

# 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.*

**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.

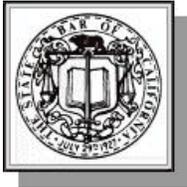
Rule 1.8.10 Sexual Relations With Client [3-120]

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.**

Our sex lives are none of your business. Given that anybody who asks for or receives any legal information is potentially a client this would seriously limit either sex or conversation. Why don't the people who have free time to draft rules know these things?



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I have been an licensed attorney since 1986 (no disciplinary actions) and I agree with most of the proposed changes to the Code of Ethics. But they are "rules". I see two two proposals that I take issue with.

"Sex with clients is just plain wrong"...why?

What do you mean "wrong". You mean you are offended? Do you mean you would not do it? Neither have I. So what does that mean? Why is it "wrong" in every situation? Please explain.

The existing rule and prohibition has legitimacy because it is effective when circumstances exist that are likely to cause adverse effects in the representation of the attorney's client. That makes perfect sense. That is what rules are for...protecting the clients. The prohibitions pertain in situations when sex is:  
1. required as a condition of a representation; 2. obtained by coercion,

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A complete ban on all sex in every situation no matter what? Why? Is all sex in every situation harmful to the representation of that client? Honestly, I suspect the answer is "no". For example, a client wants to form a corporation. The attorney forms the corporation and a dinner meeting turns into a situation involving..."sex". Oh my God! Now the State Bar is going to discipline, suspend or disbar the member? Are you serious? This sounds absolutely stupid. I may not approve. You may not approve, but really, has any harm been incurred?

By the way, what is sex? Are you planning to define that too?

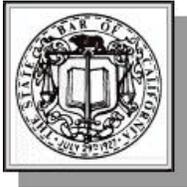
What about a client and the attorney who go hunting, camping, fishing, vacationing, wine tasting...oh my God, another personal relationship is formed. Maybe no kissing or "sex" occurred, but a special personal bond was created. Maybe even an unbreakable, great friendship was formed. I admit, I do have many of those. Is that inappropriate contact too?

Why not ban that special relationship too? Disbar the lawyer. Same ridiculous logic. Make the ban "complete"; no relationship of any kind. Next stop, check emails for excessive "friendliness".

Wake up!

The ABA claims as the slogan, "Defending Liberty, Pursuing Justice". They obviously have a peculiar definition of "Liberty". Does the California State Bar recognize true "Liberty"? What is your definition?

Please adopt rules that have a legitimate purpose, not just a "politically correct" or other "holier than thou" purpose.



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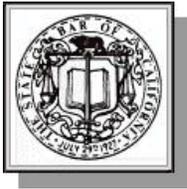
AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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Rule 1.8.10 is ambiguous in that it does not identify whether lawyers will be prevented from having sexual relations with a client after the representation has concluded. Given that our duty of loyalty and confidentiality continue to exist after the conclusion of the representation, those same continuing duties might apply to sexual relations. The rule should clarify if, or under what terms, sexual relations with clients could exist after the representation has concluded.



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AGREE with this proposed Rule

DISAGREE with this proposed Rule

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I believe the current rule adequately covers the areas of real concern regarding sexual relations with clients. I disagree with government (i.e. State Bar) involvement in personal morals and social norms, and I believe the proposed rule crosses that line. The current rule prohibits conduct that is coercive and addresses the potential for the relationship to interfere with the attorney's ability to perform to the best of his or her ability. That is as far as it should go. This would prohibit a relationship from developing in, for example, a situation in which the attorney and client are involved in real estate or other purely financial transactions or disputes. I see nothing wrong, generally, in two people developing a personal relationship that arises out of a professional one, and I think that the State Bar should limit itself to situations in which there is a real danger that the attorney/client relationship will be harmed. This proposed rule is too broad in its scope, and too confining in its proscription.



**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 1.8.10

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 1.8.10. COPRAC supports the proposed rule and offers the following comments.

Comment [2] uses the term "adversely affected" which language derived from a prior draft of Rule 1.7. Now that the current draft of Rule 1.7 uses the "materially limited" test, the phrase "adversely affected" should be replaced with "materially limited." This would be consistent with the ABA Model Rule. Also in Comment [2], the reference to 1.7(d) should be changed as the current version of 1.7 no longer has a subsection (d).

Comment [3] contains a reference to Rule 1.13. COPRAC does not see the point of this reference, and believes that it could be confusing. Accordingly, we propose to delete it.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC



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June 14, 2010

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

Dear Ms. Hollins:

Please find enclosed our comments on Proposed California Rules of Professional Conduct. We would be happy to address any follow-up questions the Commission may have regarding our comments.

Sincerely,

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

Theresa Meehan Rudy  
Executive Director



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June 15, 2010

**Comments by**  
**HALT—*an Organization of Americans for Legal Reform***  
**on**  
**Proposed California Rules of Professional Conduct**

In response to the request for public comment by the Commission on the Revision of the Rules of Professional Conduct of the State Bar of California, HALT – *An Organization of Americans for Legal Reform* hereby submits the following comments on the Proposed Rules of Professional Conduct.

Founded in 1978, HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases and grassroots lobbying, HALT has been on the forefront of fights to improve the systems in place to weed out unethical lawyers and to provide meaningful recourse to victimized legal consumers.

Although we suggest some possible improvements, four of the Proposed Rules that we discuss reflect progress in key areas of client empowerment and lawyer responsibility. On the critical issue of protecting consumers from exorbitant legal fees, however, the Commission and the California Bar continue to fail the public. Unreasonable attorney's fees are the leading cause for consumer complaints against lawyers. HALT respectfully urges the Commission to revisit this issue.

**Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.2. An attorney works for a client, and has an ethical responsibility to allow the client to make the important decisions in a matter. We applaud the Commission's recognition of a lawyer's ethical obligation to "abide by a client's decisions concerning the objectives of representation" and to "abide by a client's decision whether to settle a matter" (Proposed Rule 1.2(a)). In addition, HALT has long advocated limited representation as a cost-saving innovation that enhances

consumer choice. We strongly support the Commission's explicit authorization of this practice (Proposed Rule 1.2(c)).

**Rule 1.4 Communication.** HALT strongly supports the Commission's acceptance of the ABA Model Rule in Proposed Rule 1.4. It is a substantial improvement over current California Rule of Professional Responsibility 3-500. Without full and regular communication, the attorney-client relationship cannot function properly, and a client is not in a position to make the critical decisions during the course of a representation. Unfortunately, the proposed rule only requires a lawyer to communicate the "amounts, terms, and conditions of any *written* offer of settlement made to the client" in civil matters (Proposed Rule 1.4(c)(2), emphasis added). Whether a settlement offer is oral or written is immaterial; the client has the right to decide whether to accept it under Proposed Rule 1.2, and should be informed of all such offers. Indeed, the Commission's commentary on the proposed Rule states "[a]ny oral offers of settlement made to the client in a civil matter must also be communicated if they are significant" (Proposed Rule 1.4, Comment [7]). But a Comment is not a Rule. As currently drafted, the Proposed Rule and the Commission's commentary create unnecessary ambiguity. HALT urges the Commission to strike the word "written" from Proposed Rule 1.4(c)(2), so it is clear that a lawyer has an obligation to communicate all settlement offers to a client.

**Rule 1.4.1 Disclosure of Professional Liability Insurance.** HALT believes that all lawyers who offer their services to the general public should be required to carry adequate malpractice insurance. Proposed Rule 1.4.1 is an important step toward that objective, and HALT thanks the Commission for beginning to address the problem of uninsured and inadequately covered attorneys. While similar mandatory disclosure requirements have significantly reduced this problem in other States, we believe that there is a better approach. Since 1978, Oregon has required all lawyers in private practice to obtain malpractice insurance coverage through the Oregon State Bar Professional Liability Fund. The Oregon system of universal coverage has worked well. HALT urges the Commission and the Board of Governors to monitor the effectiveness of the new disclosure requirements, and to consider a universal coverage system, similar to that which has proven effective in Oregon, to address any continuing problems of uninsured attorneys.

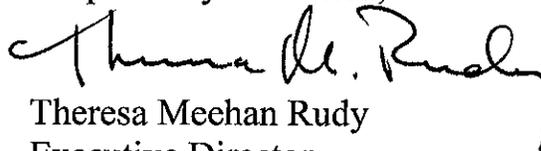
**Rule 1.5 Fees For Legal Services.** HALT is disappointed by the Commission's rejection of the ABA Model Rule, and its abject failure to propose any meaningful ethical standards to govern attorneys fees. By retaining the operative language in current California Rule of Professional Responsibility 4-200, Proposed Rule 1.5 would only prohibit fees that are "unconscionable or illegal." An ethical rule that prohibits

only the unenforceable and the unlawful adds nothing. For many years, HALT has raised questions about the elasticity of the ABA's requirement that attorneys only charge "reasonable" fees. But even that flawed approach offers some protection to consumers. The California approach protects only lawyers who charge unreasonable fees. HALT urges the Commission to revisit the issue of reasonable attorneys fees and, at a minimum, adopt the ABA Model Rule.

**Rule 1.8.10 Sexual Relations With Client.** There is an unfortunate history of abuses by attorneys who have taken sexual advantage of vulnerable clients. HALT strongly supports the clear prohibition of such lawyer misconduct by both the Commission and the ABA. Proposed Rule 1.8.10 is a substantial improvement over current California Rule of Professional Responsibility 3-120.

HALT thanks the Commission for the opportunity to offer these Comments.

Respectfully submitted,



Theresa Meehan Rudy

Executive Director

HALT, Inc.—

*an Organization of Americans for Legal Reform*

1612 K Street NW

Suite 510

Washington, DC 20006



**THE STATE BAR OF  
CALIFORNIA**

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June 15, 2010

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

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

Dear Ms. Hollins:

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

**SUMMARY**

We summarize our main concerns as follows:

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

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

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

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

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

## GENERAL COMMENTS

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

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

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

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

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

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

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

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

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

Many of the proposed Comments appear to be nothing more than a rephrasing of the rule or an annotated version of the rule. If the rule is ambiguous or not clear enough, the solution should not be a Comment rephrasing the rule, but a redrafting of the rule so it is clear and understandable. Likewise, discussing the purpose of the rule, best practices, or the limits of the rule are not proper Comments to the rules. There are other better vehicles for such discussions. Lawyers can read and conduct legal research when needed.

In addition, the rules and Comments make too much use of references to other rules and Comments, making it hard to understand the rules. Some of the Comments are too long and, thus, bury information in a very long Comment. Other Comments appear to be legally incorrect. We would recommend that most of the Comments be stricken or that the Rules be adopted without the Comments. It is our understanding that about seven states have not adopted the ABA's Comments, although two of those still provide the ABA's comments as guidance.

We are also concerned that there are too many separate conflicts rules (see rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13(g), and 1.18) and they often incorporate each other, making it difficult to comprehend, understand, and enforce them.<sup>7</sup>

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

Letter from OCTC  
To Randall Difuntorum  
June 15, 2010

**Rule 1.8.10. Sexual Relation with Client.**

1. Comment 1 is too long and seems more appropriate for a treatise, law review, or ethics opinion. The Commission, however, might want to advise the attorneys in a Comment of Business & Professions Code section 6106.9, which also covers sexual relations between attorneys and clients.