



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 5, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.1

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.1. COPRAC supports the Rule as drafted. We have one comment on Comment [6]. That comment provides that:

[6] An agreement to advance to or deposit with a lawyer a sum to be applied to fees or costs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule. This Rule is not intended to apply to an agreement with a client for a contingent fee in a civil case.

The first sentence of Comment [6] does not make it entirely clear that the rule is not applicable to a deposit or advance. The second sentence of Comment [6] makes this point more directly as to contingent fee agreements. Accordingly, if the RRC intends that this Rule not apply to an advance or deposit, then perhaps a more accurate expression of that would be to frame the statement as the RRC has done in the second sentence, that is, to say, "This Rule is not intended to apply to an advance to or deposit with a lawyer of a sum to be applied to fees or costs incurred in the future."

Thank you for your consideration of our comments.

Very truly yours,

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

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

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

Re:

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

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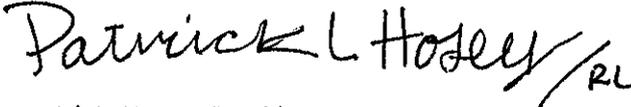
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
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Rule 4.3	Dealing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

Dear Ms. Hollins:

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

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

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association

MEMORANDUM

Date: April 22, 2008

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

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

Re: "3rd Batch," Proposed New or Amended Rules of Professional Conduct of the
State Bar of California

**Subject: Proposed Rule 1.8.1 – Business Transactions with or a Client or
Acquiring Interest Adverse to a Client
[Existing CRPC Rule 3-300]**

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

The SDCBA supports national uniformity in professional ethics as a general premise. It respectfully submits the following specific comments for your consideration:

* * * * *

Comment 1: Approve Proposed Rule 1.8.1 with the following modification: 1.8.1(a) – change the provision in the text of the proposed rule as marked in bold: "The transaction or acquisition and its terms are fair and reasonable to the client **at the time of the transaction or acquisition** and are fully disclosed ...

Rationale for Comment 1: This change would address the situation in which an asset becomes valuable later (e.g., stock in a start up company) and the regulator is tempted to assess the fairness of the transaction after-the-fact (e.g. when the start up company has become successful). Typically, the lawyer in this situation looks greedy, but in fact did not overreach because the risk-adjusted value of the asset was small at the time of the transaction.

Comment 2: Approve Proposed Rule 1.8.1 with the following modification:
Add a sentence at the end of Proposed Rule Comment 4 that states: "However, the rule may apply if the lawyer has, or should have, any reason to believe the client is investing, in part, because of the client's confidence in the lawyer's judgment."

Rationale for Comment 2: The last eight lines of Proposed Rule Comment 4 address the situation in which a lawyer and the client both enter an investment together, for example

in a limited partnership. The comment assumes that when the lawyer also invests, the lawyer and client will both be making independent financial assessments and there will be no risk of undue influence. That's not entirely true, since the client may be relying too much on the lawyer's judgment. The lawyer's situation and risk tolerance simply may be different.

Comment 3: Approve Proposed Rule 1.8.1 with the following modification: Delete the words "or to the modification of such an agreement" in line 2 and the words "and modifications to such agreements" in line 6 of Proposed Rule Comment 5.

Rationale for Comment 3: Comment 5 slips in the notion that modifications of a retainer agreement don't fit under this rule, on the theory that 1.5 covers retainer agreements. There's a big difference, however, between the initial and modified retainer, because by the time of modification the client will have become more dependent on the lawyer and the lawyer has the upper hand if he threatens to resign. All Rule 1.5 does is require the total fees to be reasonable; it doesn't require the lawyer to make sure clients sign only wise modifications.

Comment 4: Approve Proposed Rule 1.8.1 with the following modification: Delete the first two sentences (including the citation to Seltzer) of Proposed Rule 1.8.1 Comment 6.

Rationale for Comment 4: Proposed Rule 1.8.1 Comment 6, in oversimplified fashion, states that the negotiation of a retainer agreement is an arms-length transaction. While courts have sometimes said that, they have also said the opposite. The issue actually is very complicated. (I know, because I've written a 70 page article on the subject: *The Preemployment Ethical Role of Lawyers; Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569 (2007)).

Comment 5. Approve Proposed Rule 1.8.1 with the following modifications: Add the following sentence at the end of Proposed Rule 1.8.1 Comment 8: "However, a lawyer who has reason to believe that the client does not understand the disclosure must explain the issues further."

Rationale for Comment 5: Proposed Rule 1.8.1 Comment 8 says the issue of "whether the disclosure reasonably can be understood by the client is based on what is objectively reasonable under the circumstances." The addition protects the dumb client against claims of objective reasonableness.

Comment 6. Approve Proposed Rule 1.8.1 with the following modifications: Delete everything in the first sentence of Proposed Rule 1.8.1 Comment 9 after the words "paragraph (a)", the subsequent citation, and the word "It" at the beginning of the second sentence.

Rationale for Comment 6: Proposed Rule 1.8.1 Comment 9 overstates the holding of *Beery v. State Bar* when it asserts "The requirement for full disclosure in writing in paragraph (a) requires a lawyer to provide the client with the same advice regarding the

transaction or acquisition that the lawyer would provide to the client in a transaction with a third party.” Actually, in the third-party transaction, a client sometimes can reasonably rely on the lawyer to act for him; the lawyer need not make all of the disclosures that are necessary in a personal transaction (in which the rules assume the client needs protections against the lawyer.)

Comment 7: Approve Proposed Rule 1.8.1 with the following modification: In Proposed Rule 1.8.1 Comment 9, line 12, right before the last word of the line (i.e. “and”), insert the words “at the time of the transaction or acquisition”.

Rationale for Comment 7: The reason is explained in Comment 1 above, in connection with the suggested change to the text of the proposed rule.

Comment 8: Approve Proposed Rule 1.8.1 with the following modification: Insert “1.7(b) and” before “1.7(d)”.

Rationale for Comment 8: Proposed Rule 1.8.1 Comment 10, line 5 says, in connection with the lawyer who represents both the client and himself in a transaction, “The lawyer must also comply with Rule 1.7(d).

Comment 9: Approve Proposed Rule 1.8.1 with the following modification: Proposed Rule 1.8.1 Comment 11, line 8, after “The lawyer must”, insert “, before the transaction or acquisition is completed,”.

Rationale for Comment 9: Modification is needed for clarification.

Comment 10: Approve Proposed Rule 1.8.1 with the following modification: Proposed Rule 1.8.1 Comment 11, second to the last line, change “1.7(d)” to “1.7”

Rationale for Comment 10: Same reason as stated in Rationale for Comment 9 above.

Comment 11: Approve Proposed Rule 1.8.1 with the following modification: Delete Proposed Rule 1.8.1 Comment 13.

Rationale for Comment 11: Proposed Rule 1.8.1 Comment 13 misses the mark. The only situation in which “the lawyer’s interest will preclude the lawyer from obtaining the client’s consent” is when the lawyer doesn’t want the client to engage in the transaction but must offer the deal for some reason. But the remedy of Comment 13 is that no transaction is possible, even if the transaction is a good deal for the client.

Comment 12: Approve Proposed Rule 1.8.1 with the following modification: Delete the sentence starting “Under such circumstances . . .” through the semi-colon of Proposed Rule 1.8.1 Comment 15.

Rationale for Comment 12: Proposed 1.8.1 Comment 15, line 5 says that when the client gets an independent lawyer, the lawyer is not required to provide legal advice. Can we be sure that the lawyer in this situation will never have continuing fiduciary duties?

Comment 13: Approve Proposed Rule 1.8.1 with the following modification: Add the following abbreviated Comment 16 to Proposed Rule 1.8.1: "The obligations imposed under this rule apply to lawyers associated in a firm with the lawyer who represents the client directly. These lawyers must make all of the required disclosures before entering into a business transaction with or acquiring an interest adverse to the client."

Rationale for Comment 13: ABA rule 1.8.1 has a comment on imputation. The Proposed Rule 1.8.1 does not. It should.

BALIN & KOTLER, LLP
Attorneys at Law

William M. Balin
SBN: 59104
345 Franklin Street
San Francisco, CA 94102

June 14, 2010

***Eileen S. Kotler**
SBN: 83563
1750 Francisco Boulevard
Pacifica, CA 94044

Telephone: (415) 241-7360
Facsimile: (415) 252-8048

Telephone: (650) 359-1330
Facsimile: (650) 359-2567

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

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

**Re: Public Comment on Proposed Rule of Professional Conduct 1.8.1,
comments [5] and [6] and Proposed Rule 1.5 (Modification of Fee
Agreements)**

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

Drew Dilworth and , the Vice-Chair and Chairperson of the Bar Association of San Francisco's Legal Ethics Committee, respectively, are submitting the following comments on certain portions of proposed Rules 1.8.1 and 1.5. We are submitting these comments in our individual capacities, Drew and I believe that rule 1.8.1, Comments [5] and [6], together with proposed Rule 1.5, leave a gap that allows an attorney to add language to an existing contract that materially, adversely affects the rights of the client without compelling the attorney to make the appropriate disclosures and to obtain the requisite written consent.

Rule 1.8.1 governs a lawyer's business transactions with a client. Comment [5] to the proposed Rule specifically excludes the original agreement by which a client hires a lawyer as well as any "modification of such an agreement." Comment [6] states that the Rule "is not intended to apply to an agreement with a client for a contingent fee in a civil case." However, we can envision at least two scenarios in which a change in the fee agreement will not give the attorney "an ownership, possessory, security or other pecuniary interest adverse to the client" yet would materially impact the client's rights with a concomitant advantage to the attorney. The first instance is where the attorney, in mid-representation, asks the client to change a contingent fee agreement to an hourly fee agreement, or vice versa. The second instance is where the attorney asks the client to modify the fee agreement by adding a clause making all disputes subject to binding private arbitration.

In the first instance, the attorney arguably is not obtaining an interest that falls within one

Please reply to San Francisco Pacifica office.

*Certified as an Appellate Specialist by The State Bar of California Board of Legal Specialization

Audrey Hollins and RRC- June 14, 2010

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of the denominated categories; it is not an ownership, possessory, security or other pecuniary interest, yet the change may very well be adverse to the client. For example, where a lawyer representing a client in a contingency fee case comes to believe that the potential recovery is not as great or as likely as the lawyer once thought, the lawyer may go to the client and seek to change the agreement to an hourly fee arrangement. Similarly, a lawyer representing a client in an hourly fee case may come to believe that a much larger recovery is likely than originally anticipated, and that a contingent fee would be likely to greatly exceed the expected hourly fee. Additionally, there may be instances where the attorney has already received an hourly fee and then seeks to change the agreement to a contingent fee without crediting the client with the hourly fees already received against any contingent recovery. In each case, the lawyer stands to gain at the expense of the client, yet, because the change does not fall within one of the enumerated categories of suspect interests, the lawyer would not have to comply with the rule.

In the second instance, the lawyer may suspect or have reason to believe that a dispute with the client, either over fees or over the lawyer's performance, or both, is more likely than originally contemplated at the outset of the representation, and that the lawyer's chances of prevailing in such a dispute would be greater before an arbitrator than before a jury. In such a case the lawyer would be asking the client to waive substantial legal rights, such as a jury trial and the right to appeal, without having to comply with the requirements of Rule 1.8.1.

We believe that such modifications are governed by the lawyer's already existing fiduciary duty to the client, and that an approach that limits the Rule, or its comments, to those instances where the attorney actually obtains an interest in a piece of property or other asset of the client is too narrow. We note that comment [5] to Rule 1.8.1 references Rule 1.5. Rule 1.5, subdivision (f), states that a lawyer cannot materially modify an agreement with a client in a way that is adverse to the client's interests without seeing that the client is either represented by another lawyer or is advised in writing to seek the advice of another attorney. However, Rule 1.5 does not require that the change in the fee agreement be fair to the client, or that the changes are fully explained to the client in a manner the client can understand. Moreover, under Rule 1.5, the lawyer discharges his duty once the client is advised in writing to seek the advice of another attorney. There is no requirement that the client actually receive such advice.

Accordingly, we are concerned that Rule 1.5, subdivision (f) does not provide sufficient protections for clients under the scenarios outlined above, while the application of Rule 1.8.1 to such scenarios is specifically precluded. We also note that there are no comments to Rule 1.5 that address subdivision (f). We therefore recommend changing or adding a comment to Rule 1.8.1 that applies the Rule to modifications in a fee agreement that are adverse to the client's interests. While we view the protections of Rule 1.5 as insufficient to protect the interests of clients in the situations outlined above, we urge the Commission, at a minimum, to add a comment to Rule 1.5 that clearly applies the Rule to situations in which an attorney materially alters an existing fee agreement to the detriment of the client, such as in the instances we have outlined.

Audrey Hollins and RRC- June 14, 2010

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We do not purport to have exhaustively mined the field of possible modifications to fee agreements, whereby an attorney could obtain an advantage greater than that originally bestowed upon him or her in the original agreement. However, we think the scenarios we have identified show that the potential for mischief is significant enough that greater protections ought to be provided to clients in situations where an attorney may want to modify an existing agreement in a manner that is detrimental to the client but does not fall within the protections of Rule 1.8.1 as presently drafted.

We thank the Commission for this opportunity to comment on these proposed Rules, and we urge the Commission to give further consideration to these. Rules.

Very truly yours,



William M. Balin
Andrew Dilworth

Rule 1.8.1. Business Transactions with a Client and Acquiring Interests Adverse to the Client.

1. There are too many comments and many are too long and incorporate other rules and comments. They seem more appropriate for treatises, law review articles, and ethics opinions.
2. While OCTC believes modifications would normally apply to this rule (see OCTC's written Comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, already provided in OCTC's August 26, 2008 comments to the rules), it supports the compromise adopted that states in most cases modifications will be governed by proposed rule 1.5(f).
3. The first sentence of Comment 6 seems unnecessary. Comment 6's last sentence should make clear that a contingent fee could fall within this rule if the lawyer obtains a proprietary interest in the client's property. For example, if an attorney represents a client in a civil lawsuit over the shares of a company and if the agreement states that if successful the lawyer obtains a percentage of the shares and not just a percentage of the worth of the shares the attorney's agreement should come within proposed rule 1.8.1. The Commission rejected ABA rule 1.8(i) because they believed proposed rule 1.8.1 was sufficient. Thus, when we are discussing an actual interest in the subject of the representation, and not just monetary percentages, rule 1.8.1 should apply, even for contingency agreements.
4. The last sentence of Comment 9 should be stricken as it is legally incorrect. It states "Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised." If the Commission is stating or implying that in a disciplinary proceeding the attorney does not have the burden of showing that the transaction or acquisition and its terms were fair and reasonable or just and that the client was fully advised, the Commission is wrong. It is well established that the attorney in a disciplinary proceeding has the burden of showing that the transaction is fair and reasonable and was fully known and understood by the client. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314; *Hunnecutt v. State Bar* (1988) 44 Cal.3d 362, 372-373; *Clancy v. State Bar* (1969) 71 Cal.2d 140, 146-147; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 165; *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 484, 489; *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, 394-395.)
5. Comments 10-14 could be shortened and tightened.



**THE STATE BAR OF
CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

<http://www.calbar.ca.gov>

DIRECT DIAL: (415) 538-2063

June 15, 2010

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

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

Dear Ms. Hollins:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with many of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly understood by the attorneys in this state and applied in a uniform fashion by both this Office and the State Bar Court. While OCTC has submitted comments in the past to some of these rules as they were initially submitted,¹ we welcome this opportunity to comment on the entire set of rules and in context. Further, there have been changes to the proposed rules since our original comments.² We hope you find our thoughts helpful.

SUMMARY

We summarize our main concerns as follows:

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

¹ OCTC refers the Commission to its previous comments and recommendations.

² We are not commenting on the rules that were not recommended or tentatively adopted by the Board of Governors (BOG).

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

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

GENERAL COMMENTS

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

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

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

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

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

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

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

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

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.⁷

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



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

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

Dear Lauren:

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

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

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, 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.¹ Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

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

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

A few additional preliminary notes:

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

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

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

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

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

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

I. ~~**Rules relating to conflicts of interest**~~

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

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

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

~~This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The June 2008 Ethics Profs. Letter did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶¶ 33.² To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.~~

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

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

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

~~were not as carefully vetted.~~

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

2. Rule 1.8.1 – Doing business with a client

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

A. The current and proposed rules

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

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

B. Modification of fee contracts excluded

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

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

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

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

C. Inappropriate use of independent counsel

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

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

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

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

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

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

- ~~(1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client; (Emphasis added.)~~
- ~~(2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure....~~

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

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

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