the prosecutor determines, after investigation or review, that the evidence is not new, not credible, or does not create a reasonable probability that the defendant did not commit an offense of which the defendant was convicted, the prosecutor has no further duties under this Rule. However, if the prosecutor determines that the evidence is new and credible and creates a reasonable probability that the defendant did not commit an offense for which the defendant was convicted, the prosecutor shall undertake the notifications set forth in subpart (g)(1)(i).

(2) if the prosecutor did not prosecute the defendant for the offense or prosecuted the defendant but is no longer employed in the prosecuting jurisdiction, the prosecutor shall disclose the evidence to the chief prosecutor for the jurisdiction where the conviction occurred. Any chief prosecutor who receives the evidence shall undertake, or ensure that a subordinate prosecutor undertakes, the steps set forth above in subpart (g)(1).

* * * *

Comments

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[7] When a prosecutor who prosecuted a case and is still employed by the prosecuting jurisdiction receives evidence the prosecutor knows is new and credible and creates a reasonable probability that a person the prosecutor

prosecuted was convicted of a crime he did not commit, paragraph (g)(1)(i) requires disclosure to the defendant and the appropriate court. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel if the defendant is represented. If the defendant is no longer represented, disclosure may be made directly to defendant and may be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. In the first instance, the prosecutor may elect to undertake further investigation or review in lieu of disclosure under paragraph (g)(1)(ii). However, if the prosecutor determines or confirms after that further investigation or review that the evidence is indeed new and credible and creates a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, the prosecutor must undertake the notifications set forth in paragraph (g)(1)(i). If the prosecutor concludes after the investigation or review that the evidence either is not new, not credible or does not create a reasonable probability that the defendant did not commit a crime for which the defendant was convicted, no further action is required under this Rule.

[8] If a prosecutor receives evidence that is purported to show that a defendant was convicted of a crime the defendant did not commit, and the prosecutor did not prosecute the defendant or prosecuted the defendant but is no longer employed by the prosecuting jurisdiction, the prosecutor must disclose the evidence to the chief prosecutor of the jurisdiction where the conviction occurred if the jurisdiction is known or readily ascertainable. The chief prosecutor must undertake the steps set forth in paragraph (g)(1).

[9] A prosecutor's independent judgment about whether evidence is new, credible and creates a reasonable probability that defendant did not commit a crime for which defendant was convicted shall be reviewed based upon the prosecutor's subjective knowledge and intent, including all the information known to the prosecutor at the time the judgment is made. A prosecutor shall not be deemed to have violated this Rule in the absence of a showing that the violation was willful and intentional.

**U.S. Department of Justice**

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

February 7, 2008

Laurel G. Bellows
Chair, House of Delegates
American Bar Association
321 North Clark Street
Chicago, Illinois 60610

Dear Ms. Bellows:

This letter is sent to comment on the proposal by the Criminal Justice Section of the American Bar Association (ABA) to add two provisions to Rule 3.8 of the Model Rules of Professional Conduct. These two new provisions, Model Rule 3.8(g) and (h), would impose additional duties on prosecutors who receive information post-conviction that suggests that a convicted person did not commit a crime of which he or she was convicted. The Department is very supportive of the goals behind this proposed Rule. It has always held its attorneys to the highest standards of professional conduct and expects that when exculpatory evidence is obtained by its prosecutors, that information is disclosed as soon as possible. We take to heart Justice Sutherland's admonition in Berger v. United States:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Indeed, recent revisions to the United States Attorneys' Manual in connection with our disclosure obligations make that abundantly clear. The Department of Justice would not countenance the continued incarceration of someone who was convicted and later found to be innocent of the crime of which he or she was convicted. When confronted with credible evidence of a defendant's innocence, the Department expects its attorneys to disclose this information to the defendant or the court whenever the information is obtained – pre-trial, during trial, or after conviction. However, while we embrace the spirit of the rule, the Department has some concerns, as set forth below, regarding application of the rule as written, and would urge the House of Delegates to delay adoption while those final details are worked out.

In the first instance, the Rule would require a prosecutor to take action when he knows[1] "new, credible and material" exculpatory evidence. It is unclear how a prosecutor who receives information about a case he or she did not prosecute can determine whether the information is "new, credible and material." Yet, the proposed Rule seems to require a prosecutor to make this determination even if the prosecutor is not aware of the evidence presented in the case, the legal issues that had been raised or the credibility of the witnesses who testified at trial. Perhaps, in some instances, the newness, credibility, or materiality of the information would be easier to ascertain. For example, perhaps the new evidence would consist of DNA test results reached by using methods that did not exist at the time of the conviction. However, it would be even more difficult for a prosecutor who did not prosecute a case to determine whether non-DNA evidence is "new, credible and material." We would expect a prosecutor to engage in her best efforts in determining materiality, but there must be recognition that such an analysis, perhaps years after the fact, is difficult. For that reason, we would prefer language, as we note below, clarifying that a prosecutor's subjective intent should be used in determining adherence to this rule.

"Material"

Secondly, we are concerned with the use of the term "material" in the rule. . Neither the proposed Rule nor the Comments defines the term "material." In a criminal context, the term "material" is usually defined in the Brady/Giglio jurisprudence. These cases define evidence as material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). In the context of this Rule, that interpretation is reinforced by the further refinement "creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

However, the term "material" or "materially" is used elsewhere in the Model Rules and has not been given the same construction. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.7(a)(2) (2007) (prohibiting a lawyer from representing a client if there is a significant risk that the representation may be "materially limited" by the lawyer's own interests or the interests of a third person); ABA Model Rules of Prof'l Conduct 3.3(a)(1) (2007) (imposing upon a lawyer a duty to correct "material" false statements made to a court); ABA Model Rules of Prof'l Conduct R. 4.1(a) (2007) (prohibiting a lawyer from knowingly making a "material" false statement of law or fact to a third person). Often, in professional responsibility jurisprudence, the term "material" may be construed to mean important, relevant to establish a claim or defense, or relevant to a fact finder. See, e.g., Cohn v. Comm'n for Lawyer Discipline, 979 S.W.2d 694, 698 (Tex. App. 1998) (stating in reference to a lawyer's duty to correct material false statements made to a court, "materiality encompasses matters represented to a tribunal that the judge would

[1] The term "know" is defined in the Model Rules to mean "actual knowledge of the fact in question[,]" Model Rule 1.0(f), and, as a result, we read the proposed Rule change would to apply only when a prosecutor actually knows of exculpatory evidence, and actually knows that the evidence is new, credible, and material.

attach importance to and would be induced to act on in making a ruling. This includes a ruling that might delay or impair the proceeding, or increase the costs of litigation.").

We would believe that this confusion could be remedied by making clear that the term "material" is used in the Brady sense of the term.

"Promptly"

If the evidence establishes a reasonable likelihood that the defendant did not commit a crime for which he was convicted, the prosecutor must "promptly" disclose the evidence to an appropriate court or authority and, if the conviction was obtained in the prosecutor's jurisdiction, the prosecutor must "promptly" disclose the evidence to the defendant and undertake further investigation. Although the term "promptly" is not defined in the Model Rules, it does appear in several rules. See, e.g., ABA Model Rules of Prof'l Conduct R. 1.4(a) (2007) (requiring a lawyer to "promptly" consult with clients about certain matters and "promptly" comply with a client's reasonable request for information); ABA Model Rules of Prof'l Conduct R. 1.11(b)(2) (2007) (requiring the law firm of a former government attorney to "promptly" notify the government agency if the firm intends to represent a client in a matter in which the former government lawyer participated personally and substantially); ABA Model Rules of Prof'l Conduct R. 4.4(b) (2007) (requiring a lawyer who receives privileged information of an opponent that was sent inadvertently to "promptly" notify the sender). Based upon the construction of the term "promptly" when it is used in other Model Rules, we believe that a court would construe the term to mean with some dispatch. Cf. Cobb Publ'g, Inc. v. Hearst Corp., 907 F. Supp. 1038, (E.D. Mich. 1995) (where court held that private firm failed to institute screening of lawyer hired from opposing counsel's firm "promptly"; the attorney was not screened until ten days after he started working at the new firm; court discounted firm's description of administrative delays in light of the fact that the firm knew prior to the attorney's arrival that he was working as opposing counsel on the case).

When the term "promptly" is used elsewhere in the Model Rules, it imposes a duty upon a lawyer to act with dispatch when the lawyer already knows the information that triggers the duty. Under proposed Model Rule 3.8(g), however, it is exceedingly unlikely that a prosecutor would know immediately upon receipt of the alleged exculpatory information that it is "new, credible and material," particularly if the prosecutor had not handled the case.

It would not be fair for a court or bar authority to sanction a prosecutor for taking the time to review the record of the conviction before acting on the information received. Accordingly, it would be more appropriate if the term "promptly" was removed from the proposed Rule or the Comment is amended to explain that the duty to take action is not triggered until the lawyer has had a reasonable amount of time to make an appropriate inquiry into the facts of the conviction so as to be able to determine and "know" that the evidence is "new, credible and material."

"Seek to remedy the conviction"

Under proposed Model Rule 3.8(h), if the prosecutor concludes that there is clear and convincing exculpatory evidence, the prosecutor "shall seek to remedy the conviction." Proposed Comment [8] states,

> Necessary steps [to remedy the conviction] *may* include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

(Emphasis added.) Thus, the Comment suggests that the duty to "seek to remedy the conviction" may be met by disclosure, notice and, at most, a motion to the court for appointment of counsel for an indigent defendant. Thus, the unworkably vague instruction in subsection (h), is appropriately modified by the commentary. However, reliance on this Comment raises several concerns.

As an initial matter, some states that may consider adopting proposed Model Rule 3.8(g) and (h) do not have comments that accompany their rules of professional conduct or may choose to develop their own comments. See, e.g., Alaska Rules of Prof'l Conduct R. 3.8 (2007) (adopting its own comments rather than the ABA comments); N.Y. Lawyer's Code of Prof'l Responsibility DR 7-103 (2007) (adopting its own ethical cannons rather than the ABA comments);[1] Ill. Rules of Prof'l Conduct R. 3.8 (2007) (no comments adopted); La. Rules of Prof'l Conduct R. 3.8 (2006) (same); Nev. Rules of Prof'l Conduct R. 3.8 (2006) (same); Or. Rules of Prof'l Conduct R. 3.8 (2005) (same); R.I. Rules of Prof'l Conduct R. 3.8 (2007) (same); W. Va. Rules of Prof'l Conduct R. 3.8 (2005) (same). In those jurisdictions, a court or bar authority may or may not choose to construe the rule based upon the comments to the Model Rule.

Even in jurisdictions where the court decides to adopt Comment [8], it is not clear that notice, disclosure and a motion for appointment of counsel is all that is required to "remedy" a conviction. Indeed, in its report accompanying the recommendation to amend Model Rule 3.8, even the Criminal Justice Section acknowledges that the list in Comment [8] is not exhaustive.

> Although the proposed Comments identify steps that might be taken when necessary to remedy a wrongful conviction, the list is not exclusive. Sometimes disclosure to the defendant or the court, or making or joining in an application to the court, will suffice, whereas in jurisdictions where courts lack jurisdiction to release an innocent individual, the appropriate steps may be to make, or join in, an application for executive clemency.

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[1]Proposed New York Rule 3.8 would include comments. However, the comments in the draft pending before the Court of Appeals do not include a comment similar to Comment [8].

Criminal Justice Section, Report to the House of Delegates, at 5 n.10. See Report appended hereto as Attachment 1. Thus, even in jurisdictions that adopt Comment [8], a defendant or bar counsel may argue that a prosecutor faced with clear and convincing evidence of a defendant's innocence is ethically required to do more.

Finally, if the proposed revision could be construed to require prosecutors to do more than disclose, notify and move the court for appointment of counsel, this could be problematic because federal prosecutors do not have a legal or procedural mechanism to "remedy" a conviction. Rather, that responsibility lies with the defendant. See, e.g., Fed. Rule Crim. P. 33(a)("Upon a defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.").

"Good faith" of the prosecutor

The proposed Comment [9] to the Model Rule 3.8 states that a prosecutor will not run afoul of the Rule if he determines in "good faith" that the new evidence does not trigger the duty to notify and disclose under proposed subparts (g) and (h). Usually, the term "good faith" is used to describe a "state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248 (Cal. Ct. App. 1967). We read the Comment to require that a bar authority or a court determine whether a prosecutor has run afoul of the rule by examining the prosecutor's subjective intent. We believe that is the appropriate standard to use.

However, the term "good faith" is used elsewhere in the Model Rules and is not always interpreted in this way. For example, ABA Model Rules of Prof'l Conduct R. 3.1 (2007) provides, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Under Model Rule, courts have analyzed an attorney's behavior using an objective standard – a standard dependent on what a reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances. In re Disciplinary Action Against Graham, 453 N.W.2d 313, 322 (Minn. 1990).

We believe that the subjective standard of intent should be explicitly stated in the rules.

"Remedy the conviction"

Proposed Model Rule 3.8(h) requires a prosecutor to "seek to remedy the conviction" if there is clear and convincing evidence that a defendant in the prosecutor's jurisdiction did not commit a crime for which he was convicted. As discussed above, one could argue that, under proposed Comment [8], the phrase "remedy the conviction" should be construed as requiring no more than notice, disclosure, and a motion to the court seeking appointment of counsel for indigent defendants. But, the phrase "remedy the conviction" on its face is very broad, not all jurisdictions that might adopt the proposed Rule would also adopt the proposed comments, and even the Criminal Justice Section concedes the list in the proposed Comment is not exhaustive. Accordingly, a prosecutor could be required to do more to "remedy the conviction."

A federal prosecutor is limited in what he may do in the face of after-acquired exculpatory evidence. As a matter of substantive law, when a federal prosecutor receives information that exculpates a convicted defendant, there are no specific statutory or procedural mechanisms for the prosecutor to seek relief. Rather, Congress and the courts have placed the responsibility to remedy a conviction on the defendant. Under Fed. R. Crim. P. 33 (a) (2007), a defendant may move to vacate a judgment and for the grant of a new trial "if the interests of justice so require." There are time limits on such a motion. A defendant basing his motion for a new trial on the ground of newly discovered evidence only has three years from the date of the verdict to file the motion. Any motion for a new trial based upon anything other than newly discovered evidence must be filed within seven days of the verdict. Fed. R. Crim. P. 33(b) (2007). Under 28 U.S.C. § 2255 (Supp. 2007), a defendant may challenge a conviction on constitutional or other legal grounds, but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right or the date that new facts would be discoverable.[2] Thus, even if a court or bar authority were to construe proposed Model Rule 3.8(h) to require a federal prosecutor to do more than the disclosure, notice, and investigation he has undertaken under proposed Model Rule 3.8(g), there would be no rule of criminal procedure and no statutory basis by which a prosecutor could move the court to take any action to "remedy" a conviction.

The legitimate desire by the courts and congress for finality of judgment have led them to adopt mechanisms like Section 2255 and Rule 33 in order to strike an appropriate balance between the principle of finality of judgment and the desire to have assurance that the innocent are not convicted of crimes they did not commit. To be sure, ensuring that the innocent are not convicted is a fundamental goal of our criminal justice system and the principle underlying many of the constitutional, statutory, and procedural protections presently in place. However, it is also certain that the government and the people's desire for finality of criminal convictions is an equally compelling interest to be served. "[T]he principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). Moreover, as aptly stated by Justice Harlan, "No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." Mackey v. United States, 401 U.S. 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part).

> A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men

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[2]Congress has created a procedure to permit convicted defendants to seek to compel post-conviction DNA testing in extremely limited circumstances. See 18 U.S.C. § 3600 (Supp. 2007). If, however, such testing is ordered and if the test results exclude the applicant as the source of the DNA evidence, he may then file a new trial motion "[n]otwithstanding any law that would bar a motion under this paragraph as untimely." 18 U.S.C. § 3600(g)(1) (Supp. 2007).

> languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. . . . . This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Id. (citations omitted).

By developing Section 2255 and Rule 33, Congress and the courts have, after considered review, reflection and debate, struck the balance they deem to be appropriate between finality and innocence. The Criminal Justice Section's proposed revision to Model Rule 3.8 may be construed to alter this balance without being subject the rigors or accountability of a formal legislative process or judicial rule making. Such process would attempt to balance the costs and benefits to the government, society and the individual. However, it does not appear from the text of the proposed revisions or the Section Report that the Section gave sufficient weight to the costs to the government or society that may arise if the proposed revisions are adopted. Bar rules of professional conduct should not try to address matters of substantive or procedural law. Indeed, the regulations interpreting 28 U.S.C. 530B, the statute that makes state rules of professional conduct applicable to federal government attorneys, clearly state that the statute "should not be construed in any way to alter federal substantive, procedural or evidentiary law." 28 C.F.R. § 77.1(b) (2007). Accord Stern v. United States District Court for the District of Mass., 214 F.3d 4, 20 (1st Cir. 2000).

Application to all counsel

We would also suggest that the provisions be applied to all attorneys. While the prosecutor, by nature of his position has a unique role and special obligations, the intent of the proposed revisions is to rectify the conviction of the innocent. As such, a duty to disclose exculpatory evidence acquired post-conviction should apply to all attorneys, not only to prosecutors. . Although there could be various constitutional or client confidentiality concerns that may weigh in the balance of whether a private attorney should disclose such information, the Criminal Justice Section undermines its goal of rectifying the conviction of the innocent by failing to impose a duty to disclose exculpatory information on all attorneys.

For all of the foregoing reasons, we believe the passage of Rule 3.8 is premature and we would welcome the opportunity for further discussion.

Sincerely,

David Margolis
Associate Deputy Attorney General

**THE STATE BAR OF CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
Office of Professional Competence, Planning & Development
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 Ms. Hollins:

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-Vice-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. 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 many 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 understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,[1] we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.[2] We hope you find our thoughts helpful.

**SUMMARY**

We summarize our main concerns as follows:

- Some of the rules are becoming too complicated and long, making them difficult to understand and enforce;
- There are way too many Comments to the Rules, making the rules unwieldy, confusing, and

[1] OCTC refers the Commission to its previous comments and recommendations.
[2] We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

difficult to read, understand, and enforce. Many of the Comments are more appropriate for treatises, law review articles, and ethics opinions. The Comments clutter and overwhelm the rules. We recommend that most of the Comments be stricken or that the Rules be adopted without the Comments;

- Many of the Comments are too large and thus bury the information sought to be presented;
- Several of the Comments are in our opinion legally incorrect (i.e. Comment 9 of Rule 1.8.1 and Comment 5 of rule 1.9);
- One of the Comments invades OCTC's prosecutory discretion (i.e. Comment 6 of Rule 8.4);
- Some of the rules are confusing and inconsistent with the State Bar Act (i.e. that an attorney's misrepresentation to a court cannot be based on gross negligence);
- Some of the rules attempt to define and limit provisions adopted by the Legislature in the State Bar Act (i.e. Rule 1.6's defining the scope of confidentiality in Business & Professions Code section 6068(e)); and
- Some of the proposed rules deviate unnecessarily from the ABA Model Rules (i.e. proposed rules 3.9, 4.4 and 8.4).[3]

**GENERAL COMMENTS**

OCTC finds many of the proposed rules too lengthy and complicated, often making them difficult to understand and enforce. There are way too many Comments to the Rules, making the rules unwieldy, confusing, and difficult to read, understand, and enforce. We would strongly suggest that the rules be simplified and the Comments either be significantly reduced or entirely eliminated. Otherwise, it is hard to imagine the attorneys of this state reading and understanding the entirety of the rules and official Comments. Further, we believe that some of the Comments are legally incorrect.

The Rules and Comments are not meant to be annotated rules, a treatise on the rules, a series of ethics opinions, a law review article, or musings and discussions about the rules and best practices. There are other more appropriate vehicles for such discussions and expositions.

Every attorney is required to know and understand the Rules of Professional Conduct. This is why ignorance of a rule is no defense in a State Bar proceeding. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) Yet, the proposed rules (including Comments) are 99 pages; contain 68 rules; and almost 500 Comments. One rule alone has 38 Comments.[4]

In contrast, the current rules are 30 pages; contain 46 rules; and 94 comments.[5] The 1974 rules were 13 pages; contained 25 rules; and 6 comments.[6] The original 1928 rules were 4 pages long; contained 17 rules; and had no comments.

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[3] Unless stated otherwise, all future references to section are to a section of the Business & Professions Code; all references to rule are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's current Model Rules of Professional Conduct.

[4] See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

[5] The current rules list them as Discussion paragraphs; most are unnumbered, but OCTC estimates there are 94 paragraphs of discussion and will refer to them as comments so that there is a standard reference.

[6] The 1974 rules had 6 footnotes (*), four simply reference another rule and two contain a short substantive discussion.

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.[7]

[7] There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**Rule 8.5. Disciplinary Authority: Choice of Law.**

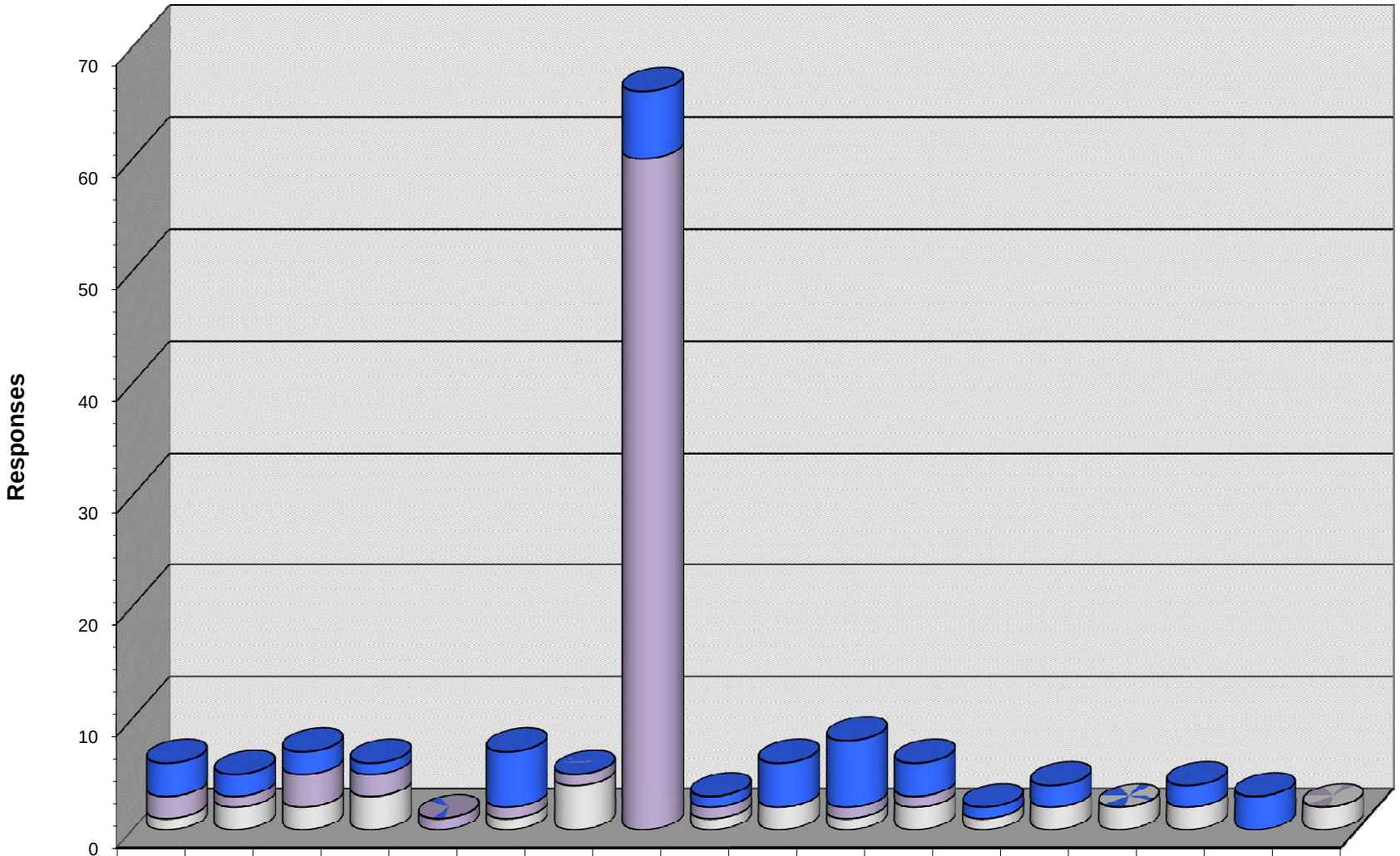
1. OCTC agrees with the policy behind this rule, but still has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.
2. OCTC finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We would recommend striking all the comments except for the last two sentences of Comment 1.

| Responses & Positions Taken on Proposed Rules | | | | |
|---|---|---|---|---|
| **Rule** | **Agree if Modified** | **Disagree** | **Agree** | **Total** |
| 1.0 | 3 | 2 | 1 | 6 |
| 1.0.1 | 2 | 1 | 2 | 5 |
| 1.1 | 2 | 3 | 2 | 7 |
| 1.2 | 1 | 2 | 3 | 6 |
| 1.3 | 0 | 1 | 0 | 1 |
| 1.4 | 5 | 1 | 1 | 7 |
| 1.4.1 | 0 | 1 | 4 | 5 |
| 1.5 | 6 | 60 | 0 | 66 |
| 1.5.1 | 1 | 1 | 1 | 3 |
| 1.6 | 4 | 0 | 2 | 6 |
| 1.7 | 6 | 1 | 1 | 8 |
| 1.8.1 | 3 | 1 | 2 | 6 |
| 1.8.2 | 1 | 0 | 1 | 2 |
| 1.8.3 | 2 | 0 | 2 | 4 |
| 1.8.5 | 0 | 0 | 2 | 2 |
| 1.8.6 | 2 | 0 | 2 | 4 |
| 1.8.7 | 3 | 0 | 0 | 3 |
| 1.8.8 | 0 | 0 | 2 | 2 |
| **Total** | **41** | **74** | **28** | **143** |

**Table 1.**

# Position Taken on Proposed Rules 1.0 - 1.8.8

**Figure 1**




| | 1.0 | 1.0.1 | 1.1 | 1.2 | 1.3 | 1.4 | 1.4.1 | 1.5 | 1.5.1 | 1.6 | 1.7 | 1.8.1 | 1.8.2 | 1.8.3 | 1.8.5 | 1.8.6 | 1.8.7 | 1.8.8 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Agree if Modified | 3 | 2 | 2 | 1 | 0 | 5 | 0 | 6 | 1 | 4 | 6 | 3 | 1 | 2 | 0 | 2 | 3 | 0 |
| Disagree | 2 | 1 | 3 | 2 | 1 | 1 | 1 | 60 | 1 | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| Agree | 1 | 2 | 2 | 3 | 0 | 1 | 4 | 0 | 1 | 2 | 1 | 2 | 1 | 2 | 2 | 2 | 0 | 2 |

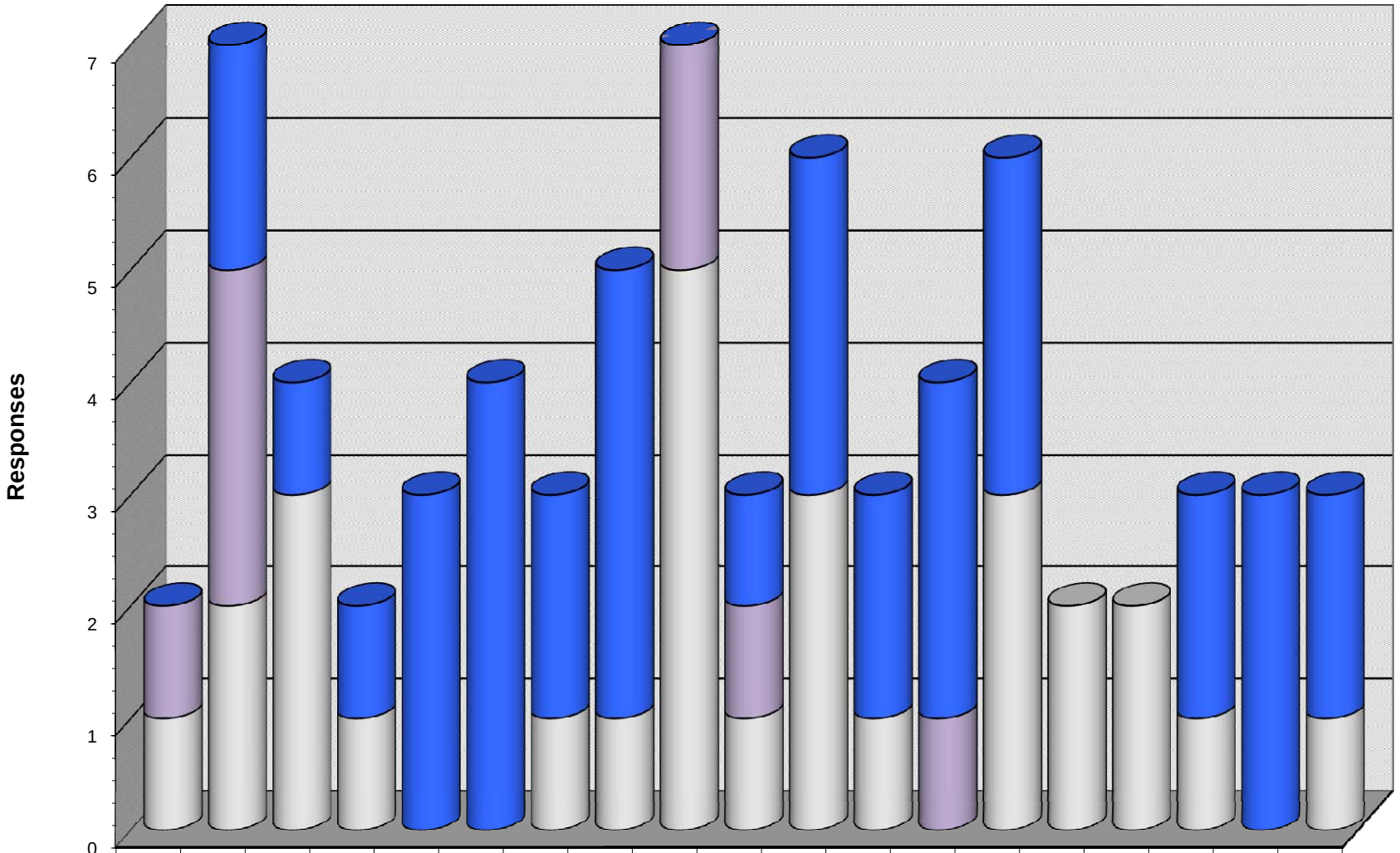
**Rule**

| Responses & Positions Taken on Proposed Rules | | | | |
|---|---|---|---|---|
| **Rule** | **Agree if Modified** | **Disagree** | **Agree** | **Total** |
| 1.8.9 | 0 | 1 | 1 | 2 |
| 1.8.10 | 2 | 3 | 2 | 7 |
| 1.8.11 | 1 | 0 | 3 | 4 |
| 1.9 | 1 | 0 | 1 | 2 |
| 1.10 | 3 | 0 | 0 | 3 |
| 1.11 | 4 | 0 | 0 | 4 |
| 1.12 | 2 | 0 | 1 | 3 |
| 1.13 | 4 | 0 | 1 | 5 |
| 1.14 | 0 | 2 | 5 | 7 |
| 1.15 | 1 | 1 | 1 | 3 |
| 1.16 | 3 | 0 | 3 | 6 |
| 1.17 | 2 | 0 | 1 | 3 |
| 1.18 | 3 | 1 | 0 | 4 |
| 2.1 | 3 | 0 | 3 | 6 |
| 2.4 | 0 | 0 | 2 | 2 |
| 2.4.1 | 0 | 0 | 2 | 2 |
| 3.1 | 2 | 0 | 1 | 3 |
| 3.3 | 3 | 0 | 0 | 3 |
| 3.4 | 2 | 0 | 1 | 3 |
| **Total** | **36** | **8** | **28** | **72** |

**Table 2.**

# Position Taken on Proposed Rules 1.8.9 - 3.4

**Figure 2**



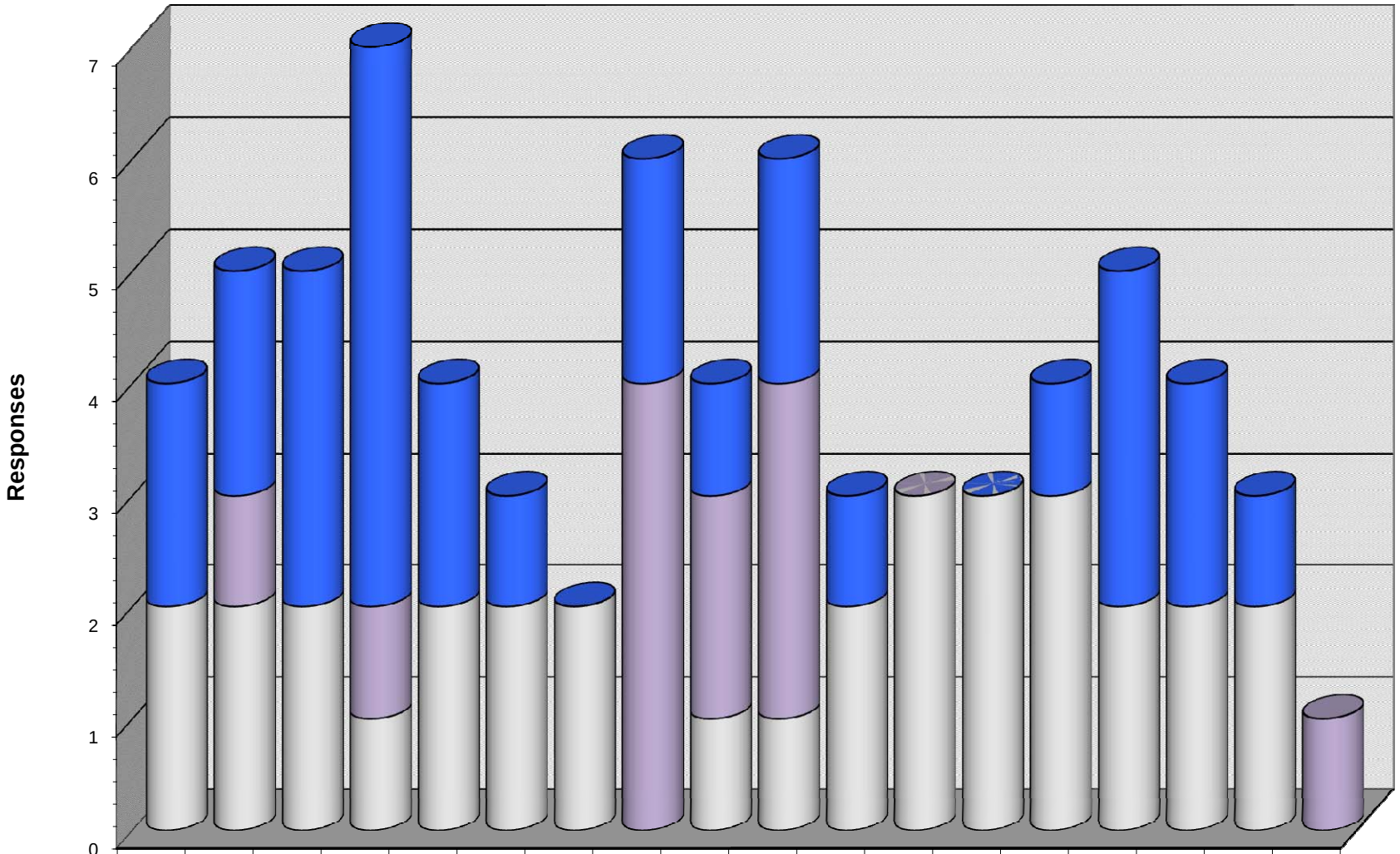

| | 1.8.9 | 1.8.10 | 1.8.11 | 1.9 | 1.10 | 1.11 | 1.12 | 1.13 | 1.14 | 1.15 | 1.16 | 1.17 | 1.18 | 2.1 | 2.4 | 2.4.1 | 3.1 | 3.3 | 3.4 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Agree if Modified | 0 | 2 | 1 | 1 | 3 | 4 | 2 | 4 | 0 | 1 | 3 | 2 | 3 | 3 | 0 | 0 | 2 | 3 | 2 |
| Disagree | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| Agree | 1 | 2 | 3 | 1 | 0 | 0 | 1 | 1 | 5 | 1 | 3 | 1 | 0 | 3 | 2 | 2 | 1 | 0 | 1 |

**Rule**

| Responses & Positions Taken on Proposed Rules | | | | |
|---|---|---|---|---|
| **Rule** | **Agree if Modified** | **Disagree** | **Agree** | **Total** |
| 3.5 | 2 | 0 | 1 | 3 |
| 3.5 | 2 | 0 | 2 | 4 |
| 3.6 | 2 | 1 | 2 | 5 |
| 3.7 | 3 | 0 | 2 | 5 |
| 3.8 | 5 | 1 | 1 | 7 |
| 3.9 | 2 | 0 | 2 | 4 |
| 3.10 | 1 | 0 | 2 | 3 |
| 4.1 | 0 | 0 | 2 | 2 |
| 4.2 | 2 | 4 | 0 | 6 |
| 4.3 | 1 | 2 | 1 | 4 |
| 4.4 | 2 | 3 | 1 | 6 |
| 5.1 | 1 | 0 | 2 | 3 |
| 5.2 | 0 | 0 | 3 | 3 |
| 5.3 | 0 | 0 | 3 | 3 |
| 5.3.1 | 1 | 0 | 3 | 4 |
| 5.4 | 3 | 0 | 2 | 5 |
| 5.5 | 2 | 0 | 2 | 4 |
| 5.6 | 1 | 0 | 2 | 3 |
| 5.7 | 0 | 1 | 0 | 1 |
| **Total** | **28** | **12** | **32** | **72** |

# Position Taken on Proposed Rules 3.5 - 5.7

**Figure 3**




| | 3.5 | 3.6 | 3.7 | 3.8 | 3.9 | 3.10 | 4.1 | 4.2 | 4.3 | 4.4 | 5.1 | 5.2 | 5.3 | 5.3.1 | 5.4 | 5.5 | 5.6 | 5.7 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Agree if Modified | 2 | 2 | 3 | 5 | 2 | 1 | 0 | 2 | 1 | 2 | 1 | 0 | 0 | 1 | 3 | 2 | 1 | 0 |
| Disagree | 0 | 1 | 0 | 1 | 0 | 0 | 0 | 4 | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Agree | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 1 | 1 | 2 | 3 | 3 | 3 | 2 | 2 | 2 | 0 |

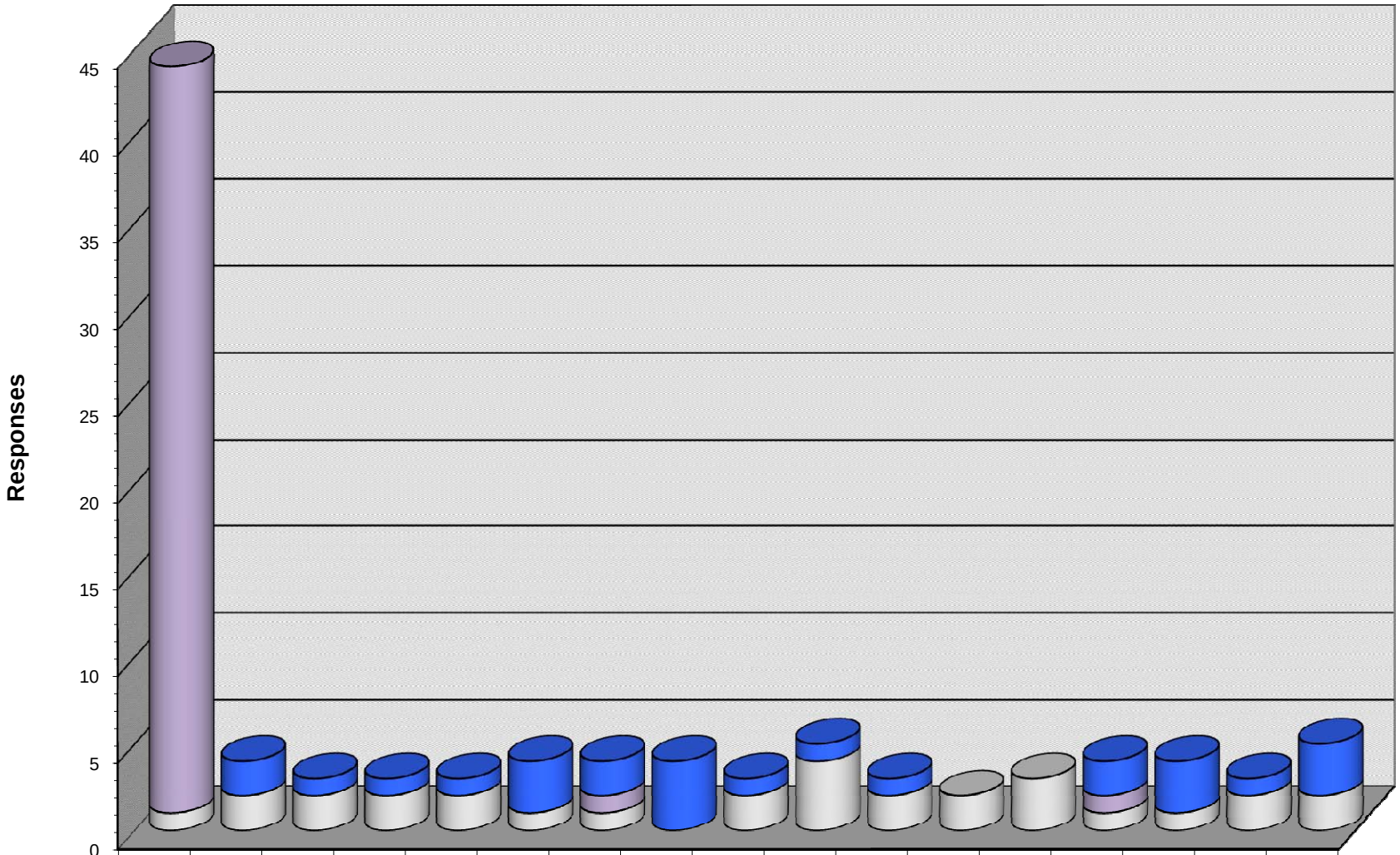
**Rule**

Public Comment Deadline: June 15, 2010

| Responses & Positions Taken on Proposed Rules | | | | |
|---|---|---|---|---|
| **Rule** | **Agree if Modified** | **Disagree** | **Agree** | **Total** |
| 6.1 | 0 | 43 | 1 | 44 |
| 6.2 | 2 | 0 | 2 | 4 |
| 6.3 | 1 | 0 | 2 | 3 |
| 6.4 | 1 | 0 | 2 | 3 |
| 6.5 | 1 | 0 | 2 | 3 |
| 7.1 | 3 | 0 | 1 | 4 |
| 7.2 | 2 | 1 | 1 | 4 |
| 7.3 | 4 | 0 | 0 | 4 |
| 7.4 | 1 | 0 | 2 | 3 |
| 7.5 | 1 | 0 | 4 | 5 |
| 8.1 | 1 | 0 | 2 | 3 |
| 8.1.1 | 0 | 0 | 2 | 2 |
| 8.2 | 0 | 0 | 3 | 3 |
| 8.3 | 2 | 1 | 1 | 4 |
| 8.4 | 3 | 0 | 1 | 4 |
| 8.4.1 | 1 | 0 | 2 | 3 |
| 8.5 | 3 | 0 | 2 | 5 |
| **Total** | **26** | **45** | **30** | **101** |

# Position Taken on Proposed Rules 6.1 - 8.5

**Figure 4**




| | 6.1 | 6.2 | 6.3 | 6.4 | 6.5 | 7.1 | 7.2 | 7.3 | 7.4 | 7.5 | 8.1 | 8.1.1 | 8.2 | 8.3 | 8.4 | 8.4.1 | 8.5 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Agree if Modified | 0 | 2 | 1 | 1 | 1 | 3 | 2 | 4 | 1 | 1 | 1 | 0 | 0 | 2 | 3 | 1 | 3 |
| Disagree | 43 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| Agree | 1 | 2 | 2 | 2 | 2 | 1 | 1 | 0 | 2 | 4 | 2 | 2 | 3 | 1 | 1 | 2 | 2 |

**Rule**