

May 6, 2010

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

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

2010 Board of Directors

President
Patrick L. Hosey

President-Elect
Dan F. Link

Vice-Presidents
Elizabeth S. Balfour
Thomas M. Buchenau
John H. Gomez
Marvin E. Mizell
Timothy J. Richardson

Secretary
Marcella O. McLaughlin

Treasurer
Duane S. Horning

Directors
Christopher M. Alexander
Tina M. Fryar
Jeffrey A. Joseph
Margo I. Lewis
James E. Lund
Nory R. Pascua
Gita M. Varughese
Jon R. Williams

Young/New Lawyer Representative
Kristin E. Rizzo

Immediate Past President
Jerrilyn T. Malana

Executive Director
Ellen Miller-Sharp

ABA House of Delegates Representatives
William E. Grauer
Monty A. McIntyre

State Bar Board of Governors District Nine Representative
Wells B. Lyman

Conference of California Bar Associations District Nine Representative
James W. Talley

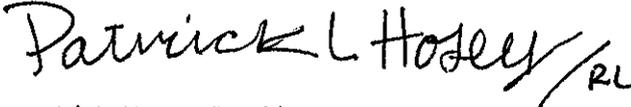
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule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

Dear Ms. Hollins:

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

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

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

February 12, 2010

2010 Board of Directors

President

Patrick L. Hosey

President-Elect

Dan F. Link

Vice-Presidents

Elizabeth S. Balfour
Thomas M. Buchenau
John H. Gomez
Marvin E. Mizell
Timothy J. Richardson

Secretary

Marcella O. McLaughlin

Treasurer

Duane S. Horning

Directors

Christopher M. Alexander
Tina M. Fryar
Jeffrey A. Joseph
Margo L. Lewis
James E. Lund
Nory R. Pasqua
Gita M. Varughese
Jon R. Williams

**Young/New Lawyer
Representative**

Kristin E. Rizzo

Immediate Past President

Jerrilyn T. Malana

Executive Director

Ellen Miller-Sharp

**ABA House of Delegates
Representatives**

William E. Grauer
Monty A. McIntyre

**State Bar Board of Governors
District Nine Representative**

Wells B. Lyman

**Conference of California
Bar Associations
District Nine Representative**

James W. Talley

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

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 6)**

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

**Patrick L. Hosey, President
San Diego County Bar Association**

Enclosures

**cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee**

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

Rule	Title [and current rule number]	Rec.	Author
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

- (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 [] 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 [] 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 []
- (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:

Format for Recommendations:

- [] 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.*

Summaries Follow:

LEC Rule Volunteer Name(s): Dave McGowan

Old Rule No./Title: Part of 1-100

Proposed New Rule No./ Title: 1.0.1 "Terminology"

(1) Well, sort of. These are the definitions. It is a good idea to have definitions. Whether you agree with particular ones is a different question.

(5) There are 14 defined terms. Most are not objectionable. A good one is the definition of confidential information, which tracks the Restatement definition and does away with the pretense that anyone understands the actual language of 6068(e). The various definitions of "reasonable" are circular and vacuous but that is not the commission's fault.

More questionable is the definition of a tribunal, which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. The difference is supposed to matter because free speech concerns are present in the latter situation but not the former. That premise is silly but its silliness may not matter much.

The bite to the definition is supposed to come in Rule 3.3, candor to the tribunal, but that rule is toothless. Sure, it says you can't lie to tribunals, but the bite to the rule came from remedial obligations to correct false testimony and statements. Under the Model Rules that obligation trumps the duty of confidentiality. Our commission reverses the trump, so if you client perjures herself before a tribunal you get to remonstrate with the client, wring your hands, and say nothing. Given that you could not straighten out a court it seems less important that you could not straighten out a mediator.

I would be inclined to favor a broader definition keyed to a more practical question: whom do we not want lawyers to lie to? But given the watering down of Rule 3.3 I do not think much turns on this and we've already had our whack at the confidentiality issue. I would just approve it and keep transaction costs down.

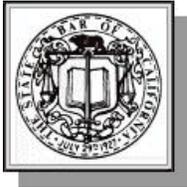
CONCLUSION: We approve the new rule in its entirety. (However, please see comments above.)

LEC Rule Volunteer Name(s): Ross G. Simmons

~~Old Rule No./Title: CRPC 3-410 Disclosure of Professional Liability Insurance~~

~~Proposed New Rule No./ Title: CRPC 1.4.1 Disclosure of Professional Liability Insurance~~

~~(5) First, please consider recently-enacted CRPC 3-410. The issue of malpractice insurance disclosure has been the subject of State Bar consideration, as well as legislative activity within the State Bar Act, for decades. In 2005, the State Bar formed the Disclosure Task Force, which after a spirited and eventful analysis by the Board of Governors between 2006 and 2007, resulted in the text of CRPC 3-410. That rule was adopted by the California Supreme Court by order dated August 26, 2009, to be effective January 1, 2010.~~



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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

All information submitted is regarded as public record.

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

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the following link: [Proposed Rules of Professional Conduct](#).

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 1.0.1 Terminology [1-100(B)]

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.

BALIN & KOTLER, LLP
Attorneys at Law

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

June 14, 2010

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

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

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

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

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

**Re: Public Comment on Proposed Rule of Professional Conduct 1.0.1(m)
(Definition of "Tribunal")**

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

I and Drew Dilworth, are submitting this letter to comment on the proposed rule, 1.0.1, subdivision (m), the definition of "tribunal." We are, respectively, Chairperson and Vice-Chair of the Ethics Committee of the Bar Association of San Francisco, but we are sending this letter to you as individuals since the BASF Board of Governors has not yet had an opportunity to review and consider our comments. Should BASF adopt these letters, we will advise the Commission.

We are concerned that the present version of the proposed rule defines the term too narrowly, thereby rendering the obligations embodied in other proposed rules, such as rule 3.3 (Candor Toward the Tribunal) inapplicable to conduct carried out by lawyers in proceedings in which such obligations should be imposed.

The Commission's proposed definition significantly deviates from ABA Model Rule 1.0(m)'s definition of tribunal. ABA Model Rule 1.0(m) provides:

"'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity."

The rule goes on to explain that "[a] legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral officer, after the presentation of evidence or legal argument by a party or parties, will tender a binding legal judgment directly affecting a party's interest in a particular matter."

Please reply to San Francisco Pacifica office.

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

Audrey Hollins and RRC ^{June} ~~May~~ 14, 2010
Page 2

In contrast, the Commission's proposed rule 1.0.1(m) states:

“‘Tribunal’ means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.”

Accordingly, the Commission's proposed definition omits, and would not cover, adjudicative proceedings conducted by administrative agencies, legislative bodies or “other bodies.” In contrast, the ABA definition applies to all proceedings that are adjudicative of a party's legal rights or interests *regardless of the specific body* that is entrusted with carrying out the adjudicative proceeding. The Commission's materials do not articulate any reason why an adjudicative proceeding that is not carried out by a court, arbitrator, administrative law judge or special master, but that nonetheless adjudicates a party's legal rights or interests, should not be included within the definition of “tribunal.”

There are many bodies that are authorized to adjudicate the legal rights or interests of a party that do not fall within the Commission's proposed definition. These include, for example, the various medical boards that hear complaints of misconduct of licensed practitioners, from doctors and osteopaths to nurses, radiologists and dentists. Virtually all disciplinary proceedings conducted by these agencies are decided by members of the particular profession in issue, not by judges, arbitrators, administrative law judges or special masters. Yet they determine very significant issues, such as a professional's ability to continue to practice. Most of the time the case against the respondent facing disciplinary action is presented by a deputy attorney general, and all respondents have the right to be represented by counsel at the hearings.

The impact of the Commission's proposed definition is significant when considered in the context of other proposed rules. Proposed Rule 3.3, for example, generally prohibits a lawyer from making false statements of fact or law to a tribunal, failing to correct a false statement of fact or law made by the lawyer to the tribunal, failing to disclose legal authority in the controlling jurisdiction known to be directly adverse to the lawyer's client and not disclosed by opposing counsel, offering evidence the lawyer knows to be false, and taking reasonably remedial measures with respect to criminal or fraudulent conduct (to the extent permitted by the duty of confidentiality). As it now stands, the proposed definition would not require the attorneys prosecuting and defending against disciplinary actions in the aforementioned professions to be truthful to the boards before whom they appear.

Candor to courts and tribunals is a fundamental precept of our legal jurisprudence. It fosters the procurement of just results and promotes confidence in the veracity of administrative proceedings. Furthermore, where a person's ability to practice in his or her chosen profession is at stake, the concept of fundamental fairness rises to the level of due process. (See, e.g., *Clare v. Board of Accountancy* (1992) 10 Cal.App.4th 294, 300.) Unfortunately, under the Commission's

Audrey Hollins and RRC ^{June} ~~May~~ 14, 2010
Page 3

proposed definition of "tribunal", lawyers would be exempted from these important obligations if, and when, they advocate before bodies that *are acting in an adjudicative manner* but do not fall within the current proposed definition. Why, for example, should a lawyer not be precluded from making false statements of law or fact to the State Franchise Tax Board or to a licensing agency?

We understand that certain concerns have been raised about defining the term "tribunal" in a manner that would apply to adjudicative bodies before which both lawyers and non-lawyers appear, thus ostensibly placing lawyers at a disadvantage, since the non-lawyers would not be subject to the same limitations. This concern does not persuade us that the ABA definition should be so limited.

First, the fundamental principles at issue here, so core to our legal system, should not be displaced simply by the fact that a lawyer's opponent may not be limited by the ethical constraints that bind attorneys. The threat of disciplinary action does not always deter unscrupulous lawyers from acting dishonestly; this does not mean that no lawyers should be subject to a rule prohibiting such conduct. Simply because non-lawyers may feel free to act unscrupulously does not mean that lawyers should also be free to do so.

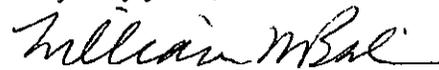
Second, the rule even as proposed, does not apply to non-lawyers in any venue. If the concern is that lawyers are therefore at a disadvantage when opposing lay people representing themselves, then we should not promulgate any rule at all regarding candor to a tribunal.

Third, we are not convinced that a non-lawyer would get away with dishonesty before a tribunal where the lawyer opposing that person must conform to the rule. The lawyer can still question and challenge the non-lawyer's conduct and attempt to discredit it.

The bottom line is that lawyers are held to higher standards than other individuals. These standards apply even to acts that do not strictly constitute the practice of law. (See, e.g., *Crawford v. State Bar* (1960) 54 Cal.2d 659.) Being a lawyer carries both special privileges and special responsibilities. That an adversary may not be held to the same high standard does not mean that our ethical obligations must therefore be diminished. An attorney must be truthful even when his or her opponent is not.

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

Very truly yours,



William M. Balin
Andrew Dilworth

cc: BASF Bd. of Governors



**THE STATE BAR OF
CALIFORNIA**

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

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2000

TDD: (415) 538-2231

FACSIMILE: (415) 538-2220

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

DIRECT DIAL: (415) 538-2063

June 15, 2010

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

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

Dear Ms. Hollins:

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

SUMMARY

We summarize our main concerns as follows:

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

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

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

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

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

GENERAL COMMENTS

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

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

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

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

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

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

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

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

Letter from OCTC
To Randall Difuntorum
June 15, 2010

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

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

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

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

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Rule 1.0.1. Terminology / Definitions.

1. OCTC is concerned with the definition in proposed rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature's authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4th 40.) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.
2. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.
3. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

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

Dear Lauren:

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

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

The co-signers are identified only by name, title, and law school affiliation. Each teaches in the area of Legal Ethics and/or Professional Responsibility, though the names of programs differ by law school. (For example, Loyola's program is called "Ethical Lawyering.")

A bit more about the demographics of the co-signers:

- One is a current law school dean, and two are professors at institutions for which they were formerly deans (Profs. Chemerinsky, Keane, and Perschbacher)
- Six (including Profs. Hazard and Rhode) hold endowed chairs at their law schools.
- Three have founded ethics centers (Prof. Robert Cochran as well as Profs. Rhode and Zitrin).
- Many have written multiple books on the legal profession, including, as it specifically relates to California, two of the authors of California Legal Ethics, (West/Thomson) (Profs. Wydick and Perschbacher), and two (Prof. Langford and I) whose annual rules book (Lexis/Nexis) has since 1995 contained a substantive comparison of the California and ABA Rules.
- One, Peter Keane, is a former member of the Board of Governors and president of the Bar Association of San Francisco.
- At least half of the co-signers have been actively involved in the practice of law as well as holding their current academic appointments.

Please include this cover letter along with the enclosed letter in the package going to the Board of Governors. Also, I would like to testify at the hearing on these rules – either before the relevant committee or the full board or both – to be available to explain any of the issues raised in the letter. I would appreciate if you would pass this request on to the Board.

Thank you, and best regards,

Sincerely,

A handwritten signature in cursive script that reads "Richard Zitrin / by son".

Richard Zitrin

rz/mcm
enc.

cc: Drafters and co-signers
Randall Difuntorum



UNIVERSITY OF CALIFORNIA
HASTINGS COLLEGE OF THE LAW

FACULTY

June 15, 2010

To the Members of the Board of Governors
State Bar of California
c/o Lauren McCurdy
Office of Professional Competence
180 Howard Street
San Francisco, CA 94105

Re: Public comment on proposed rules of professional conduct

Dear President Miller and Members of the Board:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to protect clients and the public.¹ Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

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

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

A few additional preliminary notes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Inappropriate use of independent counsel

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

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

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

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

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

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

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

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

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

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



MICHAEL P. JUDGE
PUBLIC DEFENDER

LAW OFFICES
LOS ANGELES COUNTY PUBLIC DEFENDER

CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
210 W. TEMPLE STREET, SUITE 19-513
LOS ANGELES, CALIFORNIA 90012
(213) 974-2801 / FAX (213) 625-5031
TDD (800) 801-5551

EXECUTIVE OFFICE

June 14, 2010

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

Dear Ms. Hollins:

This letter address the public comment provided for the 69 proposed new or amended Rules of Professional Conduct developed by the Commission for the Revision of the Rules of Professional Conduct.

There is a rule and comment that seem to be internally inconsistent. Rule 3.8(e), concerning the special rules for prosecutors, states that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client unless the prosecutor reasonably believes the information sought is not protected from disclosure by any applicable privilege or the work product doctrine. Comment [4] however adds an exception that is not covered in the rule, saying it is intended to limit the issuance of lawyer subpoenas to those situations in which there is a genuine need to intrude into the lawyer-client or other privileged relationship.

There is no "genuine need" exception written into the Rule and it should not swallow up the Rule's protections.

There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.

Comments [7] and [8] to Rule 3.6 seem duplicative.

Sincerely,

MICHAEL P. JUDGE, PUBLIC DEFENDER
OF LOS ANGELES COUNTY, CALIFORNIA