



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

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 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
<b>Rule 1.4.1</b>	<b>Disclosure of Professional Liability Insurance *BATCH 6*</b>
Rule 1.5	<b>Fee</b> 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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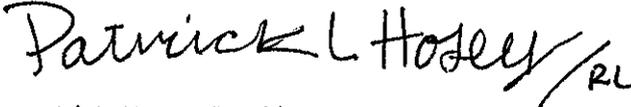
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 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**

February 12, 2010

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James W. Talley

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

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of  
The State Bar of California (Batch 6)**

**Dear Ms. Hollins:**

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

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

**Enclosures**

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

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

**Coversheet**

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
<b>Rule 1.4.1</b>	<b>Insurance Disclosure [3-410]</b>	<b>App.</b>	<b>Simmons</b>
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.)~~

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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.

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

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

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

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

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



# THE STATE BAR OF CALIFORNIA

## 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 1.4.1 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

**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 exorbitant fees of malpractice liability insurers especially 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 practically 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

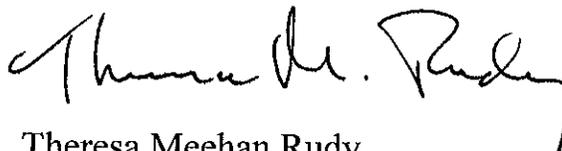
June 14, 2010

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



Simple • Affordable • Accountable • Justice for All

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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.

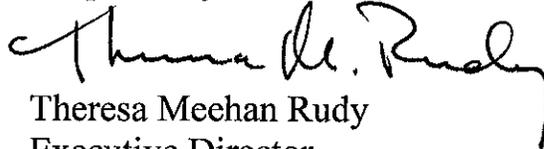
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200,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

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,<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.

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June 15, 2010

**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.