



# 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.*

**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.)

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

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

Rule 2.1 Advisor

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.**

I believe that the Rules should apply to an attorney's professional advice based upon the facts and the law. Extending the professional relationship to include more socially or morally relevant terms would tentatively impose a duty that is more personal than professional. The proposed change balances this by excluding the broader duty and merely making reference to it in a permissive way in the notes.



**THE STATE BAR  
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL  
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

May 6, 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 2.1

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 2.1 - Advisor. COPRAC supports the adoption of proposed Rule 2.1 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:**

<b>RULE</b>	<b>TITLE</b>
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*
<b>Rule 2.1</b>	<b>Advisor</b>
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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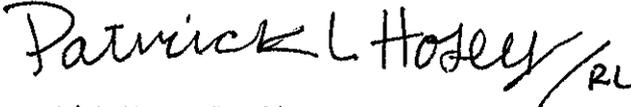
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 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**

November 11, 2009

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 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit  
the attached comments to Batch 5 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,

Jerrilyn T. Malana, President  
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee  
Edward J. McIntyre, Co-Chair, SDCBA Legal Ethics Committee

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SDCBA Legal Ethics Committee  
Subcommittee for Responses to Requests for Public Comment  
Coversheet to Recommendations on State Bar of California Rules Revision Commission  
Batch 5

- Rule 1.2      Scope of Representation [N/A]  
APPROVE
- Rule 1.6      Confidentiality of Information [3-100, B&P 6068(e)]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.8.2    Use of Confidential Information [3-100, 3-310]  
APPROVE
- Rule 1.8.13   Imputation of Personal Conflicts [N/A]  
APPROVE
- Rule 1.9      Duties to Former Clients [3-310]  
APPROVE
- Rule 1.10     Imputation of Conflicts: General Rule [N/A]  
APPROVE WITH MODIFICATIONS (to mimic ABA Model Rule 1.10)
- Rule 1.12     Former Judge, Arbitrator, Mediator [N/A]  
APPROVE WITH MODIFICATIONS – see comments
- Rule 1.14     Client with Diminished Capacity [N/A]  
APPROVE
- Rule 2.1      Advisor [N/A]  
APPROVE**
- Rule 3.8      Responsibilities of a Prosecutor [5-110]  
NO POSITION TAKEN – see comments
- Rule 8.5      Choice of Law [1-100(D)] SIMMONS  
APPROVE

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to Rules of Professional Conduct (RPC) Batch 5**  
**SDCBA Legal Ethics Committee Deadline October 8, 2009**  
**Subcommittee Deadline October 26, 2009**  
**State Bar Comment Deadline November 13, 2009**

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 2.1 - ADVISOR

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

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

Yes [ X ] No [ ]

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

Yes [ X ] No [ ]

(3) Is the new rule **worded correctly and clearly**? If “yes, please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes [ X ] 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 [ X ] No [ ]

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

*There is a minority that would add a provision stating that the failure to render moral, economic, social, or political advice is not a violation of this Rule (which says a lawyer “may” render such advice). Given the permissive, rather than mandatory, “may” language relating to moral, economic, social, or political advice, the minority’s proposed express statement that the failure to give such advice is not a violation seems somewhat duplicative and unnecessary. Additionally, the Commission proposes striking certain language from the Comments to the Rule, which tend to indicate an affirmative obligation to provide such advice. Accordingly, I agree with the majority’s opinion that the Rule should be added without the proposed addition.*

**CONCLUSIONS (pick one):**

[ X ] We approve the new rule in its entirety. (A dissenting opinion was submitted on this matter and is attached as Exhibit 1 for your consideration.)

We approve the new rule with modifications.\*

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

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

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

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

June 3, 2010

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

**RE: State Bar's Special Commission for the Revision of the Rules of Professional Conduct  
90 Day public comment on 69 Proposed New or Amended Rules of Professional Conduct**

Dear Ms. Hollins:

Please allow this communication to serve as my public comment regarding Attorney Discipline as it relates to construction defect claims and suits. I personally have contended with the brunt of a frivolous community lawsuit, as well as, encumbered professional and financial burdens due to the unethical tactics by various attorney groups.

Below are my comments/suggestions that should be examined by the Commission as it relates to Rule 2.1 Advisor, in addition to, overall disciplinary actions necessary to prevent the burdening of our legal system with unfounded claims in order for certain firms to line their checkbooks.

1. Prevent Solicitation by Plaintiff Counsel via mass mailings and door to door solicitation (STOP AMBULANCE CHASERS and WITCH HUNTS). See examples of fraudulent solicitation letters to unsuspecting owners attached.
2. Plaintiff Counsel, at time of filing, must record notice of claim/suit to the property. This will protect unsuspecting purchasers or subsequent owners by notifying them upon title search that named property is in litigation/claim status. Owners commonly will not disclose this type of info to subsequent owners which is in direct violation of California Civil Code Section 1102.6.
3. Claimants shall receive a one page (short layman's terms) summary that shall be signed and notarized by Claimant and submitted with filing of claim to courts. Example: Truth in Lending Act of 2009 for Credit Cards which was enacted has made the dissemination of legal jargon much more user friendly.
4. Real Property filings; at any time during the process of a claim/suit, the ownership of the property changes from original named claimant, property shall automatically be dismissed. New owner of property would need to sign new claim document (see item 3 above) in order for property to remain in claim/suit.
5. In order to fully comply with litigation, Claimant must be present in court in order to file. Again, this would help to prevent frivolous filings. If a Claimant knew that he/she had to attend a court filing, they would be fully and completely aware of what they have initiated.
6. SB 800 claims and construction defect claims that are not properly filed as stated in Civil Code should immediately be dismissed from court and the filing attorney group FINED for monopolizing the court system. Due to the current recession, all sorts of lawsuits have put a strain on the court system, which currently is overburdened and understaffed due to state deficits at an all time high. The impact of unfounded lawsuits impacts the availability of the

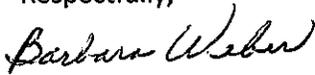
court system to handle legitimate claims and filings. If you hit them in their checkbooks, they will think twice before filing an illegitimate claim.

7. Tougher disciplinary standards for violations of professional conduct should include fines at the least, up to and including, disbarment. It is mandatory that the State Bar protect the public from lawyers who take advantage of homeowners. These firms need not conjure up issues in a home that do not exist. Homeowners are already on edge with the economic conditions and these suits/claims only exacerbate the problems by further devaluing properties.

The only individuals that gain in lawsuit claims are the attorney firms and their "dog and pony" inspection companies; the two work together to increase the bottom line profits of their companies without any consideration for the negative impacts to the client. The cost for subcontractors, builders, consultants, homeowners, insurance companies, etc. to obtain insurance to cover legal fees has put many individuals and small companies out of business, including the loss of their homes, due to these exorbitant expenses.

I appreciate your review and consideration of my comments. This process that you are evaluating is in direct correlation to the current political elections. People want change; we are tired of being taken advantage of by government politicians (most were lawyers, previously) and law firms that continue to tax the system and law abiding citizens with unethical practices and tactics.

Respectfully,



Barbara Weber  
Concerned Homeowner and Citizen

# NEWSLETTER

## **PROMINENT CALIFORNIA LAW FIRM CONSIDERING FILING LAWSUIT ON BEHALF OF**

Attorneys at the Law Offices of Milstein, Adelman & Kreger, LLP are investigating the possibility of bringing a lawsuit against the builder of your home, for defective construction. Your home may be experiencing one or more of the following defects:

➤ Premature wear on kitchen cabinets (Poor workmanship and inferior quality paint).	➤ Broken window seals (condensation between the double pane and leaks).
➤ Improper cooling and heating of the home due to defective or inferior HVAC units.	➤ Electrical problems including building code violations.
➤ Poor plumbing throughout the house and low water pressure to bathrooms.	➤ Slab cracks (interior and garage).
➤ Exterior stucco cracking or deterioration of wood siding.	➤ Drywall cracking and staining.
➤ Leaking windows (peeling, flaking, bubbling and water staining around the window sill).	➤ Mold around windows and on surfaces
➤ Water and insect intrusion through foundation slabs.	➤ Rotting and deteriorating fences and gates.
➤ Shower leaks and tile problems	➤ Poor drainage and ponding water

The attorneys at Milstein, Adelman & Kreger LLP are devoted to representing homeowners throughout California in the field of complex construction defect litigation. **The attorneys have agreed to advance all costs of the litigation, and therefore, there are no out-of-pocket costs to homeowners at any time regardless of the result.** Construction defect inspectors will evaluate each home individually. Original ownership is not required to participate.

### **VISUAL INSPECTIONS WILL BE SCHEDULED IN THE NEXT 60 DAYS!**

A profile sheet has been enclosed for completion and return in the postage-paid envelope provided. Whether or not you decide to participate, the information will be helpful to your community. For additional information please return the enclosed postage-paid reply card, or contact:

#### ***Southern California offices:***

Anneke Stewart, Esq., x 135  
Marcia Sanchez x 179 – msanchez@maklawyers.com  
**MILSTEIN, ADELMAN & KREGER, LLP**  
[www.maklawyers.com](http://www.maklawyers.com)  
2800 Donald Douglas Loop North  
Santa Monica, California 90405  
Toll-free: 1 (888) 835-8055; Fax: (310) 396-9635

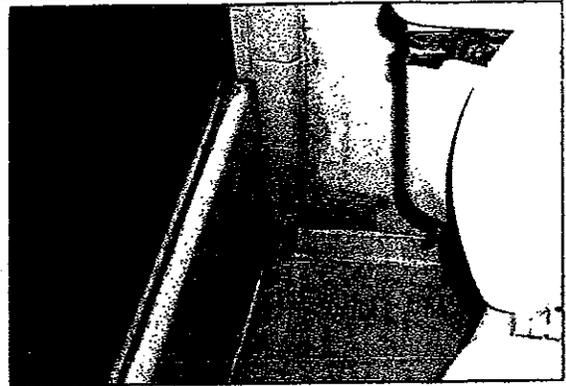
*This newsletter is intended to comply with Ca. Rules of Professional Conduct, Rule 1-400, et seq.*

# NEWSLETTER - PAGE 2

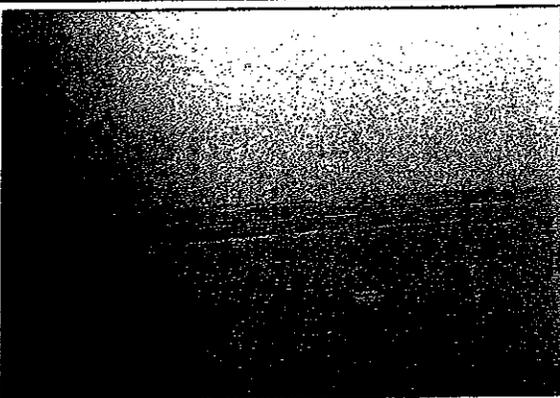
THE FOLLOWING ARE SAMPLE PHOTOS OF HOMES IN WHICH OUR FIRM HAS SUCCESSFULLY REPRESENTED IN ANOTHER CASE AGAINST A DIFFERENT BUILDER. THESE ARE NOT PHOTOS TAKEN IN YOUR PARTICULAR COMMUNITY AND MAY OR MAY NOT BE CONSISTENT WITH THE CONDITIONS PRESENT IN YOUR HOME. OUR VISUAL INSPECTIONS WILL FOCUS ON MANY OF THESE ITEMS.



**CRACKS IN CONCRETE**



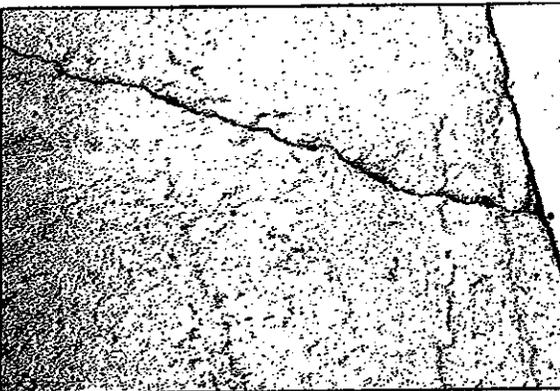
**SHOWER DOOR LEAKS / WATER DAMAGE TO FLOOR & DRYWALL**



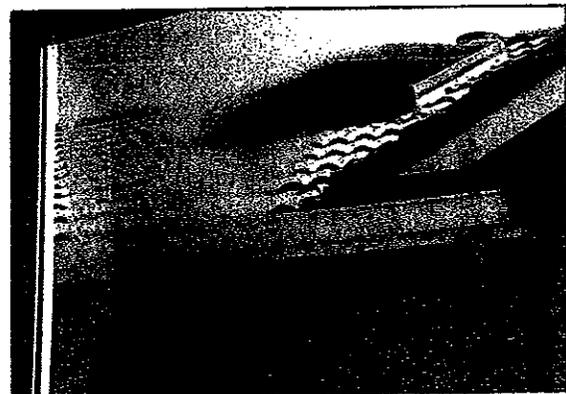
**ROOF / PLUMBING LEAKS  
WATER DAMAGE**



**DRY ROT / WOOD TRIM**



**STUCCO CRACKS**



**CONDENSATION BETWEEN PANES**

*This newsletter is intended to comply with Ca. Rules of Professional Conduct, Rule 1-400, et seq.*

**MILSTEIN, ADELMAN & KREGER, LLP**

**HOMEOWNER PROFILE SHEET**

Please complete as much information and mail or fax back to (310) 396-9635 so that a firm representative may contact you with more information

HOMEOWNER NAMES: \_\_\_\_\_

PROPERTY ADDRESS: \_\_\_\_\_

MAILING ADDRESS (if different): \_\_\_\_\_

PHONE NUMBERS: HOME: \_\_\_\_\_ ALTERNATE: \_\_\_\_\_

MR. WORK PHONE: \_\_\_\_\_ MRS. / MS. WORK PHONE: \_\_\_\_\_

NAME(S) OF TENANT(S) (if any): \_\_\_\_\_

TENANT PHONE: \_\_\_\_\_ OWNER EMAIL ADDRESS: \_\_\_\_\_

ARE YOU THE ORIGINAL OWNER? \_\_\_\_\_ PURCHASE DATE? \_\_\_\_\_

HOW MANY PEOPLE LIVE IN YOUR HOME? \_\_\_\_\_ 1 OR 2 STORY HOME? \_\_\_\_\_

NAME OF THE DEVELOPER? \_\_\_\_\_ WHAT YEAR WAS THE HOME BUILT? \_\_\_\_\_

BEDS: \_\_\_\_\_ BATHS: \_\_\_\_\_ SQUARE FEET: \_\_\_\_\_

DID THE BUILDER INSTALL THE FRONT LANDSCAPE? YES: \_\_\_ NO: \_\_\_ (Check One)

Please CIRCLE the categories of defects that you have visually observed since purchasing your house:

- |                              |                             |                      |
|------------------------------|-----------------------------|----------------------|
| STUCCO CRACKS                | DRYWALL CRACKS              | ROOF TILE CRACKS     |
| CEILING STAINS               | WINDOW STAINS               | WINDOW LEAKS         |
| ANT / INSECT INTRUSION       | CONCRETE / SLAB CRACKS      | POOR PAINTING        |
| MOLD AND MILDEW              | ELECTRICAL PROBLEMS         | WOOD SIDING PROBLEMS |
| CABINET PROBLEMS<br>PROBLEMS | DISCOLORED VINYL / LINOLEUM | PLUMBING             |
| YARD DRAINAGE PROBLEMS       | HEATING & COOLING PROBLEMS  | OTHER: _____         |

Please explain the above-circled defects. You may use additional sheets if necessary.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

AS Responding to this profile sheet will not result in your home being added to any litigation without your written consent.

**KASDAN  
SIMONDS  
RILEY &  
VAUGHAN LLP**  
ATTORNEYS AT LAW

REPLY TO:  
SOUTHERN CALIFORNIA OFFICE  
www.KasdanSimonds.com

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

THIS COMMUNICATION IS PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE AND SHOULD BE TREATED IN A CONFIDENTIAL MANNER. DISCLOSURE TO ANYONE OTHER THAN YOUR ATTORNEYS AND THEIR STAFF MAY JEOPARDIZE THE PRIVILEGE, AND RESULT IN DISCLOSURE TO ADVERSE PARTIES.

## IMPORTANT HOMEOWNER NEWSLETTER

Re: Update on Litigation RE: Construction Defects in the a Project

Dear

This law firm has been retained by more than 18 of your neighbors in the development to pursue a construction defect lawsuit against the developers and subcontractors which built the homes located in your development. As part of our representation, our office has investigated defective conditions at the project, including analysis by trained experts of defective conditions present in the homes. In addition, we have performed an analysis of the applicable statutes of limitations on our clients' homes. **Please note the 10 year Statute of Limitations may very likely expire on your particular home as early as if it has not already done so.**

Conditions which have been consistently identified throughout the project are as follows:

- Leaks in windows causing water stained window sills, drywall and surrounds, resulting in the growth of mold and fungus
- Plumbing leaks,
- Roof leaks,
- Excessive stucco cracking and discoloring,
- Adverse soils conditions; and
- Improper installation of the concrete slabs and foundations.

We have attached photographs of stucco, sliding glass doors and concrete conditions which exist at some of your neighbors' homes. Does your home have similar conditions? These kinds of conditions should not exist in your home.

Since the defective conditions appear to be uniform at the homes in the project, we offer you the opportunity to join in the action. This suit is not a class action and your rights and interests will

Advertisement

Southern California Office  
2600 Michelson Drive  
Suite 1000  
Irvine, California 92612  
Telephone 949-851-9000  
Fax 949-851-9000

Northern California Office  
1320 Willow Pass Road  
Suite 570  
Concord, California 94520  
Telephone 925-288-9220  
Fax 925-288-9220

Arizona Office  
2425 East Camelback Road  
Suite 530  
Phoenix, Arizona 85016  
Telephone 602-224-7800  
Fax 602-224-7800

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not be protected or pursued unless you either join this suit or file your own separate action. There are substantial benefits to be obtained by joining in the collective action, as costs of investigation can be shared and there is a significant strength in numbers. However, timing is important.

There are several "Statutes of Limitations" concerning deadlines for filing construction defect lawsuits. Which ones apply depends on the legal theory asserted in the complaint. Failure to file your complaint within any of the applicable time periods may forever bar your claims. The 10 year Statute of Limitations which may very likely expire on your particular home as early as

if it has not already done so. Once a Statute of Limitations expires, it will ordinarily forever bar you from recovering from the builder of your home even if you should subsequently discover it was built with substandard materials or methods. Some of the deadlines are the following:

First, and in any event, you must file your claim within ten years of "substantial completion" of the work. Generally, the "substantial completion" is the earlier of the date of final inspection, the date of recordation of a valid Notice of Completion, or the date of occupancy of the premises. There are certain specific exceptions to these time periods and factual circumstances which may lead to an "equitable tolling" or suspension of these periods. An attorney should analyze the facts of your case.

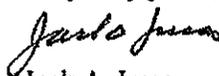
Other limitation periods include a four-year period relating to contracts and warranty claims, and three years for various tort claims.

These guidelines are general and we have not undertaken an investigation of your property or provided any specific advice regarding any other deadlines which may apply as to your potential claims, and we have not filed a lawsuit on your behalf. The issues can be more complex and technical than we can cover here, so you should consider consulting legal counsel if you desire. If you have previously retained other counsel for these issues, it is not our intention to suggest that you change counsel.

Our firm's main emphasis is representing homeowners in construction defect actions. While no attorney can guarantee results, in prior years we have recovered in excess of \$350 million in settlements and verdicts for our construction defect clients. Based upon our experience in this area, it appears that homes in your development may be suffering from substantial defective conditions. You may want to visit our firm's website [www.KasdanSimonds.com](http://www.KasdanSimonds.com) for further information on these types of defective conditions and for background on our firm.

If you are interested in more information regarding the potential construction defect lawsuit in your community, please \_\_\_\_\_, please contact Katja Base, our firm's intake paralegal or the undersigned at (949) 851-9000 or (800) 593-3332. We look forward to the possibility of representing you and advocating these most important claims.

Very truly yours,



Jack A. Lucas

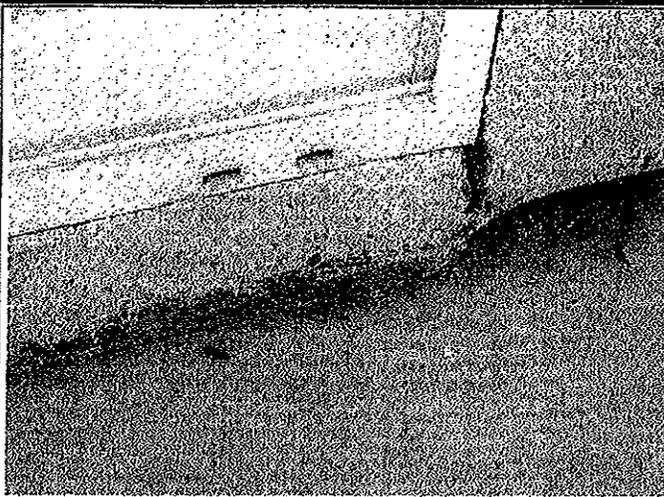
of KASDAN, SIMONDS, RILEY & VAUGHAN LLP

Advertisement

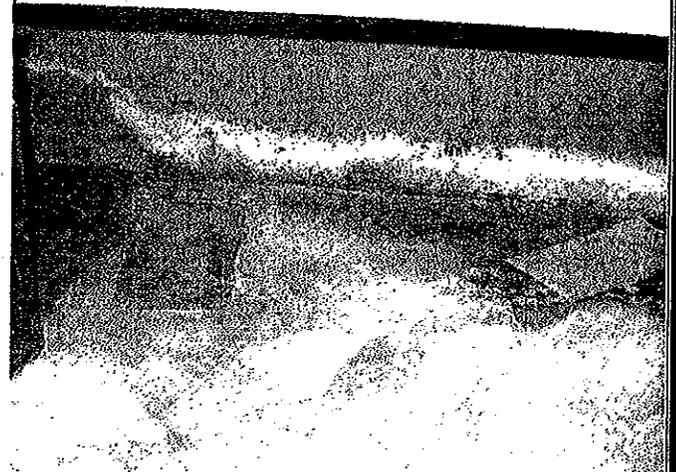
**Kasdan  
Simonds  
Riley &  
Vaughan llp**

CONSTRUCTION DEFECT ATTORNEYS

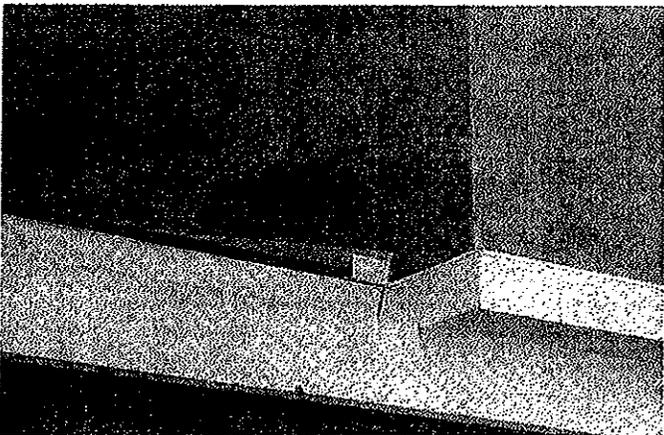
2600 Michelson Dr.  
Suite 1000  
Irvine, CA 92612-6510  
Phone: (800) 593-3332  
Fax: (949) 833-9455  
[www.KasdanSimonds.com](http://www.KasdanSimonds.com)



SLIDING GLASS DOOR THRESHOLD



GARAGE FLOOR AND STEM WALL - EFFLORESCENCE



WATER INVADING STUCCO



DETERIORATING WOOD TRIM AND DISCOLORED STUCCO

# Prospective Client Questionnaire

## ATTORNEY/CLIENT WORK PRODUCT PRIVILEGED COMMUNICATION

THIS COMMUNICATION IS PROTECTED BY THE ATTORNEY WORK PRODUCT AND ATTORNEY-CLIENT PRIVILEGE AND SHOULD BE TREATED IN A CONFIDENTIAL MANNER. DISCLOSURE TO ANYONE OTHER THAN YOUR ATTORNEYS AND THEIR STAFF MAY JEOPARDIZE THE PRIVILEGE, AND RESULT IN DISCLOSURE TO ADVERSE PARTIES.

Mail this in the self-addressed envelope provided if you would like to be contacted or if you would like to receive more information regarding the lawsuit in your development. You are also welcome to contact paralegal Katja Base (949) 851-9000 at 800-593-3332.

Please mail to me at the address listed below the Legal Services Agreement so I may sign up for the lawsuit.

Please contact me at the telephone number listed below.



NAME \_\_\_\_\_

ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_

ZIP \_\_\_\_\_

HOME PHONE: (\_\_\_\_) \_\_\_\_\_

WORK PHONE: (\_\_\_\_) \_\_\_\_\_

FAX: (\_\_\_\_) \_\_\_\_\_

E-MAIL \_\_\_\_\_

*Please share with us the type of defects you believe your home has:*

STUCCO/SIDING \_\_\_\_\_ SOILS \_\_\_\_\_ CONCRETE \_\_\_\_\_ ROOFS \_\_\_\_\_ MOLD \_\_\_\_\_

WINDOWS/DOORS \_\_\_\_\_ PLUMBING \_\_\_\_\_ ELECTRICAL \_\_\_\_\_ CRACKING \_\_\_\_\_

OTHER COMMENTS: \_\_\_\_\_

**Kasdan  
Simonds  
Riley &  
Vaughan LLP**

CONSTRUCTION DEFECT ATTORNEYS

2600 Michelson Dr.  
Suite 1000  
Irvine, CA 92612-6510  
Phone: (800) 593-3332  
Fax: (949) 833-9455  
[www.KasdanSimonds.com](http://www.KasdanSimonds.com)

Clayton M. Anderson, APC  
Construction Defect Division



Anderson & Kriger  
A Limited Liability Partnership

Joel M. Kriger, APC  
Homeowner Association Division

CLAYTON M. ANDERSON, MGR.  
Gordon C. Meurs  
William M. Sickinger  
Matthew R. Schoech  
Mary C. Tyler

Homeowner Construction Defect Claims  
Trial Attorneys - Insurance & Contract Claims

8220 University Avenue, Second Floor  
La Mesa, CA 91941-3837  
(619) 589-8800  
(800) 425-6397 • Fax: (619) 464-5414  
<http://www.a-k.com> • E-mail: [a-k@a-k.com](mailto:a-k@a-k.com)

CALIFORNIA OFFICES  
Riverside / San Bernardino  
Orange  
Los Angeles / Kern  
San Diego / Imperial  
Sacramento Area

Re:

Dear Homeowners:

The La Mesa law firm of Anderson & Kriger has been contacted by homeowners within the Housing Development regarding problems with the construction of their homes. Based on our experience, some or all of the following problems may also exist within your homes:

- ◆ Drainage / Soils Problems
- ◆ Stucco Cracks
- ◆ Concrete / Foundation Cracks
- ◆ Electrical / Plumbing Problems
- ◆ Mold / Mildew in Walls / Showers
- ◆ Broken or Cracked Tile / Grout
- ◆ Roofs / Windows Leaks
- ◆ Tub / Shower Leaks
- ◆ Vinyl Flooring Discoloration

We would like to provide an opportunity for other homeowners to join this group action to resolve these types of defects. If you have already retained legal counsel for these construction defects, please disregard this correspondence. Please note that prior repair efforts made by the developer/builder do not prevent subsequent liability for construction defects. We have a local office in La Mesa to serve your needs with individual attention to you and your home. One of our recent trials resulted in a \$1.3 million dollar verdict for our clients.

Your legal rights include:

- (1) The fact that the builder of your home may be liable for defect repairs for a 10-year period after completion of construction.
- (2) That all owners, original or subsequent, within that 10-year period may file claims against the builder for construction defects.
- (3) That you can become a participant in this lawsuit with no out of pocket cost.

These cases are being handled by our office on a contingency basis, with the expert investigation fees and litigation costs deferred until the completion of the lawsuit. If you would like to participate or have our contingent fee agreement thoroughly explained to you, please do not hesitate to contact our office at (619) 589-8800 or toll free at (800) 425-6397.

Sincerely,  
ANDERSON & KRIGER

*Jodie Wacht / LK*

Jodie Wacht, Paralegal

*\*Para recibir un copia del acuerdo de honorarios en Espanol o para informacion a cerca de derechos legales en relacion a los defectos de construccion, por favor llame al (909) 456-6467 y pregunte por Mary J.*

*Note: This advertising communication is intended to and is believed to comply with all advertising and direct solicitation rules and guidelines of the State of California, the California State Bar Association and the United States Supreme Court.*



Anderson & Kriger  
ATTORNEYS AT LAW

A Professional Law Corporation

# Homeowner's Contingent Attorney Fee Agreement

## THIS AGREEMENT

is made this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, at

\_\_\_\_\_, California between the LAW OFFICES OF ANDERSON & KRIGER [hereinafter referred to as "Attorney"] and the undersigned homeowner(s) [hereinafter referred to as "Client"].

1. Client employs the Attorney to represent the Client regarding construction defects at Client's home whose specific address is:

\_\_\_\_\_

California, [hereinafter referred to as "residence"]. Client agrees that Attorney will represent other homeowners in Client's development and that it is necessary to do so in litigation against developers and others. Frequently defendant's insurance carriers make lump sum settlement offers to the entire group of Clients. Attorneys practice is to distribute the settlement funds proportionately pursuant to the costs of repair calculated by the construction experts. Some Clients may disagree as to how the net proceeds from the settlement should be divided. This could create a conflict of interest by some Clients against other Clients. At this time Attorney knows of no actual conflicts of interest. To the extent any conflicts of interest may exist, now or in the future, between other homeowners, Client waives such conflicts and authorizes Attorney to proceed, in all good faith, on Client's behalf.

2. If Client fully cooperates under the terms of this Agreement, Client will have no financial obligation whatsoever if there is no recovery. Attorney will be compensated for services rendered, and reimbursed for costs advanced (as provided in Paragraph 3), only if a monetary recovery is received by the Client. The monetary recovery will be the sole source of compensation for the Attorney and the Client will never be responsible to pay the Attorney from any personal funds. From any recovery received prior to the start of trial (whether by settlement, after mediation, or otherwise), the Attorney shall receive one-third (33-1/3%) of the gross recovery and the Client shall receive the remaining two-thirds (66-2/3%)

From any recovery received after the start of trial (defined as first appearance in court for trial) and/or any appeal resulting from the trial, the Attorney shall receive forty percent (40%) of the gross recovery and the Client shall receive the remaining sixty percent (60%). If defendant's provide any repairs as part of any settlement, the Attorney shall be entitled to the percentages stated above based on the reasonable value of the repairs.

3. Attorney will choose all services and advance all expenses necessary for the prosecution of the defect claims including, but not limited to, court expenses, expenses of investigation, expert witness expenses, document copying expenses, parking expenses, and long distance telephone expenses. Client will reimburse any expenses expended by the Attorney from the Client's portion of any recovery from settlement or trial, including any appropriate finance or interest expenses incurred on all of the above listed litigation expenses. Service providers may have other business relationships with Attorney.

4. No settlement shall be made of the entire Client's claim without the approval of the Client. If the Attorney recommends that Client accept a reasonable settlement offer, but the Client rejects the offer, the Attorney may decline to provide further legal services as discussed below. Client agrees if the majority of Client's sign a settlement agreement to accept a lump-sum settlement offer, the agreement will bind each individual Client.

5. The Attorney, at its sole discretion and expense, may obtain the assistance of any other attorney or law firm in the prosecution of the claims of the Client.

6. The Attorney may decline to provide further legal services to the Client at any time after giving reasonable notice to the Client. One basis for such an action may be that the proposed lawsuit does not have ten (10) or more homes. Attorney and Client agree that ten (10) or fewer homes in a lawsuit against the developer and sub-contractors may not be cost effective for either the Attorney or Client. The Client shall also have the right to discharge Attorney at any time upon written notice to Attorney.

In the event of Attorney's discharge, or withdrawal due to Client's failure to cooperate, Client agrees that the Attorney shall be entitled to be paid a reasonable fee by Client for the legal services already provided, and for reimbursement of out-of-pocket expenses advanced by the Attorney, from any recovery. To secure payment to Attorney under this Fee Agreement, Client hereby grants Attorney a lien on Client's claims and on any recovery.

*Please sign and date on the reverse side of this form.*  
ANDERSON & KRIGER - A PROFESSIONAL LAW CORPORATION

OFFICES IN SAN DIEGO, HILLCREST, RIVERSIDE, ORANGE, COUNTY ANTELOPE VALLEY, SAN JOAQUIN VALLEY, SAUCRAMENTO

CASE NAME	CASE NUMBER
-----------	-------------



7. Client shall fully cooperate with Attorney. Client and Attorney agree that the successful prosecution of Client's claims is a joint effort, that such claims are part of a very complicated California judicial proceeding, and Client's cooperation shall include, but is not limited to:

- a) Keeping Attorney advised of any changes in the address where Client lives, Client's telephone number or any extended trips to be taken by Client;
- b) Appearing, upon reasonable notice, at all depositions and court appearances when requested by Attorney;
- c) Complying with all reasonable requests of the Attorney, including, but not limited to, providing Attorney with all original documents relating to the residence which Attorney may eventually need for trial;
- d) Making the residence available, on reasonable notice, for visual defect inspections and destructive testing for hidden defects;
- e) If the Client sells the residence, or otherwise loses ownership of the residence due to foreclosure by a lender, this shall automatically terminate the Attorney's obligations under this fee agreement. Such acts shall be deemed consent for Attorney to withdraw as counsel of record in any pending action unless Attorney and Client execute a new written fee agreement.
- f) Client certifies that Client is the owner of the residence; Client is solely responsible (not Attorney) for disclosing Client's participation in a Construction Defect lawsuit and the existence of known defects in the residence to potential purchasers.

8. Client gives the Attorney the power and authority to execute all pleadings, claims, contracts, settlements, checks, releases, dismissals or related documents. The Attorney's Client Trust Account shall receive all monies paid to the Client based on any settlement or judgement and such funds shall thereafter be disbursed to the Attorney, for expenses and the Client as provided in this Agreement.

9. **NOTICE: LEGAL FEES ARE NOT SET BY LAW BUT ARE NEGOTIABLE BETWEEN ATTORNEY AND CLIENT. ATTORNEY MAINTAINS INSURANCE COVERAGE APPLICABLE TO THESE SERVICES. CLIENT IS RESPONSIBLE FOR OBTAINING ANY NECESSARY INCOME OR OTHER TAX ADVICE APPLICABLE TO THIS MATTER.**

10. It is further agreed that Attorney has made no guarantees regarding the success of the construction defect claims and all expressions regarding possible success, if any, are matters of the Attorney's opinion only.

EXECUTED
on the _____ day of _____, 20____.
ANDERSON & KRIGER
By: _____
ATTORNEY ON BEHALF OF ANDERSON & KRIGER

By signing below, clients acknowledge they have read and agreed to all terms outlined above:

\_\_\_\_\_  
CLIENT/HOMEOWNER SIGNATURE

\_\_\_\_\_  
PRINTED NAME

\_\_\_\_\_  
MAILING ADDRESS

\_\_\_\_\_  
CITY, STATE, ZIP

\_\_\_\_\_  
HOME PHONE

\_\_\_\_\_  
E-MAIL

\_\_\_\_\_  
WORK PHONE

\_\_\_\_\_  
CLIENT/HOMEOWNER SIGNATURE

\_\_\_\_\_  
PRINTED NAME

\_\_\_\_\_  
MAILING ADDRESS

\_\_\_\_\_  
CITY, STATE, ZIP

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HOME PHONE

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E-MAIL

\_\_\_\_\_  
WORK PHONE

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CLIENT/HOMEOWNER SIGNATURE

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PRINTED NAME

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MAILING ADDRESS

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CITY, STATE, ZIP

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HOME PHONE

\_\_\_\_\_  
E-MAIL

\_\_\_\_\_  
WORK PHONE

**FOR A&K USE ONLY**

GRANT DECD
NOC
CLIENT OWNERSHIP REVIEWED BY



**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,<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> OCTC refers the Commission to its previous comments and recommendations.

<sup>2</sup> 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).<sup>3</sup>

## 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.<sup>4</sup>

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

---

<sup>3</sup> 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.

<sup>4</sup> See proposed rule 1.7. Another rule has 26 comments. (See proposed rule 1.6.)

<sup>5</sup> 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.

<sup>6</sup> 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.<sup>7</sup>

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<sup>7</sup> 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 2.1. Advisor.**

1. Comments 1 and 2 seem more appropriate for treatises, law review articles, and ethics opinions.



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,

*Richard Zitron / by son*

Richard Zitron

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.<sup>1</sup> 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:

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<sup>1</sup> 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.<sup>2</sup> 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~~

<sup>2</sup> 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.

might have “a chilling effect on legitimate advocacy.”

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses “means that have *no substantial purpose other than*” these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

6. Rule 5.7 – Rule application to “law related services”

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in “law related” matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides “broader and more nuanced guidance,” such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require “nuanced” court adjudication if this rule is adopted.

7. Rule 2.1 – Lawyer as advisor

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, “Purely technical legal advice, therefore, can sometimes be inadequate.” Apparently, this occurred because some Commission members were concerned about creating a “gotcha” civil liability against lawyers. This could be easily remedied by replacing the word “inadequate” with “insufficient,” and striking the word “therefore.”

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of “independent professional judgment” to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate “independent professional judgment” with “loyalty” – two vital and important concepts that are nevertheless not the same.

IV. Rules related to confidentiality

1. Rule 1.6 – Basic confidentiality

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.<sup>4</sup> The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

<sup>4</sup> The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.