



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

June 15, 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 1.8.3

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.8.3 - Gifts from Clients. COPRAC supports the adoption of proposed Rule 1.8.3 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in cursive script that reads "Carole J. Buckner".

Carole Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

May 6, 2010

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

Re:

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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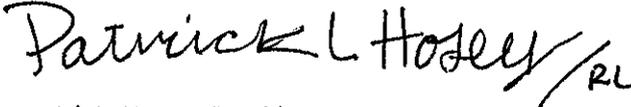
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 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

Hollins, Audrey

From: Ross G. Simmons [ross@rblaw.com]
Sent: Friday, November 16, 2007 11:43 AM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Wendy Patrick Mazzarella; judy@rblaw.com
Subject: SDCBA Comments: Five (5) Proposed Amended Rule; State Bar Special Commission For the Revision of the RPC

Dear Audrey:

As discussed at the time of the public hearing in the referenced matter, attached please find the formal comments submitted to the State Bar Special Commission for the Revision of the Rules of Professional Conduct by the San Diego County Bar Association (SDCBA). These comments were approved by the Board of Directors of the SDCBA, and adopted as its position on these matters, at its regular meeting of November 13, 2007.

I regret the timing of this deliverable, and sincerely appreciate the additional time within which to provide it. I thank the Commission for its indulging my appearance in September, and for its consideration of the attached.

I provide in this format in the interest of expediency. We would gladly provide in other, more convenient formats if doing so would be of assistance. Otherwise, as is always true, I welcome your calls, those of your colleagues or those of any Commission members if there are any residual questions concerning the attached, or if we can be of assistance in any other measure. We are grateful for being given the opportunity to participate in this process.

Ross G. Simmons
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11/16/2007

MEMORANDUM

Date: November 16, 2007

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: "2nd" PC Batch," Proposed New or Amended Rules of Professional Conduct of
the State Bar of California

Subj: Proposed Rule 1.8.3 Gifts From Client [4-400]

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:

* * * * *

Comment 1:

We propose that the proposed rule be modified to track closer to its ABA Model Rule counterpart, with the exception that the term "induce," which is currently applicable at CRPC Rule 4-400, replace the term "solicit" which otherwise is used at MR 1.8(c). We have preserved the prior Comment of the commission, but have provided additional language consistent with our proposal.

Clean and highlighted versions of our proposal are attached.

Rationale for Comment:

1. There is Merit in Unification Absent Reason for Differentiation

Generally, based on the highlighted version, it is our view that by merely replacing the word "solicit" with the word "induce," use of the phrasing and structure of Model Rule 1.8(c) does not differ in materials respect from Rule 1.8.3, proposed by the Commission.

2. Broader Interpretational Guidance

We view the proposed rule as appropriate and practical in the abstract, but unduly vague in the particulars. As a result, we would prefer greater instruction related to the terms

“substantial” and “modest,” in distinguishing between gifts that are permissible and those that are not. This affects proposed Rule 1.8.3(a)(1) & (2), and Comments [1] & [2].

We acknowledge that in taking issue with the term “substantial,” we are calling into question a term used in existing CRPC 4-400 and ABA MR 1.8(c), and to a lesser degree in view of its outright prohibition, Restatement of the Law Governing Lawyers §127(2)(b) (“insubstantial”). It is our hope that by aligning the structure of proposed Rule 1.8.3 with MR 1.8(c), that the authority of ABA Model Rules jurisdictions will be persuasively applied in California, to provide a larger pool of precedent upon which interpretation of the Rule may draw, and hence assist in providing much-needed guidance in the application of those terms.

Consistent with this strategy, note that we have similarly borrowed the term “general standards of fairness” from ABA MR. 1.8(c), in an attempt to provide practitioners with at least a modicum of guidance relative to a standard of review.

3. Attempt to Induce

We disagree with the addition of the phrase “attempt to induce,” and therefore have removed it from our proposal.

Admittedly, addition of the “attempt to induce” adds a broader sweep to proposed Rule 1.8.3 than its predecessor, toward curbing the potential for undue influence exercised by a lawyer as it relates to his or her client. However, its subjectivity—it is not being dependent upon actual receipt of the gift—makes application of the phrase hopelessly unpredictable. There is, for instance, utterly no differentiation made between an intentional “attempt to induce” as opposed to a negligent “attempt to induce,” which is to say that whether or not there was an “attempt to induce” or not could vary dramatically if viewed from the attorney-donor, the client-donee, or an interested third-party seeking to invade the attorney-client relationship. It is a phrase that makes both compliance and enforcement little more than conjecture. Too, nothing in the Commission’s work indicates that existing Rule 4-400 has been deficient in its application to date so as to warrant the sort of modification proposed.

Finally, to the extent attempted misconduct is to be subject to discipline, as a general proposition, it would seem to make sense to do that in broad strokes as does ABA MR 8.4(a), rather than piecemeal as this phrase would seem to invite California’s body of authority to do.

4. General Standards of Fairness

Exempt relationships have been moved to Comment 4. This permits our proposed version of the rule to track closer to ABA MR 1.8(c), for the reasons discussed above. Too, we do not believe that we undermine the Commission’s intent by relocating other examples of excluded relationships to Comment 4, which has been added to explicitly highlight by example the term “close, familial relationship.”

Rule 1.8.3 [4-400] Gifts From Client

A lawyer shall not induce a client to make a substantial gift, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Comment

- [1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients, provided the transaction meets general standards of fairness. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce a substantial gift from a client except where the lawyer is related to the client. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.
- [4] The term "close, familial relationship," apart from those expressly set out in the Rule, is intended to extend to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable).
- [5] In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit."

Rule 1.8.3 [4-400] Gifts From Client

~~(a)~~—A lawyer shall not:

- ~~(1)~~—induce or attempt to induce a client to make a substantial gift, including a testamentary gift, to the lawyer or a person related to the lawyer, or
- ~~(2)~~—prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift,

unless the lawyer or other recipient of the gift is related to the client.

~~(b)~~—For purposes of this Rule paragraph, related persons include a spouse, registered domestic partner or equivalent in other jurisdictions, cohabitant, relatives within the third degree of the lawyer and of the lawyer's spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

Comment

- [1] Lawyers may accept modest holiday, birthday, and other gifts of celebration or appreciation from their clients, provided the transaction meets general standards of fairness. Lawyers also may take steps that might result in their clients making permitted gifts, such as by sending them wedding announcements. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not induce or attempt to induce a substantial gift from a client except where the lawyer is related to the client ~~as set forth in paragraph (a)~~. (Compare Cal. Probate Code, section 21350(b).) Where impermissible influence occurs, discipline is appropriate. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)
- [2] If effecting a substantial gift requires preparing a legal instrument such as a will or conveyance, the client must have independent advice from another lawyer. (Cal. Probate Code, sections 21350 et seq.) The sole exception is where the client is a relative of the donee.
- [3] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provisions in Rule 1.7(d) [3-310(B)]. In disclosing the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.
- [4] The term "close, familial relationship," apart from those expressly set out in the Rule, is intended to extend to similarly situated relationships, which by way of example include registered domestic partners or equivalents in other jurisdictions, cohabitants, relatives within the third degree of the lawyer and of the lawyer's spouse (or domestic partner or equivalent, as applicable).

[5] In interpreting the Rule, similarly worded authority from other jurisdictions is intended to be instructive although not binding. The term "induce," however, is intended to be broader than the term "solicit."



**THE STATE BAR OF
CALIFORNIA**

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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.

Letter from OCTC
To Randall Difuntorum
June 15, 2010

Rule 1.8.3. Gifts From a Client.

1. The first sentence of Comment 1 seems unnecessary in light of the clear language of the rule.