



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

June 14, 2010

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

RE: Proposed Rule 1.18

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 1.18, as revised on May 17, 2010, and has the following concerns.

The revised rule provides in paragraph (d) as follows:

When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.

Proposed new comment [8] provides as follows:

Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

COPRAC support the implementation of screening in California through the Rules of Professional Conduct, and accordingly, prefers the prior version of the rule in which paragraph (d) provided that:

When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if: (1) both the affected client and the prospective client have given informed written consent, or (2) the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and (i) the prohibited lawyer is timely ~~and effectively~~ screened from any participation in the matter and is apportioned no part of the

fee therefrom; and (ii) written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this Rule.

Note that the above language of paragraph (d) from the prior version of the rule omits the requirement that the screen be effective. Consistent with our previous comment to the prior version of proposed rule 1.0.1 (definition of “screened”), we believe the proper test is whether the lawyer or firm took reasonable measures to screen the prohibited lawyer, not whether in hindsight the screen was in fact effective. The Model Rule does not require that the screen be “effective,” and we believe Rule 1.18 (to the extent it includes screening as contemplated by above paragraph (d)) should not contain such obligation.

COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be easily referenced, and easily applied. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening.

In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline.

If this change is not adopted, we are concerned that the language, as drafted may contain a contradiction, in that the rule says that you can undertake the representation if both lawyer and client give informed written consent, but the comment directs lawyers to abide by case law, which may allow screening. Is the Commission relying on the fact that the new provision in the rule does not use the word "only" before "if both the affected client and the prospective client have given informed written consent" to avoid internal inconsistency? If so, we are concerned that this may end up causing confusion.

Finally, we note that Comment [7] incorrectly refers to paragraph (d)(1), when there is no longer a subparagraph (1). In the event the Commission does not follow our recommendation, this reference should be amended to refer to paragraph (d).

Thank you for your consideration of our comments.

Very truly yours,



Carole J. Buckner
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

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

Re:

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

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
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

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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

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
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:

~~will not be permitted to “cherry pick” lucrative matters and leave clients with less lucrative matters to fend for themselves;~~

- ~~2. The selling lawyer must cease practice if the entire practice is sold, or cease practice in the particular substantive field or geographic area of practice if only a substantive field or geographic area of practice is sold;~~
- ~~3. Although brokers to facilitate the sale are allowed, the lawyer may only sell the practice to a lawyer, not to a broker or other intermediary – this is to ensure continuity of representation and protection of the seller’s clients;~~
- ~~4. Fees may not be increased solely by reason of the sale - clients are protected by requiring the purchaser to abide by pre-existing fee agreements; and~~
- ~~5. Appropriate protections for confidentiality of the clients have been made part of the rule.~~

~~The Commission deemed Proposed Rule 1.17 “Moderately Controversial” because a minority of the Commission believed that the proposed Rule that permits lawyers to sell a geographic area of the practice or a substantive field of practice will be viewed by some members of the profession as a lessening of client protection and further commercialization of the practice of law.~~

~~CONCLUSION: We approve the new rule in its entirety.~~

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

Old Rule No./Title: Not Applicable

Proposed New Rule No./ Title: Rule 1.18 Duties to Prospective Client

(5) Rule 1.18 clarifies the duties a lawyer owes to prospective clients who consult with the lawyer to seek representation. There is no California rule counterpart, but the duty to protect confidential information of a proposed client, even if no attorney-client relationship results, is found in Evidence Code section 951 and is discussed at length in Cal. State Bar Formal Opn. 2003-161.

Disagreement over the inclusion of a provision permitting the non-consensual screening of the consulted lawyer when confidential information is learned during the pre-retention period.

The Commission voted 5-5 to strike from the proposed Rule 1.18 the concept of non-consensual screening and so the concept which is part of Model Rule 1.18, remains in the rule as paragraph (d)(2). Given the split of opinion on whether this paragraph should remain in the proposed rule, the LEC should take a position on whether to strike paragraph (d)(2) or not. A summary of this issue, which is fully set forth in the materials for those interested in the detail, is as follows:

Paragraph (d) of Rule 1.18 provides as follows:

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if:

- (1) both the affected client and the prospective client have given informed written consent; or
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client; and
 - i. the prohibited lawyer is timely and effectively screened from any participation in the matter and is apportioned no fee therefrom; and
 - ii. written notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

Those who oppose (d)(2) believe that the unilateral nature of this power would enable lawyers to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought.

Those who favored (d)(2) noted that it was only available in limited situations and that it appropriately balances the interests of the prospective client and the interests of the law firm's affected clients in retaining the lawyer of its choice. It follows that the lawyer who might have acquired the prospective client's information despite the lawyers "reasonable measures" is screened to protect the information.

After reviewing this proposed rule, I am in favor of modifying it to delete paragraph (d)(2). I agree with the opposition's concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very matter in which representation was sought without their consent. This would be a change from existing California law and seems to be contrary to the policy of open communication between lawyer and (potential) client.¹ Furthermore, after the prospective client is provided with written notice to enable the prospective client to ascertain compliance with the provisions of the proposed rule, a situation could develop where a firm is representing an adverse party while the potential client is investigating and objecting to whether there was compliance with the rule, and thus, whether representation of the adverse party is allowed. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach.

I am in approval of the new rule after paragraph (d)(2) is deleted.

¹ A potential client might withhold information out of concern that the law firm might ultimately represent an adverse party.

CONCLUSION: We approve the new rule with modifications.* - delete paragraph (d)(2)

LEC Rule Volunteer Name(s): Jack Leer

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 3.9 – “Non-adjudicative Proceedings”

(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee’s determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. However, given the proposed Rule’s minimal requirements and the policy of seeking to bring California’s rules in line with the ABA Model Rules, I believe the Rule should be adopted as proposed.

CONCLUSION: We approve the new rule in its entirety.

LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)

Old Rule No./Title: N/A (Existing CA statute: Bus & Prof. Code section 60608(e))

Proposed New Rule No./ Title: 4.1 “Truthfulness In Statements to Others”

(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers’ conduct and beliefs.

Proposed Rule 4.1 (a) states a lawyer’s duty of honesty that is owed to third persons in the course of representing a client as follows:

“(a) In the course of representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is



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June 11, 2010

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

Re: Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association is submitting comments on the following proposed new or amended rules of professional conduct:

- 1.2 Scope of Representation
- 1.5 Fees for Legal Services
- 1.13 Organization as a Client
- 1.18 Duties to Prospective Client
- 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
- 6.2 Accepting Appointments
- 7.1 Communications Concerning the Availability of Legal Services
- 7.3 Direct Contact with Prospective Clients
- 7.5 Firm Names and Letterheads
- 8.3 Reporting Professional Misconduct

The enclosed comments were drafted by the OCBA Professionalism and Ethics Committee and approved by the Board of Directors. Please let us know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Lei Lei Wang Ekvall
2010 President

Enc.

MEMORANDUM

Date: June 9, 2010

To: 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 1.18 – Duties to Prospective Client**

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 law firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

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

The OCBA supports the adoption of proposed Rule 1.18 with one substantive change. Specifically, the OCBA notes that paragraph (d) states that, “[w]hen the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.” While this statement does not say “...permissible *only* if...,” the language could be interpreted to imply that such a representation can only be undertaken with informed written consent. This interpretation is reinforced by the language of paragraph (c) insofar as it provides a direct prohibition with regard to “represent[ing] a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, *except as provided in paragraph (d).*” This single exception is repeated in the next sentence of paragraph (c) with regard to imputation. However, Comment [8] states that “Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.” This appears to contradict the language of the proposed Rule itself, in that paragraph (d) could be read to suggest that a non-consensual screen (even if supported by case law) would not be permitted because it does not involve informed written consent by both clients. To correct this inconsistency, the OCBA suggests revising the language of paragraph (d) to add either of the following at the end of the sentence: “...or if otherwise allowed pursuant to case law” or “...or if otherwise allowed by law.”

On a non-substantive note, the OCBA notes that Comment [7] still refers to paragraph (d)(1), even though subparagraph (1) was removed in the Commission’s revisions to this proposed Rule. It appears that this reference was meant to be to paragraph (d) itself.



**THE STATE BAR OF
CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
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June 15, 2010

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

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

Dear Ms. Hollins:

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

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Rule 1.18. Duties to Prospective Clients.

1. The Commission states that this is a new rule to California, although OCTC believes it is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.
2. OCTC is concerned that subparagraphs (c) and (d) are essentially a repeat of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule.
3. Many of the Comments are more appropriately placed in treatises, law review articles, and ethics opinion. The inclusion of factors in 2A could be confusing and give the impression they are the exclusive factors. Further, if they are to be considered, it should be in the rule.