

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

<b>Re:</b>	<b>TITLE</b>
<b>RULE</b>	
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
<b>Rule 1.2</b>	<b>Scope of Representation and Allocation of Authority Between Client and Lawyer</b>
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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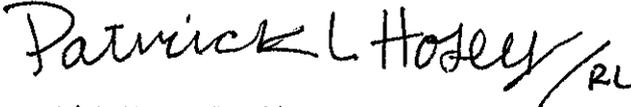
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 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, President  
San Diego County Bar Association



**SAN DIEGO COUNTY  
BAR ASSOCIATION**

November 11, 2009

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James W. Tolley

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  No

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

Yes  No

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

Yes  No

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

Yes  No

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

CONCLUSIONS (pick one):

We approve the new rule in its entirety.

We approve the new rule with modifications.\*

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

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

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



**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.

## 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

Commenting on behalf of an organization

Yes

No

\* Name

\* City

\* State

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

The following proposed rules can be viewed by clicking on the 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 sentence 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  
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Garrick Byers, Senior Defense Attorney  
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Fax: (559) 262-4104  
e-mail gbyers@co.fresno.ca.us



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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,

A handwritten signature in black ink that reads "Theresa M. Rudy". The signature is fluid and cursive.

Theresa Meehan Rudy  
Executive Director



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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

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. Proposed 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.

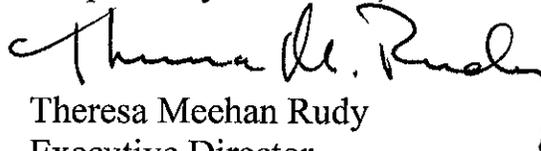
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, 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**

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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,<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> OCTC refers the Commission to its previous comments and recommendations.

<sup>2</sup> 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).<sup>3</sup>

## 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.<sup>4</sup>

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

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<sup>3</sup> 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.

<sup>4</sup> See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

<sup>5</sup> 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.

<sup>6</sup> The 1974 rules had 6 footnotes (\*), four simply reference another rule and two contain a short substantive discussion.

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

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.<sup>7</sup>

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<sup>7</sup> There is actually no Rule 1.8, but several separate rules, going from 1.8.1 through 1.8.11.

**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.