



**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 3.6

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 3.6 - Trial Publicity. COPRAC supports the adoption of proposed Rule 3.6 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

<b>Re:</b>	<b>TITLE</b>
<b>RULE</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*
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
<b>Rule 3.6</b>	<b>Trial Publicity</b>
Rule 3.7	Lawyer As A Witness

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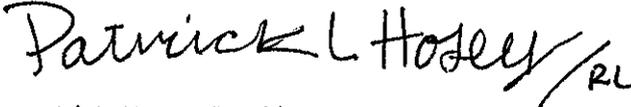
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule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

**SDCBA Legal Ethics Committee**  
**Comments to Revisions to Rules of Professional Conduct (RPC)**  
**BATCH #4, Comment Deadline October 23, 2009**  
**SDCBA Legal Ethics Committee Deadline September 22, 2009**  
**Subcommittee Deadline August 31, 2009**

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

Old Rule No./Title: 5-120 Trial Publicity

Proposed New Rule No./ Title: 3.6 Trial Publicity

**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 [  ] No [  ]

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

Yes [  ] No [  ]

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

Yes [  ] No [  ]

(4) Is the policy behind the existing rule correct? If “yes,” please proceed to the Conclusions section. If “no,” please elaborate, and then proceed to the Conclusions section.

Yes  No

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

See Attached.

**CONCLUSIONS (pick one):**

We approve the new rule in its entirety.

We approve the new rule with modifications.\*

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

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

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

\* 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.

Continuation Pages; Simmons Comments  
Proposed Rule 3.6 Trial Publicity  
Batch #4, Proposed Amendments to CRPC

**Summary:**

In the attached, I have proposed that the LEC approve of Proposed Rule 3.6 as presented. In short, Proposed Rule 3.6 adopts its ABA Model Rule counterpart with only minor corrections that, in fact, aid interpretation. It also clarifies, more as a reminder than as substantively necessary to the rule, that confidences are to be maintained.

Most of the Comments of the ABA Model Rules likewise are a part of Proposed Rule 3.6, although certain sections were replaced with better drafted counterparts adopted by the District of Columbia bar, and there is a clarifying section retained from former CRPC 5-120.

**General Comment:**

The materials provided in support of this public comment for Batch 4 are vastly superior to any previously received. It was extremely helpful to my review to understand the Commission's process and considerations from which the proposal was derived. I have many, personal and substantive issues with this rule, all of which were resolved by the materials provided.

**Comments:**

In my view, Proposed Rule 3.6 is the correct course. I so conclude without labored analysis of the provisions of the Proposed Rule, because it is essentially Model Rule 3.6, except with grammatical nips and tucks, interpretationally better. One can quarrel with the propriety of the rule and the wisdom of its enactment itself (as I do), and yet that is a historical matter no longer of substantive moment.

(Having said that, I was pleased to see that there was discussion of its possible elimination, if nothing more than for the purposes of that consideration being a part of this proposal's "legislative intent." I agree with the Commission, though, that because of the circumstances giving rise to its initial adoption, as well as the charge of the Commission more generally, mere repeal would not be a sensible, productive approach to former CRPC 5-120.)

CRPC 5-120 suffered through a tortured conception. First, it was crafted in California only following a legislative mandate, in the context of the State Bar Act, that such a rule be adopted (anecdotally most likely as a reaction to the media surrounding the then-recently concluded O.J. Simpson prosecution, although the efficacy of this rule or any rule in that setting remains objectively unclear). In fact, when CRPC 5-120 in its initial form was originally given to the California Supreme Court for adoption consideration, the Board of Governors of the State Bar of California urged the Court to reject it, the statute having otherwise been satisfied solely by its presentation.

For better or worse, the Court ignored the Board and adopted CRPC 5-120. Oddly, though, the Court did not adopt the rule as proposed by the Board, but instead unartfully (1) adopted the then-applicable Model Rule 3.6, substantively different than that proposed by the Board, but (2) retained the rule comments prepared by the Board, but otherwise inapplicable to Model Rule 3.6.

The result is that present CRPC 5-120 is simply not a cohesive, well-crafted rule, and is worthy of little more than disregard. The Commission has taken a prudent tack in doing so, by selecting current Model Rule 3.6 as its starting place.

Model Rule 3.6 (or more precisely, its substantially similar predecessor) has independent, threshold-allure in its own right, having been subject to judicial review in the context of Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). Although the Gentile analysis is an unusual, at times curious presentation, imperfect or otherwise, there is some benefit in having judicial guidance in navigating among the important interests implicated by trial publicity, those of the free speech of the participants, the public's right to information, and the integrity of the judicial system.

There are a number of substantive elements of Model Rule 3.6 that one could analytically explore (such as the standard of review in determining culpability, the merits and wording of its "safe harbors," etc.), and in fact, the form of this rule varies widely as adopted state-by-state. The Commission, wisely in my view, chose not to. If nothing else, deviating substantively from Model Rule 3.6 has the effect of needlessly meandering away from precedential benefit of Gentile, such as it is. But further, to me the desirability of Proposed Rule 3.6 is found in the Commission's charge itself, that being to "[e]liminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

Hence, struggling through the minutiae of Model Rule 3.6 is just that, and of extraordinarily little consequence. Although intellectually interesting, it is not germane in this context, in my view. This strategy is correct regardless of the substantive provisions of Model Rule 3.6, which the Commission proposes be adopted wholesale with only nonsubstantive improvement. I respectfully agree that this is as it should be.



**THE STATE BAR OF  
CALIFORNIA**

OFFICE OF THE CHIEF TRIAL COUNSEL  
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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,<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.

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<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 3.6. Trial Publicity.**

1. There are too many Comments, many are too long, and they cover subjects and discussions best left to treatises, law review articles, and ethics opinions. Comment 8 is identical to Comment 7 and should, therefore, be stricken.



**MICHAEL P. JUDGE**  
PUBLIC DEFENDER

**LAW OFFICES**  
**LOS ANGELES COUNTY PUBLIC DEFENDER**

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**EXECUTIVE OFFICE**

June 14, 2010

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

Dear Ms. Hollins:

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

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

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

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

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

Sincerely,

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