



# THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT

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,

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

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC

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:**

<b>RULE</b>	<b>TITLE</b>
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
<b>Rule 1.13</b>	<b>Organization as Client</b>
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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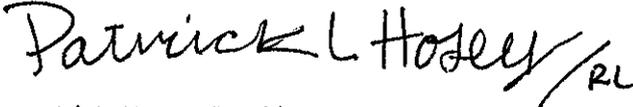
Rule 3.8	Special Responsibilities of a Prosecutor
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Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment 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

**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: "3<sup>rd</sup> 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.



**ORANGE COUNTY  
BAR ASSOCIATION**

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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 1.13 – 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**

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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

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<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.

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

**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, Loyola'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 Zitron / by son*

Richard Zitron

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.<sup>1</sup> 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:

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<sup>1</sup> 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.<sup>2</sup> 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~~

<sup>2</sup> 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~~