



**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 1.1

Dear Mr. Sondheim:

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

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

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink 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

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

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
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Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
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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

October 10, 2006

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

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

Dear Ms. Hollins:

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

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

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

Respectfully Submitted,



Andrew S. Albert, President  
San Diego County Bar Association

Enclosures

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District Nine Representative**

Lilys D. McCoy

**MEMORANDUM**

Date: October 16, 2006

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

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

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

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

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

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

\* \* \* \* \*

Comment 1:

We approve the new/proposed rule in its entirety.

Dissent 1:

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

Rationale for Dissent 1:

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

Dissent 2:

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

June 4, 2010

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

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

ATTN: Audrey Hollins

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) The claimant or his or her legal representative shall provide written notice via certified mail, overnight mail, or personal delivery to the builder, in the manner prescribed in this section, of the claimant’s claim that the construction of his or her residence violates any of the standards set forth in Chapter 2 (commencing with Section 896). That notice shall provide the claimant’s name, address, and preferred method of contact, and shall state that the claimant alleges a violation pursuant to this part against the builder, and shall describe the claim in reasonable detail sufficient to the claimed violation. In the case of a group of homeowners or an association, the notice may identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences. That document shall have the same force and affect as a notice of commencement of legal proceedings.**
- (b) The notice requirements of this section do not preclude a homeowner from seeking redress through any applicable normal customer service procedure as set forth in any contractual, warranty, or other builder-generated documents;**

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

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

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

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

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

#### **Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**

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

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

Litigation/Claims increase the cost of housing. *Why is California's housing market so expensive?*

Litigation/Claims cause insurance to go up.

Litigation/Claims force builders to raise their prices.

Litigation/Claims burden the judicial system and expend judicial resources.

Litigation/Claims reduce competition in the marketplace as smaller builders are forced out of business. *If small builders cannot afford to build in California, they will bypass California for their business ventures.*

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

Rule 1.0 (a) (4) To promote respect for, and confidence in, the legal profession.

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

Rule 1.0 (b) (2) A willful violation of these Rules is a basis for discipline.

*See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Again, Senate Bill SB 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond when given the chance or opportunity.*

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

## **Rule 1.1 Competence**

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

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

## **Rule 1.4 Communication**

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

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

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

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

## **Rule 1.5 Fees For Legal Services**

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

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

Rule 1.5 (b) A fee is unconscionable under this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience; or if the lawyer, in negotiating or setting the fee, has engaged in fraudulent conduct or overreaching, so that the fee charged, under the circumstances, constitutes or would constitute an improper appropriation of the client's funds. Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.

*When a Soliciting Attorney Group settles a lawsuit or SB 800 Claim for a client without discussing or considering the costs the client will incur from being in a construction defect lawsuit/claim in which the client has to disclose his/her home as defective and possibly affecting the home warranty, the client will not gain. Again, in most cases, no repairs to the home are performed and the settlement will not usually even cover the proposed defects.*

#### **Rule 1.7 Conflict of Interest: Current Clients**

Rule 1.7 (a) (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

Rule 1.7 (b) (4) Each affected client gives informed written consent.

*As noted previously, many clients are unaware they are involved in a SB 800 Claim or lawsuit, or even know what it is about. Some have only sent in the survey as requested by*

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

### **Rule 1.8.6 Payments Not From Client**

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

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

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

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

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

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

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

Thank you for your time in these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bradley T. Paulsen', written over a horizontal line.

Bradley T. Paulsen  
Concerned Citizen

/encl

# MAK

[www.maklawyers.com](http://www.maklawyers.com)

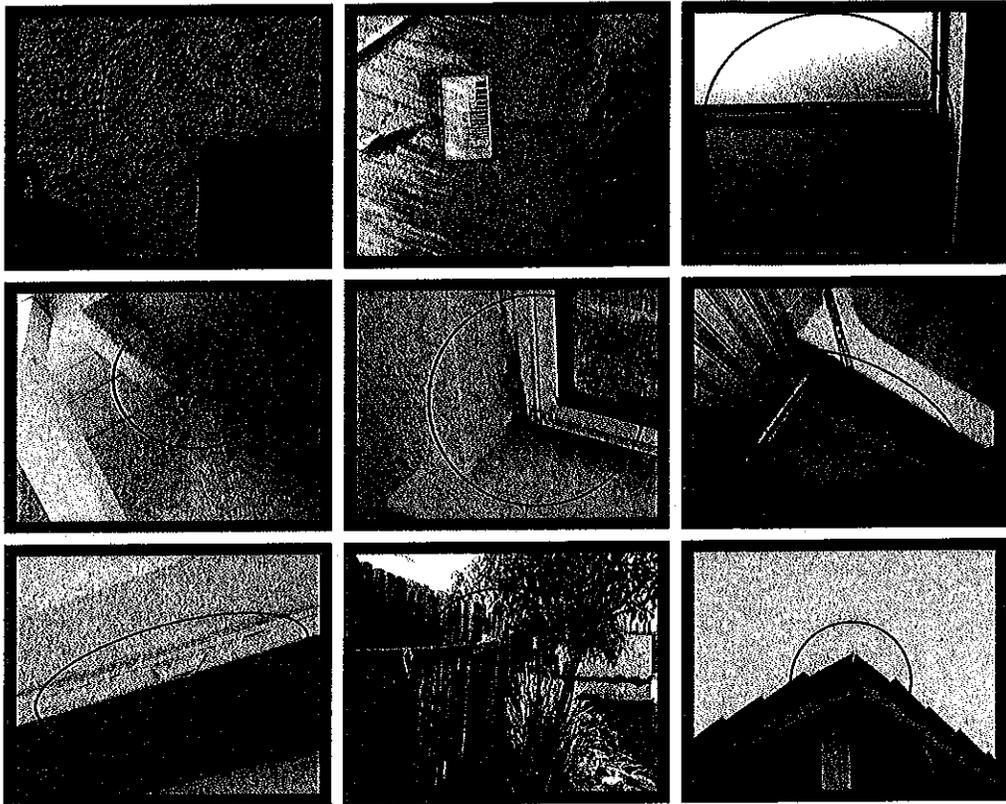
MILSTEIN, ADELMAN &  
KREGER, LLP

## NEWSLETTER

### NUMEROUS

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

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm



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

of Milstein, Adelman & Kreger, LLP, in Santa Monica and San Francisco. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases for over a decade throughout California, including Riverside County. The attorneys have agreed to advance all costs of the litigation; **therefore there are no out-of-pocket costs to the homeowners.** **Original ownership is not required to participate.** Each home will be **inspected individually.** Enclosed is a profile sheet for your completion. Whether or not you choose to participate in the litigation, the information you

provide will be helpful to your community and their efforts in this action. For additional information, fill out and return the postage-paid reply card enclosed or contact:

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

**Lisa Appelbaum**  
extension 146 or

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

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

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

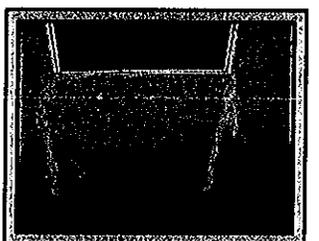
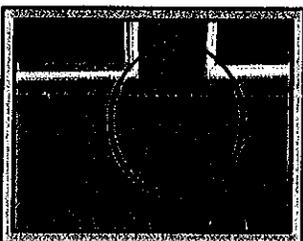
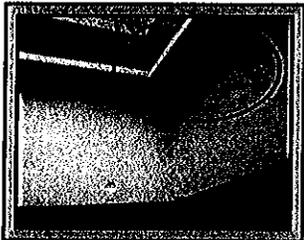
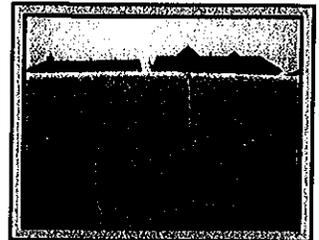
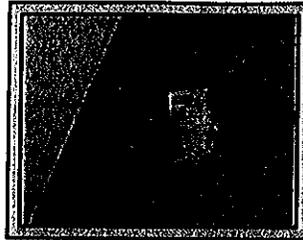
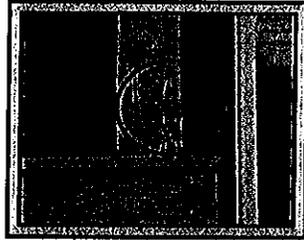
Numerous homeowners in your Corona community continue to join lawsuit against the builder for construction defects. If you are also experiencing problems with any of the following, you may want return the enclosed paperwork: Leaking Windows & Damage to Sills, Condensation between the Double Pane, Cracking/Damaged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

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

# MAK

MILSTEIN, ADELMAN &  
KREGER, LLP

January 2009



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

## NEWSLETTER

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

The case is being handled on behalf of the homeowners by the construction defect attorneys at the law firm of Milstein, Adelman & Kreger, LLP, in Santa Monica and Concord. The attorneys, whose practice is devoted to representing homeowners, have handled complex construction defect cases

for over a decade throughout California. The attorneys have agreed to advance all of the costs of the litigation; therefore there are **no out-of-pocket costs** to the homeowners. Original ownership is **not** required to participate.

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

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

David S. Grove, Esq.

Extension 123 or

Lisa Appelbaum

Extension 146

2800 Donald Douglas Loop  
North

Santa Monica, California  
90405

Toll Free: (888) 835-8055

Fax: (310) 396-9635

Many of the homes are experiencing or have reported defectively built roofs, leaking windows, defective interior and exterior paint, broken window and door seals, plumbing problems, electrical problems, drywall cracking and staining, stucco cracking and staining, deficient air conditioning and heating, mold growth, finish carpentry problems, drainage, landscape and water intrusion through foundation slabs causing discoloration and lifting of flooring surfaces.

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

HOMEOWNER PROFILE SHEET

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

HOMEOWNER NAMES: \_\_\_\_\_

PROPERTY ADDRESS: \_\_\_\_\_

MAILING ADDRESS (if different): \_\_\_\_\_

PHONE NUMBERS: HOME: \_\_\_\_\_ ALTERNATE: \_\_\_\_\_

MR. WORK PHONE: \_\_\_\_\_ MRS. / MS. WORK PHONE: \_\_\_\_\_

NAME(S) OF TENANT(S) (if any): \_\_\_\_\_

TENANT PHONE: \_\_\_\_\_ OWNER EMAIL ADDRESS: \_\_\_\_\_

ARE YOU THE ORIGINAL OWNER? \_\_\_\_\_ PURCHASE DATE? \_\_\_\_\_

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

NAME OF THE DEVELOPER? \_\_\_\_\_ WHAT YEAR WAS THE HOME BUILT? \_\_\_\_\_

BEDS: \_\_\_\_\_ BATHS: \_\_\_\_\_ SQUARE FEET: \_\_\_\_\_

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

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

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

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Clayton M. Anderson, APC  
Construction Defect Division



Joel M. Kriger, APC  
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.  
Gordon C. Meurs  
William M. Siakinger  
Matthew R. Schaech  
Mary C. Tyler

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

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

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

June 27, 2008

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

Dear Homeowners:

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

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

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

Your legal rights include:

- (1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.
- (2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.
- (3) That you can become a participant in this lawsuit with no out of pocket cost.

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

Sincerely,  
ANDERSON & KRIGER  
*Jodie Wacht*  
Jodie Wacht, Paralegal

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

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



# Homeowner's Contingent Attorney Fee Agreement

A Professional Law Corporation

## THIS AGREEMENT

is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at

\_\_\_\_\_, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

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

\_\_\_\_\_

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

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%)

From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

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

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

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

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

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

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

ANDERSON & KRIGER - A PROFESSIONAL LAW CORPORATION

OFFICES IN SAN DIEGO, TEMECULA, RIVERSIDE, ORANGE COUNTY ANTELOPE VALLEY, SAN JOAQUIN VALLEY, SACRAMENTO

CASE NAME [REDACTED]	CASE NUMBER
-------------------------	-------------



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

- a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;
- b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;
- c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;
- d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;
- e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.
- f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

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

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

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

EXECUTED

on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

ANDERSON & KRIGER

By: \_\_\_\_\_

ATTORNEY ON BEHALF OF ANDERSON & KRIGER

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

CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_ E-MAIL \_\_\_\_\_

HOME PHONE \_\_\_\_\_ WORK PHONE \_\_\_\_\_

CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_ E-MAIL \_\_\_\_\_

HOME PHONE \_\_\_\_\_ WORK PHONE \_\_\_\_\_

CLIENT/HOMEOWNER SIGNATURE

PRINTED NAME \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_

CITY, STATE, ZIP \_\_\_\_\_ E-MAIL \_\_\_\_\_

HOME PHONE \_\_\_\_\_ WORK PHONE \_\_\_\_\_

**FOR A&K USE ONLY**

GRANT DEED \_\_\_\_\_

NOC \_\_\_\_\_

CLIENT OWNERSHIP REVIEWED BY \_\_\_\_\_

# Homeowner's Contingent Attorney Fee Agreement

## THIS AGREEMENT

is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at

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*(Continued on reverse)*

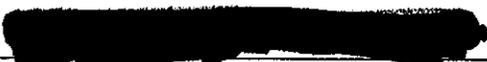
————— Please sign and date on the reverse side of this form. —————

ANDERSON & KRIGER • A PROFESSIONAL LAW CORPORATION

RIVERSIDE OFFICE • 2155 CHICAGO AVE., SUITE 300 • RIVERSIDE, CA 92507

(866) 273-9742 • (951) 787-7146 • FAX (951) 787-7168 • EMAIL: a-k@a-k.com • WEBSITE: <http://www.a-k.com>

OFFICES IN SAN DIEGO, TEMECULA, RIVERSIDE, ORANGE COUNTY, ANTELOPE VALLEY, SAN JOAQUIN VALLEY, SACRAMENTO

CASE NAME 	CASE NUMBER
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*A Professional Law Corporation*

**Construction Defect & Community Association Law**

2155 Chicago Avenue, Suite 300

Riverside, CA 92507

**(951) 787-7146**

Fax: (951) 787-7168

## *FINAL NOTICE !*

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

Some of the problems that your neighbors are experiencing include:

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

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

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

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

Thank you,  
Anderson and Kriger

*Rhonda Harrington*

Rhonda Harrington

• select Print from the File menu above

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REAL ESTATE • May. 26, 2010

## Searching For Cracks In Construction Law

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

By Jason W. Armstrong

Daily Journal Staff Writer

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

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

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

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

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

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

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

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

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

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

go directly to a lawsuit," Kasdan said.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Builders battling construction defect cases have had mixed results.

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

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

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

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

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

[jason\\_armstrong@dailyjournal.com](mailto:jason_armstrong@dailyjournal.com)

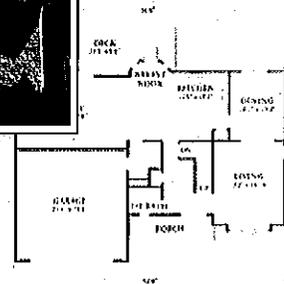
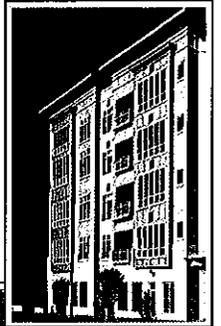


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# Protecting Your Home's Equity

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



BIA Orange County Chapter  
17744 Sky Park Circle, Suite 170  
Laguna Hills, CA 92653



Construction  
Quality and Sustainable  
Building Committee

TCC



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

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

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

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

### **Litigation Reduces Home Values**

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

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

Two years later, the lawsuit finally settled for one-

fees were deducted, the homeowners were left with only \$5,000 to repair \$30,000 in alleged defects. This meant that the homeowners still would be required to disclose the defects they could not afford to repair and give a credit to any prospective purchaser for those defects. By comparison, the article stated that homes that had not joined the lawsuit appreciated in value and were selling much more easily.<sup>1</sup>

"BUT THE PLAINTIFFS WOULD NEVER SEE THIS CASH MORE THAN \$200,000 IN COSTS HAD BEEN INCURRED BY THE PLAINTIFFS' ATTORNEYS IN DISCOVERY AND EXPERT WITNESS EXPENSES. ADDITIONALLY, THE ATTORNEYS WOULD TAKE A FEE OF 33 PERCENT FOR SETTLING THE CASE, THIS AMOUNT BEING COMPUTED ON THE GROSS SETTLEMENT AMOUNT. THIS WOULD LEAVE EACH PLAINTIFF WITH APPROXIMATELY \$5,000 WITH WHICH TO REPAIR \$30,000 IN ALLEGED DEFECTS."

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

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

## **Litigation Can Hurt Your Ability To Refinance**

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

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

### **Avoiding Costly Litigation**

There are alternatives to lawsuits and benefits to pursuing those alternatives. Here are some steps you should follow when dealing with allegations of defective construction:

1. If construction defect attorneys are approaching homeowners in your tract, urge your neighbors and your association to investigate alternatives before filing attorneys.
2. Contact your homebuilder to seek a solution. Often, the builder will work with you to resolve a problem. If you need help locating your builder, or if your builder is not responsive, call Citizens Against Lawsuit Abuse at 714-259-8400.
3. Understand what constitutes a defect. Opinions may differ on this, but hear out your builder before authorizing an attorney to file court papers on your behalf.
4. Follow the procedures in your homeowner's warranty and submit a customer service/warranty request to your homebuilder. Homeowner warranties often provide homeowners an effective process by which to resolve concerns informally and promptly.
5. If resolution remains difficult, review your purchase and homeowner's association documents and follow their claim and dispute resolution procedures. These procedures often include mediation, arbitration, or judicial reference, which can be less time consuming and less costly than litigation.

## **Litigation Increases The Cost Of Housing**

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

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

## **When The Construction Defect Lawyers Call**

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

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

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

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

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

## Questions to Ask Defect Attorneys

If you meet with an attorney who wants to bring a construction defect lawsuit against your homebuilder, here are a few key questions to ask:

1. Can you show me the specific problems I have in my home?
2. How much money is likely to be awarded and where will it all go?
3. Explain the "destructive testing" process, including how much time it will take and how many homes you will destructively test. What if my issues are not the same as my neighbor's — will you need to conduct destructive testing at my home to establish your case?
4. How do you make your money?
5. What percent of any money you recover will you use to pay for expert witnesses and destructive testing? Is the expert's compensation affected by the outcome of the case?
6. Who pays for the experts, destructive testing and court costs if we lose the lawsuit?
7. What happens if we lose the case? Can I be liable for anything?
8. What happens if we receive less than the cost of the repairs you claim are needed? Will my house get fixed?
9. When I sell my house, do I have to disclose this lawsuit? Do I have to disclose whether enough money was collected to fund the repair of the alleged defects?
10. When I refinance, do I have to disclose this lawsuit and will it impact a lender's willingness to give me a loan?
11. Will you represent me in the event I get sued for failing to disclose a defect you claimed on my behalf?
12. Are the documents you file on my behalf public record?
13. How long do construction defect lawsuits typically take to resolve and won't the lawsuit be an unenjoyable, draining, drag mar?

14. What happens if the builder offers to make repairs during the course of the lawsuit? Will you prevent those repairs from being made?

15. After the lawsuit starts, if I change my mind, can I withdraw from the lawsuit? Will it cost me anything to withdraw?

16. After the lawsuit starts, can I decide to settle just my claims, or does everyone have to agree to settle?

## Outrageous Estimates & Destructive Testing

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

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

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

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

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

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

\$508,000 to a defendant after losing at trial. The homeowners' attorney, however, was not ordered to pay anything.<sup>5</sup>

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

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

#### **Repairs: Too Little and Too Late**

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

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

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

#### **California's New Construction Law: Facilitated Repairs**

In 2003, California enacted a new law (Civil Code sections 895 et seq.), which applies to certain types

of new residential construction purchased on or after January 1, 2003. This law is designed to informally resolve construction defect claims. It better defines what constitutes a defect, and allows a builder to provide you with detailed maintenance expectations up front, so you know how to maintain the quality of your home.

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

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

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

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

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

## About Our Sponsors

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

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

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

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

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

We'd Like To Hear From You!

Comments: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

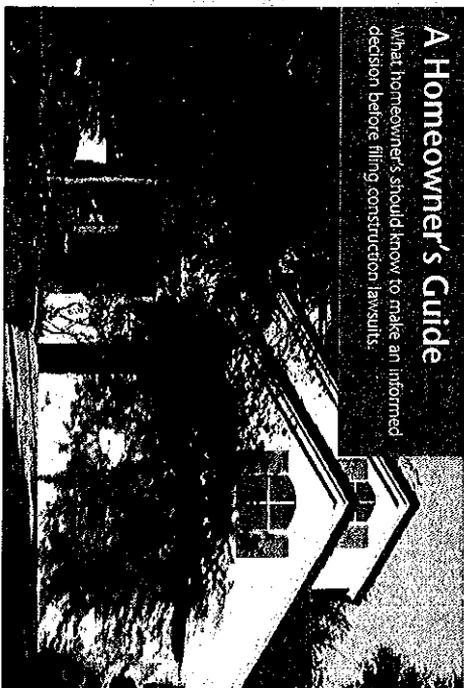
City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

E-mail: \_\_\_\_\_

Our Builder/HOA/Property Mgmt. Co: \_\_\_\_\_

# Think Before You Litigate!



## A Homeowner's Guide

What homeowner's should know to make an informed decision before filing construction lawsuits.



*Neighbors Protecting*  
H O M E V A L U E S

[www.NeighborsProtectingHomeValues.com](http://www.NeighborsProtectingHomeValues.com)



# Think Before You Litigate!

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

## And Make An Informed Decision

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

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

Unnecessary construction lawsuits have been a growing problem throughout California,

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

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

Think before you litigate.

**Neighbors Protecting Home Values**



## Be an Informed Homeowner

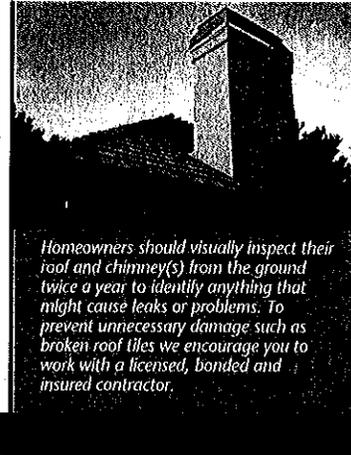
Under the law if your home was sold after January 2003 you must contact the homebuilder first so they have the opportunity to mitigate any legitimate construction concerns. Homeowners are often unaware under California law there are multiple home warranties covering

more than just the original homebuyer.

Remember there are alternatives to unnecessary lawsuits.

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

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



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

## What Questions Should I Ask?

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

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



**Be An Informed Homeowner**

## Frequently Asked Questions:

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

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

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



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

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

Under California law you must provide full disclosure when selling your home, which includes everything regarding perceived problems with the construction of your home and any major repairs and lawsuits relating to your home. The seller of the home must provide any potential buyers with a transfer disclosure statement – listing all defects to the property known to

the seller. The statement must be presented to the potential buyer prior to entering into any sales contract – reports usually extend the normal marketing time for the property and discount the potential selling price on the property 10%-20% depending on how extensive the defect list.

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

Due to California's full disclosure law your lender will be put on notice and may require proceeds from any lawsuit be applied to your loan due to the loss in home value as a result of the suit.

Joining in an unnecessary lawsuit may also prevent homeowners from ever being able to sell or refinance a home, at least without proving all of the required repairs have been made.

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

If you are considering filing a lawsuit, have plenty of time on your hands – it is a very lengthy process and can take as much as two to five years to be settled. Running up costs and running down housing values. The lawsuit may also require destructive

testing on your home to prove the defects exist. Unnecessary lawsuits only benefit defect lawyers while harming homeowners and small businesses throughout California.

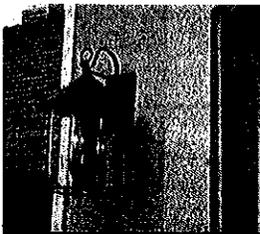
### **How much will you really get from the settlement? Will my mortgage lender require some of the possible settlement proceeds from the litigation?**

"The promise of "easy money" may be very tempting – but you should know as much as 70% of your settlement could go to the attorneys and their paid experts in the case. These "experts" also often grossly inflate repair estimates to justify large settlement claims and pay their huge legal bills. Bills the homeowner is responsible for whether you win or lose the case. Homeowners could also be liable for the cost of the

builder's defense if their suit is unsuccessful.

Lenders may also require proceeds from the settlement due to the loss of value as a result of the suit. Unnecessary construction lawsuits are a form of extortion – only benefiting the defect attorney who brought forth the unreasonable claim."

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



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

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

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

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

Cities are interested in making sure all homes meet building code requirements and inspect each home at various stages of construction before it is approved. Inspections may include for example window flashings for water tightness, roofing, plumbing, fire blocking and installation of exterior waterproof paper are to be completed by city building inspectors. All inspection records are on file at the City building departments

and available for the homeowner's review. In order to protect future homebuyers cities often require homeowners to repair the defect(s) with settlement funds, list the defects on a disclosure statement to potential lenders or buyers and the city may also file a correctional or information lien on the home title to assure protection of future owners.



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

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

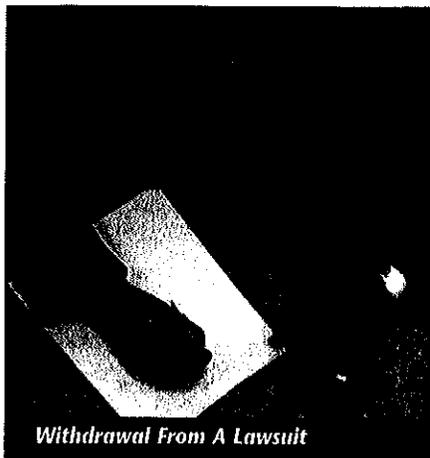
There are instances where homeowners have legitimate concerns about the quality of their home's construction and they must first contact the homebuilder directly to arrange for repairs rather

than joining an unnecessary lawsuit. If the builder will not resolve the legitimate problems, complaints may be filed with the appropriate governmental agency and trade associations.

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

Under California law homeowners are expected to maintain their homes - performing preventative maintenance on a regular, seasonal and one time task basis. Homeowners are often provided with suggested maintenance checklists by their insurance companies and encouraged to follow

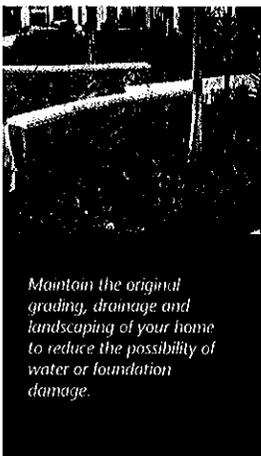
manufacturer's recommendations. Insurance companies recommend homeowners use licensed contractors for any task they are unprepared to complete - doing it properly the first time will save homeowners time and money in the long run.



*Withdrawal From A Lawsuit*

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

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



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

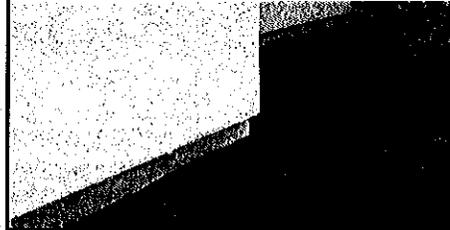
## **THINK BEFORE YOU LITIGATE!**

Give your homebuilder a call – you will be pleasantly surprised! For additional information and facts about how proper housing maintenance may eliminate homeowner concerns we encourage you to visit our website at [www.neighborsprotectinghomevalues.com](http://www.neighborsprotectinghomevalues.com)

***Think Before you Litigate!***

## Frequently Called Phone Numbers

My Homebuilder	_____
Homebuilder's Customer Service	_____
Licensed Maintenance Person	_____
Gardener	_____
Pool Maintenance	_____
City Services	_____
Other	_____
Other	_____
Other	_____



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



*Neighbors Protecting*  
H O M E V A L U E S

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June 14, 2010

Via Facsimile  
(415) 538-2171

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

Re: **Public Comment on Proposed Rule of Professional Conduct 1.1  
(Competence)**

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

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

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

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

Ms. Audrey Hollins and RRC  
June 14, 2010  
Page 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

A handwritten signature in black ink, appearing to be a cursive combination of the names Andrew I. Dilworth and William M. Balin.

Andrew I. Dilworth  
William M. Balin



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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

*All information submitted is regarded as public record.*

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

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

## Your Information

Professional Affiliation

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 1.1 Competence

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

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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

Please see attached 2 page .pdf.



## LAW PRACTICE MANAGEMENT AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

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

#### ***INTRODUCTION***

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

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

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

#### ***ANALYSIS***

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

LPMT believes that the Proposed Rule 1.1(b) definition of "competence" does not adequately account for differences in legal resources, skills, and expectations that may exist as between different communities.

Accordingly, LPMT recommends that the Commission revise paragraph (b)(1) to clarify that "competence" is to be assessed by reference to the particular locality in which a lawyer is practicing.

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

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

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

Clean version of amended Proposed Rule 1.1(b):

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



**THE STATE BAR OF  
CALIFORNIA**

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June 15, 2010

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

re: Comments of the Office of the Chief Trial Counsel to Proposed  
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,<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.

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

**Rule 1.1. Competence.**

1. OCTC supports this rule so long as diligence is included either in this rule or elsewhere as in the Model Rules. OCTC does not find the Comments to this rule necessary.



UNIVERSITY OF CALIFORNIA  
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

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

Dear Lauren:

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

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

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, 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.

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

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

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

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

II. Rules relating to able representation

1. Rule 1.1 – Competence

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

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

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

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

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

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

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