

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 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

October 10, 2006

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

Re: Response to Request for Comments
Discussion Draft: Proposed Amendments to the Rules of
Professional Conduct of the State Bar of California

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association, I respectfully submit the enclosed with respect to the pending Twenty-Seven (27) Proposed New or Amended Rules of Professional Conduct of the State Bar of California, developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We have also included separate comments (approvals) of the proposed Global Changes related thereto. This is in response to the State Bar of California's request for comments thereon distributed in June, 2006.

Please note that although the comments reflect the position of the San Diego County Bar Association, we have also included dissenting views offered by members of its Legal Ethics Committee. Given the tentative state of the proposed new and amended rules, we wished to provide as much input to the Special Commission as possible, with which to assist them in their efforts.

Thank you for providing our Association the opportunity to participate in this process.

Respectfully Submitted,



Andrew S. Albert, President
San Diego County Bar Association

Enclosures

2006 Board of Directors

President

Andrew S. Albert

President-Elect

Jill L. Burkhardt

Vice-Presidents

Karen A. Holmes

Linda A. Ludwig

Heather L. Rosing

Dick A. Semerdjian

James R. Spievak

Secretary

Kristi E. Pfister

Treasurer

Michael W. Battin

Directors

Lea L. Fields

Brian P. Funk

Patrick L. Hosey

Charles Wesley Kim, Jr.

Garrison "Bud" Klueck

Russell S. Kohn

Jerrilyn T. Malana

Michelle D. Mitchell

Young/New Lawyer Director

Scott H. Finkbeiner

Immediate Past President

Wells B. Lyman

Executive Director

Sheree L. Swelin, CAE

**ABA House of Delegates
Representatives**

Janice P. Brown

Monty A. McIntyre

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

Raymond G. Aragon

**CYLA District Nine
Representative**

Matthew B. Butler

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

Lilys D. McCoy

MEMORANDUM

Date: October 16, 2006

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

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

Re: "1st PC Batch," Proposed New or Amended Rules of Professional Conduct of the
State Bar of California

**Subj: Proposed Rule 1.5.1 Financial Arrangements Among Lawyers
[2-200]**

Founded in 1899 and comprised of over 8,000 members, the SDCBA is its region's oldest and largest law-related organization. Its response herein, as adopted by the SDCBA Board of Directors, followed extensive review and consideration by its selectively-constituted Legal Ethics Committee, the advisory body charged by the SDCBA bylaws with providing its members guidance in the areas of ethics and ethical considerations.

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

* * * * *

The Committee has differing thoughts about this rule. As the Committee saw it, the new rule has two big changes: (1) the requirement that the lawyers enter into a written agreement, and (2) a requirement that the client give written consent to the fee split as soon as the lawyers agree to fee split (as opposed to at a later point in time, perhaps when the fee splitting itself is proposed to take place).

The Committee had several members who liked the changes; several who favored changes, but different ones than those proposed; and at least one member who favored the existing rule.

Comment 1:

Those who liked the changes liked the idea of the client knowing about the fee split upfront, so that the client had the option of making decisions based on the proposed split. For example, in a pure referral fee case (where the attorney receiving the referral fee does nothing but make the referral), the client might want to know that his attorney is not receiving the entire fee. The client might conclude that his attorney might not work as hard because of the diminished fee. Those who liked the changes also thought that there is a benefit to requiring attorneys to have their fee splitting in writing, because it reduces unseemly disputes and litigation between attorneys over fees.

Comment 2:

Those who favor the rule "as is" do not believe that we should require all of these things in an ethical rule. An attorney might decide as a matter of best practice that he wants his fee splitting arrangement in writing to avoid disputes, but should we really mandate that in an ethical rule, and make the failure to do so an offense subject to discipline? Because the fee to the client can never be increased by virtue of the fee splitting, the client will not be at a disadvantage by the fee splitting, and, therefore, there is no compelling reason to require it sooner rather than later at the time of the fee splitting. The client always has the option, no matter what he or she is asked, to decline to consent. Those who support the existing rule also raised the issue of whether it is feasible to really pin down all the details of fee splitting at the beginning of the engagement, and memorialize it in two different writings. Arrangements can change as the case changes.

Comment 3:

A third group proposed a compromise. The rule could require disclosure to the client in a signed retainer agreement that the attorney may engage in fee splitting, and that the attorney will secure the written consent of the client before actually do so. This way the client is on notice of the possibility, and can ask questions, but the lawyer is not required to scramble to get two signed writings at a premature point in time.

Dissent 1:

The dissent believed that 1.5.1(a)(3) is unknowable. Arguably, in a competitive market, a fee sharing arrangement that does not correspond to effort will always raise the fee. The dissent therefore preferred the ABA approach to the rule, which limits fee-sharing to situations in which a lawyer shares in the work or responsibility. The dissent, however, did agree in allowing prospective clients to pay lawyers a limited reasonable fee for assistance in identifying the lawyer who is well-suited to the representation.



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 1.5.1 Financial Arrangements Among Lawyers [2-200(A)]

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.

Comment [1] seems to limit the restriction on fee divisions to fees "paid by a client." Does this mean that a fee paid by a third party on behalf of a client (such as a family member or an insurer) can be divided without regard to consent or written agreement? The comment should probably say "by or on behalf of a client."



**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.

Rule 1.5.1. Financial Arrangements Among Lawyers.

1. Many of the Comments to this rule are more appropriate for treatises, law reviews, or ethics opinions. OCTC is concerned that Comment 4 appears more limited than the purposes stated in *Chambers v. Kay* (2002) 29 Cal.4th 142, 156-157 and, thus, could be confusing and misleading. If the purposes of the rule are to be stated, all of the purposes should be stated.
2. OCTC disagrees with Comment 5. There is nothing in the rule which would void or limit the rule regarding fee sharing by a court's approving a fee, which is what Comment 5 seems to be saying, although it provides no authority for this proposition. (OCTC believes this comment is not in the Model Rules.) In *In the Matter of Harney*, the attorney argued that he could not be disciplined for his illegal fee because a court had approved his fee. The Review Department rejected this claim. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 277-278.) Likewise, an attorney is currently arguing to the Supreme Court that the State Bar Court erred in finding he violated rule 2-200 because they are court awarded fees. (*In the Matter of Philip Kay*, 01-O-1930, Supreme Court Case No. S180405.) Unless and until the Supreme Court agrees with this argument, the Comment should be stricken.
3. OCTC strongly disagrees with Comment 6. Comment 6's statement that the rule does not subject a lawyer to discipline unless the lawyer actually pays the divided fee is inconsistent with subparagraph (a)(2) of the rule, which states that attorneys must obtain the client's consent "at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable." While there are civil cases that have held that current rule 2-200 does not apply until the actual division of fees, those cases addressed the civil enforceability of fee agreements between lawyers, not attorney discipline (see *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838; *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 320. The Supreme Court denied a petition for review in *Mink*, but two justices voted to take it up and a third justice was absent from the consideration.) Further, those decisions were based on the current rule, not the proposed rule. Other jurisdictions have found that the fee sharing rules require attorneys to disclose and obtain the client's written consent even if no payment has actually been made to the other attorney. (See *Saggese v. Kelley* (Mass. 2005) 837 N.E.2d 699, 706 [finding that attorneys must disclose fee sharing agreements and obtain the client's written consent before attorney refers client to second attorney]; *In the Matter of Mendelson* (Ill.Atty.Reg.Disp.Com.1996) IL Disp. Op. 95 CH 339, 1996 WL 931273 [holding that an attorney can be disciplined for entering into an agreement to split fees with another attorney, even though no payment has actually been made to the other attorney].) Comment 6 would permit attorneys to violate the rule with no consequences.

Even under the current rule, Comment 6 would be overbroad, confusing, and misleading, implying that there can be no disciplinary consequences for a failure to advise the clients of the agreement between the lawyers and obtaining the client's informed written consent to the fee sharing at the time the lawyers enter into the agreement to divide fees if the fees are not actually paid. However, the State Bar Court has found attorneys culpable of soliciting, assisting, or inducing a violation of current rule 1-120 and violating the duty to keep clients informed of significant developments under current rule 3-500 and Business & Professions Code section 6068(m) when attorneys enter into an agreement to share fees without advising clients of the agreement and obtaining the client's informed written consent, even when the fees were not ultimately shared. (See e.g. *In the Matter of David D. Mangar*, Case No. 06-O-10183; *In the*

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Matter of Philip E. Kay, Case No. 01-O-193. The hearing department finding and recommendation in Kay's case is currently pending before the California Supreme Court, Supreme Court Case No. S180405. The Supreme Court approved the hearing department's findings and ordered the disbarment of Mr. Mangar on May 14, 2010 in Supreme Court Case No. S180863.) At the very least, the Comment should advise that attorneys may be disciplined for 1) failing to advise the client of the agreement at the time of the agreement, in violation of their duty to advise the client of significant developments under Business & Professions Code section 6068(m) and rule 1.4 (current rule 3-500) (see *Chambers v. Kay, supra*, 29 Cal.4th at 157); and 2) assisting in, soliciting, and/or inducing a violation of the Rules of Professional Conduct or the State Bar Act in violation of proposed rule 8.4(a) (current rule 1-120).