



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 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 3.4

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 3.4 - Fairness to Opposing Party and Counsel. COPRAC supports the adoption of proposed Rule 3.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

Carole Buckner, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

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

Re:

<b>RULE</b>	<b>TITLE</b>
Rule 1.0	Purpose and Scope of the Rules of Professional Conduct
Rule 1.0.1	Terminology *BATCH 6*
Rule 1.1	Competence
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.4	Communication
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
<b>Rule 3.4</b>	<b>Fairness to Opposing Party and Counsel</b>
Rule 3.5	Impartiality and Decorum of the Tribunal
Rule 3.6	Trial Publicity
Rule 3.7	Lawyer As A Witness

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

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

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

Very truly yours,



Patrick L. Hosey, President  
San Diego County Bar Association

## MEMORANDUM

Date: April 22, 2008

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

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

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

**Subject: Proposed Rule 3.4– Fairness to Opposing Party and Counsel  
[Existing CRPC Rules 5-200, 5-220, 5-310]**

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 3.4 with the following modification: Delete section (e)(3).

Rationale For Comment 1: The new rule is overbroad in two key respects, and the breadth is not necessary to achieve the stated policy objectives.

Proposed Rule 3.4 section (e) sets limits on compensation paid to witnesses. Subparts (1) and (2) limit to a reasonable amount any compensation or expenses paid to fact witnesses. These two limitations promote the policy that fact witnesses should not be paid an unreasonably high sum that would tend to improperly influence their testimony about facts necessary to a party's claims or defenses.

However, section (e)(3) sets limits on payments to expert witnesses. Expert witnesses are fundamentally different from fact witnesses, because they are typically sophisticated witnesses familiar with the legal system and retained to testify on behalf of one party. They negotiate a fee in exchange for professional expert services and typically have no first-hand knowledge of the facts giving rise to any party's claims or defenses. Although comment [4] attempts to define objective guidelines for what constitutes a reasonable fee, the test is inherently subjective. Experts are chosen by a party based upon perceived

qualifications, and a party should be free to negotiate any payment to an expert, whether subjectively or objectively reasonable to another party.

In litigation, the compensation to and potential biases of the expert can be brought out in discovery through deposition or at trial in cross-examination. A judge and jury are likely to react negatively to a fee they perceive as too high, and thus the system polices itself. An attorney should not be penalized with potential ethics violations if he or she, or his or her client, paid an amount for expert services that another person believes is too high to be objectively or subjectively reasonable.

In other words, improper influence of testimony is less of a concern with expert witnesses because of their unique situation. Comment [3] to ABA Model Rule 3.4, which was not included in the comments to proposed Rule 3.4, acknowledges that it is less of a concern by stating, "it is not improper ... to compensate an expert witness on terms permitted by law."

Therefore, we recommend that proposed rule section (e)(3) be struck as overbroad and unnecessary to accomplish the policy objective of preventing the improper influence of witness testimony. The rule should be limited to prevent undue influence of fact witnesses. If, in the alternative, section (e)(3) is retained, then the portion of comment [3] to ABA Model Rule 3.4 that states "it is not improper to compensate and expert witness on terms permitted by law" should be included, because it permits any compensation to an expert that is permitted by law.

Comment 2: Approve Proposed Rule 3.4 with the following modification: Delete section (h).

Rationale for Comment 2: Section (h) is too broad to be reasonably implemented by an attorney. Without section (h), proposed Rule 3.4 is more narrowly tailored to the policy of preventing obstructive tactics in discovery procedure. Section (h) requires an attorney to refrain from requesting a person other than a client to refrain from giving relevant information to another party unless: "(1) the person is a relative or employee or other agent of a client, and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. (2) the person may be required by law to refrain from disclosing the information." Its effect is that an attorney could not advise someone other than a client (or a client's relative, employee or agent) to refrain from disclosing "relevant" information in any legal matter. Notably, section (h) is not limited to a discovery or litigation context. Therefore, it applies to attorneys participating in any legal transaction (real estate, mergers and acquisitions, licensing, etc.), including transactions where full disclosure of all "relevant" information may not be required or desirable. Therefore, section (h) should at least be limited to the litigation context.

However, even if section (h) was limited to the litigation context, it does not allow for full and frank participation in joint defense agreements (between parties or between a party and a non-party) or other normal commercial activity that would benefit a client's

interests. If section (h) were adopted, it could be unethical for an attorney to discuss legitimate tactics, such as timing or disclosure of potentially relevant business information in discovery, with an entity other than his or her client, even if the entity had entered into a joint defense agreement with the client. For example, the attorney could not request that the non-client refrain from producing relevant information unless served with a subpoena, and could not request that the non-client refrain from producing relevant information while the parties negotiated the scope of the potential production.

In other words, in some circumstances, there may be legitimate and legally permissible business reasons for refraining from giving relevant information voluntarily, at least for a particular period of time. An attorney should not be ethically prohibited from having these discussions, which are in the best interests of his or her client, particularly where the discussions do not obstruct legitimate discovery.

Section (h) also is unnecessary and duplicative in light of section (a), which more narrowly accomplishes the purpose of preventing a lawyer from unlawfully obstructing another party's access to evidence. Section (a) also prohibits a lawyer from counseling or assisting another person in any such obstruction.

Therefore, we recommend that proposed rule section (h) be struck as overbroad and unnecessary to accomplish the policy objective of preventing obstructive tactics in discovery, especially in light of section (a).



**THE STATE BAR OF  
CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL  
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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 3.4. Fairness to Opposing Party and Counsel.**

1. While OCTC supports the intent of this rule, it is concerned that subsection (f) of this rule, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, is vague and potentially overbroad. It is unclear whether “an obligation under the rules of a tribunal” includes, for example, local court rules or a judge’s individualized preferences. Without additional clarification or definition, the intended meaning of this rule will be a major source of debate, confusion, and litigation.
2. OCTC requests clarification from the Commission whether this rule is violated when a lawyer advises a person that he or she need not voluntarily speak with opposing counsel/party in the matter.
3. Many of the Comments cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Some of the Comments are too long and Comment 2 has too many ideas for one comment.