

Lee, Mimi

**From:** Marlaud, Angela  
**Sent:** Monday, November 23, 2009 10:24 AM  
**To:** CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net  
**Subject:** Final RRC Agenda Submission - 1.8.7 [3-310] - III.B. - December 11-12, 2009 Meeting Materials  
**Attachments:** RRC - 3-310 [1-8-7] - Dash, Intro, Rule, Comment, Clean, Redline, PubCom -COMBO - DFT2.1 (11-19-09).pdf

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**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Sunday, November 22, 2009 3:44 PM  
**To:** Marlaud, Angela  
**Cc:** Robert L. Kehr  
**Subject:** RRC - 1.8.7 [3-310] - III.B. - December 11-12, 2009 Meeting Materials

Greetings Angela:

I've attached a single, scaled PDF file that includes the following documents for this Rule (please use this e-mail as the cover memo for the Agenda item):

1. Dashboard, Draft 2.1 (11/19/09)ML-RLK-KEM;
2. Introduction, Draft 3 (11/19/09)KEM;
3. Rule Chart, Draft 6 (6/11/09)RD;
4. Comment Chart, Draft 5.1 (11/14/09)RD;
5. Rule 1.8.7, Draft 7 (11/11/09), Clean version;
6. Rule 1.8.7, Draft 7 (11/11/09), redline, compared to Public Comment Draft [#6.6];
7. Public Comment Chart, Draft 2.1 (11/19/09)RD-RLK-KEM.

Please let me know if you have any questions. Thanks,

Kevin

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# Proposed Rule 1.8.7 [3-310(D)] “Aggregate Settlements”

(Draft #7, 11/12/09)

**Summary:** Proposed Rule 1.8.7 carries forward the Model Rule and current California concept that a lawyer has a conflict when jointly represented clients are asked to approve an aggregate settlement of their claims or liabilities. This proposal includes the informed written consent requirement normally found in California’s conflict rules but otherwise is substantially the same as the Model Rule.

<b>Comparison with ABA Counterpart</b>	
<b>Rule</b>	<b>Comment</b>
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input checked="" type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

## Primary Factors Considered

- Existing California Law
 

Rules	RPC 3-310(D)
Statute	
Case law	
- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)
- Other Primary Factor(s)

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## Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

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Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption \_\_\_\_\_

Opposed Rule as Recommended for Adoption \_\_\_\_\_

Abstain \_\_\_\_\_

Approved on Consent Calendar

Approved by Consensus

Minority/Position Included on Model Rule Comparison Chart:  Yes  No

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## Stakeholders and Level of Controversy

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No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## Proposed Rule 1.8.7\* Aggregate Settlements

November 2009

(Draft rule following consideration of public comment)

### *INTRODUCTION:*

ABA Model Rule 1.8(g) and proposed Rule 1.8.7 both treat as a potential conflict of interest a lawyer's representation of two or more clients in arranging a settlement of claims, whether civil or criminal. Proposed Rule 1.8.7 largely tracks the first sentence of Model Rule 1.8(g). The only substantive difference is the substitution of California's more client-protective "informed written consent" requirement. The Commission has slightly modified the second sentence of Model Rule 1.8(g) because it is an incomplete statement of the disclosure necessary to obtain informed client consent. In addition, the proposed comment expands upon Model Rule 1.8, cmt. [13] and includes a more robust discussion of the disclosure necessary under this Rule, increasing the likelihood of lawyer compliance with the Rule and enhancing client protection.

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\* Proposed Rule 1.8.7, Draft 7 (11/12/09).



<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b></p> <p align="center"><b>Rule 1.8.7 Aggregate Settlements</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.</p>	<p><del>(g)</del> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an <del>aggregated</del><u>aggregate</u> agreement as to guilty or <i>nolo contendere</i> pleas, unless each client gives informed <u>written</u> consent, <del>in a writing signed by the client</del>. The lawyer's disclosure shall include, <u>among other things</u>, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.</p>	<p><b><u>Changes to the Model Rule.</u></b> Proposed paragraph (a) is substantially the same as MR 1.8(g). For consistency, the term "aggregate" is used in relation to both civil and criminal matters throughout this Rule and its Comment. Instead of the Model Rule phrase "informed consent, in a writing signed by the client," the Commission recommends retaining California's more client-protective requirement of "informed written consent." Unlike the Model Rule language, "informed written consent" requires by definition a written disclosure. It is noteworthy that the Restatement of Law of Aggregate Litigation § 3.17(a) (Tent. Draft No. 1 4/2008) requires that each claimant "be able to review the settlements of all other persons subject to the aggregate settlement," indicating the predicate of a written disclosure to permit "review." Moreover, current California rule 3-310(D), the counterpart to Model Rule 1.8(g), requires "the informed written consent of each client," which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place. The statement of the lawyer's disclosure duty in the second sentence of Model Rule 1.8(g) does not provide adequate client protection. Therefore, the phrase, "among other things" has been added to the sentence, and a more expansive explanation of disclosure under this Rule appears in the comment. See Comments [2] and [3]. <b><u>Approaches in Other Jurisdictions.</u></b> Several other jurisdictions have added other exceptions to the Model Rule. Some</p>

\* Proposed Rule 1.8.7, Draft 7 (11/12/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.7 Aggregate Settlements</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>jurisdictions exclude settlements in class actions (Louisiana and N.D.) or, more broadly, any settlement that is approved by the court (N.Y. and Ohio) or that is in the court's written record (Maryland). Minnesota removes criminal matters from the Rule.</p> <p>Concerning the requirement of "informed consent," most jurisdictions follow the Model Rule consent language, but there are a number of jurisdictions that provide less client protection than does the Model Rule. Some of these jurisdictions do not require that the consent be in a writing signed by the client, and some even do not require that the consent be in any writing. For example, Illinois has "consents after disclosure" and N.J. requires "informed consent after consultation". N.D. retains the 1983 Model Rule language that the client "consents after consultation", as do Georgia, Mississippi, and Virginia (which have not yet revised its rules). Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer. Conn. requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client. Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer. Conn. requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client."</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 1.8(g) Conflict Of Interest:  Current Clients: Specific Rules</b></p>	<p align="center"><b><u>Commission's Proposed Comment to Rule*</u></b>  <b>Rule 1.8.7 Aggregate Settlements</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>Model Rule 1.8, cmt. [13]. See below.</p>	<p><u>[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule [1.2(a)] to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or <i>nolo contendere</i> plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.</u></p>	<p>Comments [1], [2], and [3] substantially expand on the single Comment paragraph found in the Model Rule but are intended to be consistent with it. These three paragraphs supplement the discussion of what an aggregate settlement is and what information about the proposed settlement a lawyer is obligated to provide to the client. This fuller explanation should aid lawyer compliance and thus add to client protection.</p>
<p>Model Rule 1.8, cmt. [13]. See below.</p>	<p><u>[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. [See Rule 1.4].</u></p>	

\* Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><b>ABA Model Rule</b></p> <p align="center"><b>Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><b>Commission's Proposed Comment to Rule*</b></p> <p align="center"><b>Rule 1.8.7 Aggregate Settlements</b></p>	<p align="center"><b>Explanation of Changes to the ABA Model Rule</b></p>
<p><b>Comment</b></p> <p align="center">* * *</p> <p><b>Aggregate Settlements</b></p> <p>[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements</p>	<p><del>[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under This Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(permits a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea lawyer in a eriminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before anycivil matter to negotiate potential settlement offer or plea bargain is made or accepted</del> terms on behalf of multiple clients, <u>but</u> the lawyer must <u>inform</u> obtain the informed written consent of each client as provided in this Rule to accept an opposing party's aggregate settlement offer or to make an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of <del>them about</del> the lawyer's clients, <u>applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written</u></p>	

<p align="center"><u>ABA Model Rule</u></p> <p align="center"><b>Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</b></p>	<p align="center"><u>Commission's Proposed Comment to Rule*</u></p> <p align="center"><b>Rule 1.8.7 Aggregate Settlements</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>designed to ensure adequate protection of the entire class.</p>	<p><u>consent, the lawyer ordinarily must include</u> the material terms of the settlement, <del>including</del> what <u>each of the other lawyer's</u> clients <del>will</del><u>would</u> receive or pay if the settlement <del>or plea offer is</del><u>were</u> accepted, <u>and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.</u> The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also [Rule 1.0(e) (definition of informed consent). <del>Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.]</del></p>	

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 1.8(g) Conflict Of Interest:  Current Clients: Specific Rules</b></p>	<p align="center"><b><u>Commission's Proposed Comment to Rule*</u></b>  <b>Rule 1.8.7 Aggregate Settlements</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[No corresponding provision]</p>	<p><a href="#">[4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.</a></p>	<p>Comment [4] is consistent with the Model Rule but expresses ideas that are not generally known. The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement.</p>

<p align="center"><b><u>ABA Model Rule</u></b>  <b>Rule 1.8(g) Conflict Of Interest:  Current Clients: Specific Rules</b></p>	<p align="center"><b><u>Commission's Proposed Comment to Rule*</u></b>  <b>Rule 1.8.7 Aggregate Settlements</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></p>
<p>[No corresponding provision]</p>	<p><a href="#">[5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1( ).</a></p>	<p>There is no Model Rule counterpart for proposed Comment [5]. The Commission added it in response to public comment to clarify that a court's record of client approval of the terms of a settlement is a "written" disclosure and consent, as the Rule requires.</p>



**Rule 1.8.7 Aggregate Settlements**  
**(Commission’s Proposed Rule – Clean Version)**

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer’s disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

**Comment**

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer’s clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a “package deal”. This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer’s duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule [1.2(a)] to abide by each client’s decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. [See Rule 1.4].

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule to accept an opposing party’s aggregate settlement offer or to make an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer’s duty to communicate with each of the lawyer’s clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer’s clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If

the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also [Rule 1.0(e) (definition of informed consent).]

before a licensed court reporter that transcribes the disclosure and consent. See the definition of “written” in Rule 1.0.1( ).

[4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this This Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer’s clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

[5] A lawyer’s obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court

1  
2  
3 **Rule 1.8.7 Aggregate Settlements**  
4 **Post Public Comment Draft (DFT7, 11/14/09)**  
5 **(Redline showing changes to the Batch 4 Public Comment Version)**

6 A lawyer who represents two or more clients shall not participate in making an  
7 aggregate settlement of the claims of or against the clients, or in a criminal case  
8 an aggregate agreement as to guilty or nolo contendere pleas, unless each client  
9 gives informed written consent. The lawyer's disclosure shall include, among  
10 other things, the existence and nature of all the claims or pleas involved and of  
11 the participation of each person in the settlement.

12  
13 **Comment**

14  
15 [1] This Rule addresses the conflict issues that arise for a lawyer when the  
16 lawyer's clients enter into an aggregate settlement. An aggregate  
17 settlement occurs when two or more clients who are represented by the  
18 same lawyer resolve their claims, defenses or pleas together, whether in a  
19 single matter or in different matters. This can occur in a civil or criminal  
20 matter, and it includes a civil settlement made before potential criminal  
21 charges are filed. An aggregate settlement in criminal matters often is  
22 referred to as a "package deal". This Rule adds an obligation to those the  
23 lawyer has under Rule 1.7(b) concerning a lawyer's duties when  
24 representing multiple clients in a single matter. It also adds an obligation to  
25 those the lawyer has under Rule [1.2(a)] to abide by each client's decision  
26 whether to make, accept, or reject an offer of settlement in a civil matter or  
27 to enter a guilty or nolo contendere plea in a criminal case. This Rule  
28 applies whether or not litigation is pending. However, it does not apply to  
29 class action settlements that are subject to court approval.

30  
31 [2] This Rule applies in criminal matters in addition to any obligation to obtain  
32 the approval of the trial court. All plea offers, whether written or oral, must  
33 be communicated to each client. [See Rule 1.4].

34  
35 [3] This Rule permits a lawyer in a civil matter to negotiate potential settlement  
36 terms on behalf of multiple clients, but the lawyer must obtain the informed  
37 written consent of each client as provided in this Rule to accept an  
38 opposing party's aggregate settlement offer or to make an aggregate  
39 settlement offer that would be binding on multiple clients if an opposing  
40 party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty  
41 to communicate with each of the lawyer's clients, applies during the  
42 negotiation of an aggregate settlement; the lawyer is obligated to fulfill the  
43 duty to communicate with all the clients. In making written disclosure to

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46 required by this Rule in obtaining informed written consent, the lawyer  
47 ordinarily must include the material terms of the settlement, what each of  
48 the lawyer's clients would receive or pay if the settlement were accepted,  
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50 by the lawyer and any expenses to be paid out of the settlement proceeds)  
51 would be apportioned among them. The disclosure also must include the  
52 amount of any fee and of any expense reimbursement the lawyer would  
53 receive from the settlement. If the lawyer does not yet know the total  
54 amount of expenses to be reimbursed, the lawyer must disclose the  
55 amounts then known and make a good faith estimate of additional  
56 expenses. See also [Rule 1.0(e) (definition of informed consent).]  
57

58 [4] The aggregate settlement that is the topic of this Rule is the agreement  
59 with the adverse parties. The Rule does not address any process by  
60 which the jointly-represented clients determine how to share the benefits or  
61 burdens of that settlement. For example, this This Rule does not prevent  
62 a lawyer in a civil matter from participating in making an aggregate  
63 settlement although the allocation of the benefits or burdens of the  
64 settlement is delayed for subsequent agreement among the lawyer's  
65 clients, so long as the lawyer complies with the written disclosure and  
66 consent requirements of the Rule. See Comment [3]. Also, provided a  
67 lawyer complies with those disclosure and consent requirements, it does  
68 not prevent the lawyer from assisting the jointly-represented clients from  
69 agreeing at any time to a procedure by which a third-party neutral would be  
70 authorized to determine what each of the clients would receive or pay if the  
71 settlement were accepted, and the method by which expenses (including  
72 any expenses already paid by the lawyer and any expenses to be paid out  
73 of the settlement proceeds) would be apportioned among them.  
74

75 [5] A lawyer's obligation to make a written disclosure and obtain written  
76 consent is satisfied when the lawyer makes the required disclosure, and  
77 the clients give consent, on the record in court before a licensed court  
78 reporter that transcribes the disclosure and consent. See the definition of  
79 "written" in Rule 1.0.1( ).  
80  
81

**Rule 1.8.7 Aggregate Settlements.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
6	California Attorneys for Criminal Justice	M			<p>CACJ believes that the proposed rule fails to accommodate situations in which a settlement proposal is made by a prosecutor or by the court with an urgent time line for acceptance or rejection, during the course of a hearing, pretrial conference or at trial. In such circumstances, it will frequently be impossible or impractical to obtain the client's written informed consent.</p> <p>The proposed rule should be modified to permit, in criminal cases, the client's informed consent to an aggregate settlement be made "on the record" in court. While multiple representation in criminal cases is rare, it does occur and often finalization of a settlement is made in court, perhaps on the day of trial. In such circumstances, obtaining written consent would be difficult and time consuming. The purpose of the rule can be fulfilled by having the Court accept the consent on the record.</p> <p>CACJ requests that the first sentence of the proposed rule be modified to include the bold, italicized language below:</p> <p>"A lawyer who represents two or more clients</p>	<p>The Commission agrees. See RRC response to the Orange County comment, item 5 above. The Commission does not believe it is necessary to alter the Rule to accomplish the goal sought.</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.8.7 Aggregate Settlements.**  
**[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
 Disagree = \_\_  
 Modify = \_\_  
 NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere plea, unless each client gives informed written consent <b>or verbally consents on the record.</b> "	
3	California Commission on Access to Justice	M			Urges that this Rule be modified to permit attorneys to obtain clients' prior approval to an aggregate settlement with follow-up notification within a reasonable amount of time after the settlement is finalized.	It is correct that this Rule will prevent the resolution of some disputes and could as a result cause harm to some clients. The Commission has been troubled by this and discussed it at length. This risk also has troubled others, including the New Jersey Supreme Court. See <i>Tax Authority, Inc. v. Jackson Hewitt, Inc.</i> , 187 N.J. 4 (2006) in which the Court referred this issue to its Commission on Ethics Reform [N.J. has not subsequently changed its corresponding Rule]. The Commission concluded, consistent with the Model Rule and California's current Rule, that the predominate concern should be to assure that lawyers do not interfere with their clients' control over settlement. See <i>People v. Davis</i> , 48 Cal.2d 241, 256-57 (1957) [it amounts to taking a position adverse to the client, and therefore violates the duty of undivided loyalty, for an attorney to surrender any of the client's substantial rights without the client's "...free and intelligent consent after full knowledge of all the facts and circumstances...." citing <i>Anderson v. Eaton</i> , 211 Cal. 113, 116 (1930)];_because doing so violates the lawyer's duty of undivided loyalty to each client].

**Rule 1.8.7 Aggregate Settlements.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
4	Chamberlain, Suzanne V.	M			Urges the Commission to consider the practicality of a written attorney disclosure as required by propose rule 1.8.7, and the difficulties that such would pose to settlement and to the attorney-client relationship. It is suggested that in connection with aggregated settlements, a lawyer be required to secure the informed written consent of each client to the settlement, but that such informed consent may be effectuated by way of the member's oral disclosure.	The Commission disagrees and did not make the requested change.
1	COPRAC	A			Recommends specific language to clarify Comment [4].	The Commission agrees, and has adopted language suggested by COPRAC.
10	Legal Aid Assoc. of Cal.	D			Urges adoption of the Model Rule in lieu of the Commission's proposal because it believes the proposal likely will lead to fewer settlements in aggregate litigation.	See the RRC response to the comment of the California Commission on Access to Justice, item 3 above. In addition, although Model Rule 1.8(g) does not say when the lawyer must make disclosure to the clients and obtain their consent, Model Rule [13] makes it clear that this must be before the lawyer accepts the settlement. The Commission believes that most and perhaps all jurisdictions have read the Model Rule that way, and it therefore does not provide the flexibility the commenter apparently found in it.
7	Los Angeles County Bar Association, Professional Responsibility and Ethics	M			The proposed rule should recognize an exception for multi-party cases (such as multidistrict litigation) where there is active	

**Rule 1.8.7 Aggregate Settlements.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	Committee				<p>judicial supervision of the settlement. In cases where there are hundreds (or perhaps thousands) of individual litigants, it is impracticable to seek written consent from each client. Where such settlements are crafted under active judicial supervision, the onerous written consent requirement is unnecessary, just as it is unnecessary in class action cases. This issue has been recognized by the American Law Institute in its recently approved Principles of Aggregate Litigation, Topic 3, "Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" (Proposed Final Draft at 264).</p> <p>An aggregate settlement may be reached when it is simply impossible to get the informed written consent of each client after full written disclosure in a timely manner. For example, the case may be called for trial, but a settlement reached at the last minute. Not all of the clients are present – some may be at work or unavailable due to conflicting obligations. The settlement is discussed by phone, and the clients agree to accept the settlement.</p>	

**Rule 1.8.7 Aggregate Settlements.**  
**[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
 Disagree = \_\_  
 Modify = \_\_  
 NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	OCTC	M			OCTC criticizes Comment [4] without suggesting any correction except to say that the Rule should state the right of lawyers to assist clients in agreeing to the use of a third-party neutral to determine the allocation of an aggregate settlement.	The Commission disagrees and did not make the requested change. Comment [4] explains that the scope of the Rule includes only the settlement with adverse parties, not the allocation of the benefits or burdens of a settlement among jointly-represented clients. This explanation of the limits of the Rule is the proper subject of a Comment. See the COPRAC comment, item 1 above, and the RRC response.
5	Orange County Bar Association	M			Commission should consider whether a separate exception should be delineated in the Comment for oral settlements on the record that include full disclosure of the terms. OCBA proposed specific Comment language for this purpose.	The Commission agrees and has added new Comment [5].
2	San Diego County Bar Association Legal Ethics Committee	M		Rule	<p>The second sentence of the Rule states: “The lawyer’s disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”</p> <p>SDCBA criticizes “among other things” as being vague and not specifically defining exactly what must be covered in a disclosure. It then recommends says that the entire sentence is unnecessary and likely to cause confusion and should be removed.</p> <p>It points out the need for a conforming change to Comment [3] if the second sentence is</p>	The Commission disagrees and did not make the requested change. The phrase “among other things” is an addition to the Model Rule language that does not change its meaning and is intended only to emphasize, as is true of the Model Rule, that information described in the sentence is not intended to be exclusive. On the broader point, removing the sentence would not alter the lawyer’s ability to make a disclosure sufficient to obtain “informed written consent”, but doing so would leave the lawyer without any guidance as to what needs to be disclosed to obtain “informed written consent”. Including the Model Rule sentence does provide some guidance.

**Rule 1.8.7 Aggregate Settlements.  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					removed.	
8	Santa Clara County Bar Association	M			<p>SCCBA supports the changes to this rule, in particular, the change to add “written” to the informed consent requirement. However, the SCCBA recommends that an exception be made for public agencies. This rule should not apply to public agencies that are required by law to defend and indemnify their officers and employees for claims or actions arising out of acts or omission occurring within the scope of their employment with the public agency.</p> <p>Requiring the public agency to obtain the written consent of named officers and employees but who have not participated in the litigation could unnecessarily complicate the settlement of these cases and, in some cases, the public agency may not have current contact information for the named employee.</p>	

## **File List - Public Comments – Batch 4 – Proposed Rule 1.8.7**

D-2009-265 COPRAC [1.8.7]

D-2009-275b State Bar OCTC [1.8.7]

D-2009-276b Frank Tobin SDCBA Legal Ethics Comm [1.8.7]

D-2009-278b California Commission on Access to Justice [1.8.7]

D-2009-280b Legal Aid Assoc CA [1.8.7]

D-2009-282 Suzanne Chamberlain [1.8.7]

D-2009-283a Orange County Bar [1.8.7]

D-2009-285c Ted Cassman CACJ [1.8.7]

D-2009-286a James Ham LACBA [1.8.7]

D-2009-287b Santa Clara County Bar [1.8.7]





**THE STATE BAR  
OF CALIFORNIA**

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

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 1.8.7 – Aggregate Settlements

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 1.8.7 on aggregate settlements. COPRAC supports the adoption of the proposed rule, but recommends that the language of Comment [4] be revised to clarify what the Comment is intended to convey when it is read without the benefit of the explanatory language that accompanies it in the materials circulated for public comment. As presently proposed, the language of Comment [4] could be read to suggest that additional disclosures and consents may need to be provided under the Rule with regard to any allocation agreement or arrangement between the jointly represented clients.

In this regard, COPRAC recommends that the last two sentences contained in the "Explanation of Changes to the ABA Model Rule" be inserted at the beginning of Comment [4]. This would provide an appropriate introduction to the examples that are included and place them in context. Comment [4] would then provide as follows (recommended additional text is italicized):

*The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, it does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be*

authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

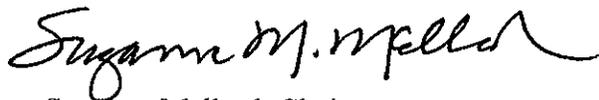
Alternatively, if the current proposed language of Comment [4] is intended to clarify that the Rule does not prohibit the specific circumstances identified, as opposed to providing examples of the types of allocation procedures among jointly represented clients that would not be precluded by the Rule, Comment [4] could be revised as follows:

This Rule applies to aggregate settlements, as defined in Comment 1, even if the allocation of the benefits or burdens of the settlement is delayed for subsequent agreements among the lawyer's clients or in matters where the jointly-represented clients agree to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

This revision would eliminate possible confusion that could result from references to the written disclosure and consent requirements in such circumstances.

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair  
Committee on Professional  
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR OF  
CALIFORNIA**

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October 20, 2009

Randall Difuntorum, Director  
Office of Professional Competence & Planning  
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 Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in July 2009. Here are our comments:

**~~Rule 1.8.6 Payments Not from Client.~~**

- ~~1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.~~

**Rule 1.8.7 Aggregate Settlements.**

- OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.

~~**Rule 1.15 Handling Funds and Property of Clients and Other Persons.**~~

- ~~1. While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.~~
- ~~2. OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.~~
- ~~3. OCTC suggests that the term "inviolable" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.~~
- ~~4. OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.~~
- ~~5. OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4<sup>th</sup> 430, 439; *Obrien v. Jones* (2000) 23 Cal.4<sup>th</sup> 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.~~
- ~~6. OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able~~

~~to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)~~

### ~~Rule 3.3 Candor Toward the Tribunal.~~

- ~~1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.~~
- ~~2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation~~
- ~~3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model~~

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5 200.~~

4. ~~OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." (Butler v. State Bar (1986) 42 Cal.3d 323, 329.)~~

~~**Rule 6.4 Law Reform Activities Affecting Client Interests.**~~

1. ~~OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,



Russell G. Weiner  
Interim Chief Trial Counsel

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to Rules of Professional Conduct (RPC)**  
**BATCH #4, Comment Deadline October 23, 2009**  
**SDCBA Legal Ethics Committee Deadline September 22, 2009**  
**Subcommittee Deadline August 31, 2009**

LEC Rule Volunteer Name(s): \_\_\_\_\_ Frank L. Tobin \_\_\_\_\_

Old Rule No./Title:           3-310(D)/Avoiding the Representation of Adverse Interests

Proposed New Rule No./ Title:       1.8.7/Aggregate Settlements

**QUESTIONS (please use separate sheets of paper as necessary):**

(1) Is the **policy** behind the new rule correct? If “yes,” please proceed to the next question. If “no,” please elaborate, and proceed to Question #4.  
Yes [x] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If “yes,” please proceed to the next question. If “no,” please elaborate, and then proceed to the Conclusions section.  
Yes [x] No [ ]

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.  
Yes [ ] No [x] The second sentence of the new rule is not clear. The second sentence reads:

The lawyer’s disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

By using the language “among other things”, the second sentence is vague and not inclusive of all of the items that must be in the disclosure. The second sentence does not specifically define what exactly must be covered when disclosing the existence and nature of all of the claims and pleas. This could lead to confusion as to the extent of what should be disclosed. One of the committee members, specifically in comments contained in February 25 and 27, 2009 emails from Melchior, expressed concerns that this sentence may create the requirement of drafting a treatise with regard to explaining “the nature of the claims involved.” I have attached these emails. I tend to agree that in cases where a large number of claims and defenses are included, this language is confusing as to what is actually required when providing a written disclosure as to each claim and defense involved. Because of the lack of clarity and because the sentence does not otherwise list all of the items that must be included in the disclosure,<sup>1</sup> I recommend taking the second sentence out as unnecessary and likely to cause confusion. Once taken out, the proposed rule becomes very similar to existing Rule 3-310(D). In addition, if the second sentence of the new rule is taken out, then the sentence in Comment [3] that refers to the requirement in the second sentence should be revised as follows: “In making written disclosure to each client of the existence and nature of ~~all~~ the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining

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<sup>1</sup> By using the language “among other things”, there are presumably items that must be in the written disclosure that are not expressly set forth in the body of the new rule.

informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them." This change which omits the word "all" addresses the concern about being required to write a treatise and allows more flexibility when disclosing the nature and existence of the claims or defenses.

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.  
Yes  No

(5) Do you have any other comments about the proposed rule? If so, please elaborate here: See above.

The first sentence of the new rule and Rule 3-310(D) are very similar. Rule 3-310(D) provides: "A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client." The first sentence of the new rule provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.

Unlike Rule 3-310(D), the first sentence of the new rule clarifies that it applies to aggregate agreements as to guilty or nolo contendere pleas in criminal matters. Otherwise, the new rule and Rule 3-310(D) are consistent. I recommend approving the new rule modified by omission of the second sentence and revision of the sentence in Comment [3] as explained above.

**CONCLUSIONS (pick one):**

We approve the new rule in its entirety.

We approve the new rule with modifications.\*

We disapprove the new rule and support keeping the old rule.

We disapprove the new rule and recommend a rule entirely different from either the old or new rule.\*

We abstain from voting on the new rule but submit comments for your consideration.\*

\* If you select one of the \* options, please make sure your concerns are included in your comments above in response to Questions 1-5, or set the forth on a separate sheet of paper.

# CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

October 23, 2009

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

**Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7**

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- ~~• **Proposed Rule 1.8.6** – The Access Commission recommends a minor revision to Rule 1.8.6 to add to the exception those non-profit charitable organizations which represent clients without a fee.~~

~~This rule, titled “Payments Not From Client”, addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires “informed written consent” from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that “no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public.” The rationale for this exception is “...because the concerns addressed by the Rule do not come into play in those situations.” While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.~~

~~The Commission’s stated rationale for the exception – enhancing access to justice – also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client’s written consent, before rendering any service. Not only would this shut down hotlines and other phone based services, but it would unnecessarily slow down in person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.~~

HON. STEVEN K. AUSTIN  
Chair  
Superior Court of Contra Costa County  
Pittsburg

KENNETH W. BABCOCK  
Vice Chair  
Public Law Center  
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State Bar of California  
San Francisco

- **Proposed Rule 1.8.7** - The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.
- ~~**Proposed Rule 6.3** - This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.~~
- ~~**Proposed Rule 6.4** - Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.~~

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,



Hon. Steven K. Austin  
Co-Chair

*"The Unified Voice of Legal Services"*



VIA FACSIMILE (415) 538-2171

October 22, 2009

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

**Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7**

Dear Ms. Hollins:

I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

**Comments on Proposed Rule 6.3 - SUPPORT**

LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

**Comments on Proposed Rule 6.4 - SUPPORT**

LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

**Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED**

This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires “informed written consent” from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that “no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public.” This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission’s stated rationale for the exception, which it identifies as enhancing access to justice, is “because the concerns addressed by the Rule do not come into play in those situations.” The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

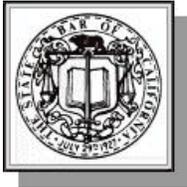
**Comments on Proposed Rule 1.8.7 - OPPOSE**

While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,

  
Julia R. Wilson  
Executive Director



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

### PUBLIC COMMENT FORM

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*All information submitted is regarded as public record.*

**DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009**

## 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 links below:

[Rule 1.8.6 \[3-310\(F\)\]](#)

[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

\* Select the Proposed Rule that you would like to comment on from the drop down list.

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.

## Attachments

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Attachment 

file: [rule1.8.7\\_mtd.wpd \(10k\)](#)

Attachment 

Attachment 

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“Settlement on the courthouse steps” has been an accepted, welcomed, almost expected occurrence in the annals of trial work. This phenomenon, seen always as a savings to the court system and often as a savior to litigants, as a practical matter, could become a thing of the past for clients sharing a single counsel, were proposed rule 1.8.7 adopted.

In its “Explanation of Changes to the ABA Model Rule, at the third paragraph, the Commission states that, “current California rule 3-310(D) [which proposed rule 1.8.7 would replace] , the counterpart to Model Rule 1.8(g), requires ‘the informed written consent of each client,’ which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place.” This, however, is an erroneous interpretation of the current rule which is demonstrable from the language of the rule itself, and borne out by practice and practicality.

To determine the true import of a passage containing a defined term, it is helpful to substitute the definition for the term itself. If, when this is done, the passage ceases to make sense, then it is likely that the term was used not as defined. For example, substituting the definition of “informed written consent” from rule 3-310(A)(2), while eliminating grammatically incompatible redundancies as would make the passage clumsy, rule 3-310(C) would read, “[a] member shall not, without each client’s written agreement to the representation following written disclosure: (1) Accept representation ... ; or (2) Accept or continue representation ... ; or (3) Represent a client ... .” With the same substitution, rule 3-310(E) would read, “[a] member shall not, without the client’s or former client’s written agreement to the representation following written disclosure, accept employment ... .” Both of these subdivisions make sense when the language of the definition, rather than the defined term, is incorporated into each passage.

The Commission asserts that this same definition of “informed written consent” applies to rule 3-310(D), making the requirement of written attorney disclosure apply in connection with aggregate settlements. Substituting this definition, rule 3-310(D) would read, “[a] member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without each client’s written agreement to the representation following written disclosure.” Notwithstanding the provision of rule 3-310(A) that the definition is to apply for purposes of the rule, once incorporated, this passage does not make sense. This is because rule 3-310(D) does not deal with prospective or continued representation. Written disclosures as to representation are already to have been made. This passage is addressing activity within an existing representation, speaking in the active voice, that is, “[a] member who represents” or, stated another way, “a member who is representing.” How else could the member be entering into settlement except in the course of an established, existing representation? In order that rule 3-310(D) make sense, its use of “informed written consent” must indicate some other type of disclosure sufficient to inform of claims, defenses and settlement terms, and quite distinct from the written disclosure of the definition addressing representation.

On occasion, settlement occurs pursuant to a measured exchange of correspondence carrying a series of respective demands and offers which nudge parties to mutual resolution. In these circumstances, admittedly desirable written disclosures by the attorney to the client, keeping tabs on the strengths and weaknesses of a side, bolstered or adversely impacted by evidentiary developments, are possible. Many settlements occur, however, as the result of a rush of negotiation, occasioned by the time constraints of the court in an MSC or the usual climax of the process in a mediation. In either of these circumstances, there is rarely time or inclination of the parties to draft more than basic deal-points, capturing a settlement made then, perhaps to be more fully set forth later. It is unrealistic to believe that the court in an MSC setting would wait with personnel at the ready, while counsel proceeds to draft a disclosure that includes, “among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.” It is equally unrealistic to believe that clients in a mediation would see such a written disclosure as “client protection” in light of the added expense incurred

for attorney and idle mediator fees associated with its preparation time, particularly when the value or cost of the case to them has just been fixed by way of settlement.

One of the values of settlement for clients, is that it puts the upset of the matter behind them. If they are to review a written, lengthy recitation of the allegations, of their conduct, and of others' conduct, the anticipated settlement may evaporate, not because they are now informed, but because they are now inflamed. Assuming the window for settlement even remains open, it is not likely to be on the same terms, as expenses and aggravation increase. Finally, the pressure on the member to fulfill his obligation to provide a written disclosure may actually create a conflict between the clients and the member as where, for example, at an MSC the member determines that there is not enough time to produce and discuss a written disclosure, and place the settlement "on the record," causing the member to balk, and lose the opportunity to settle due to imminent trial. Such a conflict truly would work a disadvantage to the clients and clearly need not exist.

Current rule 3-310(A)(1) contains a definition of "disclosure" which neither incorporates the concept of a writing nor requires that such be written. It is this type of disclosure likely anticipated by current rule 3-310(D) due to considerations of practicality. It is also this concept of an oral disclosure which the 1983 Model Rule found sufficient and which a number of states across the country, including New Jersey, North Dakota, Georgia, and Virginia, believe efficacious, requiring client consent "after consultation," that is, requiring no attorney writing.

Accordingly, it is urged that the Commission consider the practicality of a written attorney disclosure as required by proposed rule 1.8.7, and the difficulties that such would pose to settlement and to the attorney-client relationship. It is suggested that in connection with aggregated settlements, a member be required to secure the informed written consent of each client to the settlement, but that such informed consent may be effectuated by way of the member's oral disclosure.

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\* Date

10/23/2009 

Period

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File :

D-2009-282 Suzanne Chamberlain [1.8.7].pdf

Commented On:

Specify:

Submitted via:

Online

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\* Required

**Hollins, Audrey**

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**From:** Trudy Levindofske [trudy@ocba.net]  
**Sent:** Friday, October 23, 2009 2:46 PM  
**To:** Hollins, Audrey  
**Cc:** 'Shawn M Harpen'; 'Garner, Scott'; 'Bagosy, Jennifer'; 'Yoder, Mike'  
**Subject:** Orange County Bar Comments Re Rule Revisions  
**Attachments:** OCBA Comments on Rules Due Oct 23 2009.pdf

**Dear Ms. Collins:**

**Please find attached the comments from the Orange County Bar Association regarding the following proposed amended rules. We appreciate the opportunity to offer our comments to the Bar's Special Commission for the Revision of the Rules of Professional Conduct. Please note that we will not be submitting comments on Rule 1.8.6.**

**Please let me know if you have any questions. I would also appreciate your acknowledgement of receipt of these comments.**

**Rule 1.8.7**

Aggregate Settlements [3-310(D)]

**Rule 1.15**

Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]

**Rule 3.3**

Candor Toward the Tribunal [5-200]

**Rule 3.6**

Trial Publicity [5-120]

**Rule 3.7**

Lawyer as Witness [5-210]

**Rule 6.3**

Membership in Legal Services Organization [n/a]

**Rule 6.4**

Law Reform Activities Affecting Client Interests [n/a]

*Trudy C. Levindofske, CAE*

*Executive Director*

*Orange County Bar Association*

*Orange County Bar Association Charitable Fund*

*(949)440-6700, ext. 213*

## MEMORANDUM

Date: September 4, 2009

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

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.8.7 – Aggregate Settlements**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

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

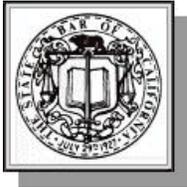
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The Orange County Bar Association ("OCBA"), with the assistance of the OCBA Professionalism and Ethics Committee, provides the following Comments for the Commission's consideration with respect to Proposed Rule 1.8.7 – Aggregate Settlements.

The OCBA supports the adoption of Proposed Rule 1.8.7 subject to the comment set forth below.

The Commission should consider whether a separate exception should be delineated in the Comments regarding oral settlements on the record, provided that the full disclosure of the terms and the consent outlined in Proposed Rule 1.8.7 are made orally in the presence of all parties and are transcribed by a licensed court reporter. Often, attorneys and clients participate in settlement conferences or court-ordered mediations that result in a resolution of a litigation. Many courts insist upon putting the settlement on the record at the settlement conference, and each client typically is required to give consent to the settlement on the record following a recitation of all of the terms of the settlement and an acknowledgment by each party that he or she understands the terms. The disclosures to the parties are made orally by the court, and the parties' consents are provided orally, but a written transcript is prepared. Courts typically make a translator available if one is required to ensure informed consent to the settlement is provided. Under these circumstances, the informed written consent requirement not only may be impractical and redundant of the disclosures made by the court on the record, but may impede the separate and equally important goal of fostering settlement and resolution. Therefore, the OCBA proposes modifying the last sentence of Comment [1] as follows:

“However, this Rule does not apply to (a) class action settlements that are subject to court approval; or (b) oral settlements made on the record in court and transcribed by a licensed court reporter, provided that the nature and terms of the settlement, as well as each parties’ consent to the settlement, are recorded in the record.”



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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**DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009**

## 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.)

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[Rule 3.3 \[5-200\]](#)

[Rule 6.3 \[n/a\]](#)

[Rule 1.8.7 \[3-310\(D\)\]](#)

[Rule 3.6 \[5-120\]](#)

[Rule 6.4 \[n/a\]](#)

[Rule 1.15 \[4-100\]](#)

[Rule 3.7 \[5-210\]](#)

[Batch 4 Discussion Draft \(All rules\)](#)

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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Attachment 

file: [1.8.7.pdf \(58k\)](#)

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**1.8.7 – Aggregate Settlements.** CACJ believes that the proposed rule fails to accommodate situations in which a settlement proposal is made by a prosecutor or by the court with an urgent time line for acceptance or rejection, during the course of a hearing, pretrial conference or at trial. These situations which frequently arise. In such circumstances, it will frequently be impossible or impractical to obtain the client’s written informed consent. The proposed rule should be modified to permit, in criminal cases, the client’s informed consent to an aggregate settlement be made “on the record” in court. While multiple representation in criminal cases is rare, it does occur and often finalization of a settlement is made in court, perhaps on the day of trial. In such circumstances, obtaining written consent would be difficult and time consuming. The purpose of the rule can be fulfilled by having the Court accept the consent on the record.

CACJ requests that the first sentence of the proposed rule be modified to include the bold, italicized language below:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent ***or verbally consents on the record.***

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10/23/2009 

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File :

D-2009-285c Ted Cassman CACJ [1.8.7].pdf

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**LACBA**

**LOS ANGELES COUNTY  
BAR ASSOCIATION**

**MAILING ADDRESS:**

P O Box 55020  
Los Angeles CA 90055-2020

**TELEPHONE:** 213.627.2727

**FACSIMILE:** 213.833.6717

**WEB SITE:** www.lacba.org

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NORMA J. WILLIAMS

ROBIN L. YEAGER

October 23, 2009

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

RE: Comments Regarding Proposed Rule of Professional Conduct 1.8.7

Dear Ms. Hollins:

The Los Angeles County Bar Association's Professional Responsibility and Ethics Committee has the following comments regarding proposed Rule 1.8.7 of the Rules of Professional Conduct.

Certain requirements contained in proposed rule 1.8.7 are unworkable in many settings as a practical matter, which will lead to widespread noncompliance. PREC does not believe it is good policy to adopt disciplinary rules that are impractical or honored in the breach. The promulgation of impracticable rules threatens to degrade confidence in the administration of justice enforced, can lead to a perception of unfair selective prosecution.

First, the proposed rule should recognize an exception for multi-party cases (such as multidistrict litigation) where there is active judicial supervision of the settlement. In cases where there are hundreds (or perhaps thousands) of individual litigants, it is simply impracticable to seek written consent from each client. Where such settlements are crafted under active judicial supervision, the onerous written consent requirement is unnecessary, just as it is unnecessary in class action cases. This issue has been recognized by the American Law Institute in its recently approved Principles of Aggregate Litigation, Topic 3, "Non-Class Aggregate Settlements" and in the "Need for Special Treatment of Non-Class Aggregate Settlements" (Proposed Final Draft at 264).

Second, in many other cases, the requirement of written client consent after written disclosure is simply infeasible. Take, for example, an attorney who represents six tenants in a slum building who are suing their landlord, or eight welfare recipients suing the county for allegedly cutting off their support in violation of the law, or a husband and wife being jointly sued for eviction. In each case, an aggregate settlement may be reached when it is simply impossible to get the informed written consent of each client after full written disclosure in a timely manner. For example, the case may be called for trial, but a settlement reached at the last minute. Not all of the clients are present – some may be at

Office of Professional Competence, Planning & Development  
State Bar of California  
October 23, 2009  
Page 2

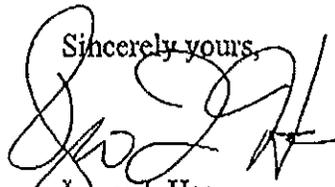
work or unavailable due to conflicting obligations. The settlement is discussed by phone, and the clients agree to accept the settlement.

As the proposed rule is written, an attorney must write up a full disclosure statement (and possibly get it translated), get a copy to each of the clients, and obtain their written consent before being able to agree to the settlement. In the meantime, the case may be assigned out for trial and the trial concluded. In other circumstances, the trial may already have begun when a settlement is reached. The permutations are endless, as is the mischief caused by a "written consent" requirement. The objectives of disciplinary rules -- public protection and maintaining confidence in the administration of justice -- are not sufficiently advanced by such a requirement, particularly when the rule practically forces attorneys into breach.

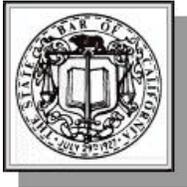
Impractical disciplinary rules undermine confidence in the fair administration of justice and respect for the disciplinary rules themselves. Great care should be taken to implement rules that are consistent with the day to day reality of legal practice, particularly where the perceived public protection benefit offered by the impractical rule is minimal.

We appreciate the opportunity to comment on the proposed rules.

Sincerely yours,



James I. Ham  
Chair, LACBA Professional  
Responsibility and Ethics Committee



# THE STATE BAR OF CALIFORNIA

## PROPOSED RULES OF PROFESSIONAL CONDUCT

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## 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 links below:

- |                                       |                                  |  |
|---------------------------------------|----------------------------------|--|
| <a href="#">Rule 1.8.6 [3-310(F)]</a> | <a href="#">Rule 3.3 [5-200]</a> | <a href="#">Rule 6.3 [n/a]</a>                       |
| <a href="#">Rule 1.8.7 [3-310(D)]</a> | <a href="#">Rule 3.6 [5-120]</a> | <a href="#">Rule 6.4 [n/a]</a>                       |
| <a href="#">Rule 1.15 [4-100]</a>     | <a href="#">Rule 3.7 [5-210]</a> | <a href="#">Batch 4 Discussion Draft (All rules)</a> |

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- 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.**

The Santa Clara County Bar Association (SCCBA) supports the changes to this rule, in particular, the change to add "written" to the informed consent requirement. That informed consent be written is critical for client protection which is the primary objective of this rule. However, the SCCBA recommends that an exception be made for public agencies. This rule should not apply to public agencies that are required by law to defend and indemnify their officers and employees for claims or actions arising out of acts or omission occurring within the scope of their employment with the public agency. Requiring the public agency to obtain the written consent of named officers and employees but who have not participated in the litigation could unnecessarily complicate the settlement of these cases and, in some cases, the public agency may not have current contact information for the named employee.

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\* Date

10/30/2009 

Period

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File :

D-2009-287b Santa Clara County Bar [1.8.7].pdf

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