



**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 4.4

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 4.4 - Respect for Rights of Third Persons. COPRAC supports the adoption of proposed Rule 4.4 and the Comments to the Rule.

Thank you for your consideration of our comments.

Very truly yours,

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

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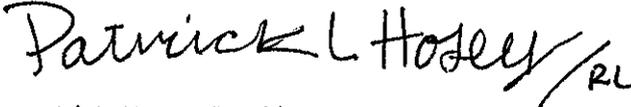
Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
Rule 5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
Rule 5.4	Duty to Avoid Interference with a Lawyer's Professional Independence
Rule 5.5	Unauthorized Practice of Law; Multijurisdictional Practice
Rule 5.6	Restrictions on Right to Practice
Rule 6.1	Voluntary Pro Bono Publico Service *BATCH 6*
Rule 6.2	Accepting Appointments *BATCH 6*
Rule 6.3	Legal Services Organizations
Rule 6.4	Law Reform Activities
Rule 6.5	Limited Legal Services Programs *BATCH 6*
Rule 7.1	Communications Concerning the Availability of Legal Services
Rule 7.2	Advertising
Rule 7.3	Direct Contact with Prospective Clients
Rule 7.4	Communication of Fields of Practice and Specialization
Rule 7.5	Firm Names and Letterheads
Rule 8.1	False Statement Regarding Application for Admission to Practice
Rule 8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
Rule 8.2	Judicial and Legal Officials; Lawyer as a Candidate or Applicant for Judicial Office *BATCH 6*
Rule 8.3	Reporting Professional Misconduct
Rule 8.4	Misconduct
Rule 8.4.1	Prohibited Discrimination in Law Practice Management and Operation
Rule 8.5	Disciplinary Authority; Choice of Law

Dear Ms. Hollins:

This letter constitutes the San Diego County Bar Association's response to The State Bar of California's Request for Public Comment on the foregoing proposed rules of Professional Conduct.

The SDCBA reconfirms previous responses to each of the foregoing proposed rules.

Very truly yours,



Patrick L. Hosey, President
San Diego County Bar Association



**SAN DIEGO COUNTY
BAR ASSOCIATION**

February 12, 2010

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**Conference of California
Bar Associations
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James W. Talley

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 6)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 6 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

- (1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
 Yes [] No []
- (2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
 Yes [] No []
- (3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
 Yes [] No []
- (4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
 Yes [] No []
- (5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Format for Recommendations:

- [] We approve the new rule in its entirety.
- [] We approve the new rule with modifications.*
- [] We disapprove the new rule and support keeping the old rule.
- [] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*
- [] We abstain from voting on the new rule but submit comments for your consideration.*

Summaries Follow:

LEC Rule Volunteer Name(s): David Cameron Carr

Old Rule No./Title: n/a

Proposed New Rule No./ Title: 4.4 Respect for Rights of Third Persons

(5) The Commissions arguments against adopting the current ABA Model Rule 4.4(a) are not persuasive. A prohibition against “means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person “would not chill legitimate litigation tactics. ABA Model Rule 4.4(a) should be adopted verbatim. Draft rule 4.4(b) restricts itself to in, documents that “obviously appears to be privileged or confidential” consistent with Rico v. Mitsubishi. It should be adopted as drafted by the Commission.

CONCLUSION: Although modified approval was recommended, the LEC vote was 7-6 in support of modified approval. Since the Rules Revision vote was 5-5, the LEC is recommending NO position be taken given the close split in hopes that further revisions will develop consensus.

~~LEC Rule Volunteer Name(s): Robert S. Gerber~~

~~Old Rule No./Title: No prior Cal. R. Prof. Conduct; but see Cal. Bus. & Prof. Code Section 6073.~~

~~Proposed New Rule No./ Title: Proposed Rule 6.1, Voluntary Pro Bono Publico Service~~

~~(5) The primary issue concerning this rule is whether pro bono publico services ought to be placed in the disciplinary rules or not. In the past, the “aspirational” goals of such service have been set out in Bus. & Prof. Code Section 6073 and have not been part of the Cal. R. Prof. Conduct. This differs from the ABA Model Code provisions adopted by the vast majority of the states. This rule change would bring California in line with the majority of the states. *However, to make it clear, this rule change would NOT impose any disciplinary authority on the State Bar for a lawyer’s failure to provide pro bono publico services.* The goal remains aspirational, as clarified specifically in Comment 12 to the Rule, which states that “The responsibility set forth in this Rule is not enforceable through disciplinary process.”~~

~~Other than this “controversial” aspect of the rule, nothing about the rule change is significant from a policy perspective. I fully support the rule as proposed.~~

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

LEC Rule Volunteer Name(s): Erin Gibson

Old Rule No./Title: n/a



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

Updated on May 17, 2010 to implement the Batch 6 Rules and one Batch 5 Rule (Rule 1.10) conditionally adopted by the Board of Governors at its meeting on May 15, 2010.

DEADLINE TO SUBMIT COMMENT IS: JUNE 15, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

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

* Select the Proposed Rule that you would like to comment on from the drop down list. Rules not listed in the drop-down box below are rules that are not being recommended for adoption. To submit comments on the rules not recommended please submit your comment by using the form at this link: [Rules Not Recommended Public Comment Form](#).

Rule 4.4 Respect for Rights of Third Persons

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.

CORRECTED . . . This time with indication that comments are on behalf of LPMT.
Please see attached 10 page .pdf.



LAW PRACTICE MANAGEMENT AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

PROPOSED RULE 4.4 [N/A] “DUTIES CONCERNING INADVERTENTLY TRANSMITTED WRITINGS” (DRAFT #5, 04/21/10)

INTRODUCTION

LPMT’s comment on Proposed Rule 4.4 concerns what was originally paragraph (b) but now constitutes the entire rule:

A lawyer who receives a writing that obviously appears to be privileged or confidential or subject to the work product doctrine, and where it is reasonably apparent that the writing was inadvertently sent or produced, shall promptly notify the sender.

We recommend that Proposed Rule 4.4 be removed from the Commission’s proposed revisions.

ANALYSIS

I. ABA Model Rule 4.4(b) is as Unsusceptible as 4.4(a) to Migration to the California RPC

Rule 4.4 of the ABA Model Rules of Professional Conduct (MPRC) – from which Proposed Rule 4.4 is drawn – has always been a bit odd. With the title “Respect for Rights of Third Persons”, MPRC 4.4 paragraph (b) would appear tacked on for lack of a better home. Paragraph (a) is the only part that refers to third persons.

The Commission has correctly decided not to keep paragraph (a). It should do the same for paragraph (b). We assume the Commission considered 4.4 because it was already part of the MRPC.

Once the Commission decided to consider and revise rules of the MPRC for application to California, Rule 4.4 came up for review. Otherwise we doubt that the Commission would find a need for what has become Proposed Rule 4.4. It has no precedent in the CRPC, and its significance relates primarily to discovery, a topic generally omitted from the CPRC and the current proposed rule revisions.

Even those in favor of MRPC 4.4(b) [now the entire Proposed Rule 4.4], recognized the anomaly. *See, e.g.,* Orange County Bar Association, Comments at Rule 4.4 Discussion Draft (April 24, 2010) at 24 (“we respectfully raise for consideration whether this provision belongs as part of Rule 4.4 or may be better positioned somewhere else, given that it applies equally to parties and to third persons and does not address merely the rights of third parties.”). Indeed, the Commission decided to split off MRPC 4.4(b), keeping only it, and the narrowing it further.

II. 2009 eDiscovery Enactments by the Legislature and Judicial Council Militate Against Adoption of 4.4(b)

Although the latest version bears the date of April 24, 2010, the Commission’s decision to include MRPC 4.4(b) [in the Public Comment version] presumably occurred before the enactment of the Electronic Discovery Act (“EDA”) (signed by the Governor on June 29, 2009) regarding electronic discovery.

In any event, it appears unlikely the Commission took the EDA into account because it does not cite the EDA in its listing of Existing California Law section 2031.285 of the California Code of Civil Procedure (“C.C.P.”), which regulates inadvertently produced electronically stored information (“ESI”) in discovery.¹

¹ Electronic Discovery Act at § 18:

SEC. 18. Section 2031.285 is added to the Code of Civil Procedure, to read:

2031.285. (a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as attorney work product, the party making the claim may notify any party that received the information of the claim and the basis for the claim.

In addition, it appears unlikely the Commission took into account the Judicial Council's subsequent related amendments to California Rules of Court, Rule 3.724. Duty to meet and confer:

Unless the court orders another time period, no later than 30 calendar days before the date set for the initial case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in rule 3.727 and, in addition, to consider the following:

* * *

2031.285 (c't'd)

(b) After being notified of a claim of privilege or of protection under subdivision (a), a party that received the information shall immediately sequester the information and either return the specified information and any copies that may exist or present the information to the court conditionally under seal for a determination of the claim.

(c) (1) Prior to the resolution of the motion brought under subdivision (d), a party shall be precluded from using or disclosing the specified information until the claim of privilege is resolved.

(2) A party who received and disclosed the information before being notified of a claim of privilege or of protection under subdivision (a) shall, after that notification, immediately take reasonable steps to retrieve the information.

(d) (1) If the receiving party contests the legitimacy of a claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal.

(2) Until the legitimacy of the claim of privilege or protection is resolved, the receiving party shall preserve the information and keep it confidential and shall be precluded from using the information in any manner.

CRC 3.724 (c't'd)

(8) Any issues relating to the discovery of electronically stored information, including:

* * *

(E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

(F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings; * * *

*Rule 3.724 amended effective August 14, 2009;
adopted effective January 1, 2007.*

We should hesitate to select from the many California Supreme Court and Court of Appeal regarding what parties and their attorneys must do and create a disciplinary rule where none existed before. In support of Proposed Rule 4.4, the Commission cites *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758]. *Rico* provides a California rationale for Rule 4.4(b), but it is doubtful that proposed rule 4.4(a) would have made it onto the Commission's plate if there had been no MRPC on the subject. Existing law already gives lawyers the same guidance, if not more.

Where a statute and a rule of court address a lawyer's conduct in a particular circumstance, we believe the State Bar need not add a separate injunction. Among other reasons, the judicial interpretation of the concepts underlying a particular statute and a rule of court should retain primacy, especially where the application of a disciplinary rule by the State Bar may in time diverge from such judicial interpretation.

A particular feature of American jurisprudence is that courts do not give advisory opinions. Rather American case law develops in response to disputes regarding the application of law to specific facts. Even when a senior appellate body, such as the California makes a broad pronouncement, it is left to the lower court to develop the contours of the law as applied, the nuances, and, for example here, such terms as “obviously appears”, “reasonably apparent”, and, particularly, “inadvertently.”²

II. It Is Misguided to Focus on the Recipient-Attorney Instead of the Producing/Sending-Attorney

Upon reviewing the rule, LPMT Executive Committee members reacted first – when noticing the title of *Duties Concerning Inadvertently Transmitted Writings* – that the emphasis in any rules governing a lawyer’s conduct regarding transmitted writings should be on the duties of the sending or producing lawyer. That is not to say the Commission need add more to rule 4.4 – after all, California Business and Professions Code §6068(e)(1) already deals with a lawyer’s disclosure of her or his client’s confidential information.

In addition the law and practice regarding the inadvertent sending and producing of confidential information is evolving. Rather, the proposed discipline by the State Bar of the receiving attorney for a lack of action is inapt. The State Bar should save its powder and devote its resources to helping lawyers develop procedures to reduce the risk of inadvertently sending a client’s confidential information to another.

² See also the comment of the Los Angeles Superior Court of California regarding inadvertently produced information in its comments regarding the draft text of what will become the EDA:

“Additionally, C.C.P. § 2031.285 only addresses the obligations of a party who receives privileged information, and then receives a ‘notification of privilege’ from the party who produced the information. It does not address whether the production of privileged information as part of a document production with ‘quick peeks’ or ‘claw back provisions’ is deemed to be ‘inadvertent’ so that the obligations of the receiving lawyer set forth in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807 apply.”

California Judicial Council Report on Electronic Discovery: Proposed Legislation [including attachments] (April 16, 2008) (“Council Report”) at 164.

As the Commission has stressed, “the State Bar disciplinary process has limited resources to investigate and prosecute all alleged unprofessional conduct and that a State Bar disciplinary process should not be the initial or primary remedy . . . when the law provides other . . . remedies.” Proposed Rule 8.4.1 [2-400] Prohibited Discrimination in Law Practice Management and Operation, Explanation of Changes to the California Rule 2-400, at 7.

III. Inadvertent Disclosure Is a Nuanced Area, Due to Differences

Between Litigation-Related and Transactional Exchanges of Information

As with the two salient California Supreme Court cases on the issue of inadvertent disclosure, the issue usually arises in the context of litigation. Indeed, the Commission recognizes as much when it inserts “or produced” into the equivalent text of the MRPC: “where it is reasonably apparent that the writing was inadvertently sent *or produced*, [the receiving lawyer] shall promptly notify the sender.”

The *Rico* court’s agreement with *amicus curiae* The Product Liability Advisory Council, Inc. refers to the burden’s of responding to “a request for mass production.” *Rico* at *5. Hence, the tribunal before which an instance of inadvertent disclosure arises has sufficient authority to sanction attorneys – including referral to the State Bar – if warranted.³

³ Even when a court must notify the State Bar of an attorney’s misconduct pursuant to Business and Professions Code § 6086.7, the law carves out an exception for certain misconduct regarding discovery. See Bus. & Prof. C. § 6086.7(3) (“The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars (\$1,000).). In addition, under circumstances reasonably suggesting that the crime-fraud exception applies, however, a lawyer may ethically read the communication and not be subject to sanctions. See Proposed Formal Opinion Interim No. 06•0004 (Confidential Information and Unsolicited E-Mail Correspondence): “The opinion digest states:

“If an attorney receives a confidential written communication between opposing counsel and opposing counsel’s client under circumstances reasonably suggesting that the crime-fraud exception precludes application of the attorney-client privilege, the attorney may ethically read the communication.”

Id. at <http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=97668> (accessed June 14, 2010).

IV. Metadata's Complexity and Still-Developing Ethical Principles Warrant that the Commission Decline to Adopt Proposed Rule 4.4

LPMT has a further concern, particularly as the use of technology by lawyers is right in LPMT's wheelhouse.

Complex issues regarding the receipt of confidential material lie just under the surface of what appears to be a straightforward rule. An important example is that of the propriety of a receiving lawyer's accessing or viewing metadata in the received item.

Metadata is the hidden or embedded data in a writing in an electronic medium. For such a writing, The Electronic Discovery Act uses the term "electronically stored information" (ESI). "'Electronically stored information' means information that is stored in an electronic medium." C.C.P. § 2016.020(e).⁴ Examples of metadata include the "properties" in a Microsoft Word file (document), for example, when it was created and last modified. Formulas and comments in a spreadsheet, usually not visible in a printed copy, provide another example.

An attorney may be unaware, however, of metadata's presence or significance because:

- Metadata is often hidden.
- Metadata is often created automatically by the user's computer.
- As a piece of computer mumbo-jumbo, attorneys may be unaware of what metadata is or that it even exists.

⁴ The EDA offers the following definitions for ESI in a revised C.C.P. § 2016.020:

(d) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(e) "Electronically stored information" means information that is stored in an electronic medium.

- Even those attorneys who know about metadata may be unaware of its special characteristics or what special care must be taken regarding it.
- Metadata may be revealed by certain applications' features such as MS Word's Track Changes, of which many people are unaware.⁵

Lawyers and their clients create and transmit almost all “writings” or “documents” electronically. Examples include what you are now reading and the ubiquitous email, with attachments. All ESI contains metadata not apparent viewable on the “face” of the ESI/document. For convenience, we will use as an example of ESI a Microsoft Word file and refer to it as a “document.”

If a lawyer receives a document from another lawyer, some of that document's metadata may contain another's confidential information. At times, the metadata is hidden from view. In that case, the lawyer is safe from the proposed rule in that the metadata is not obvious, although sometimes the metadata is obvious, such as when opening a document that reveals tracked changes made to an earlier version of the document. In either case, there are legitimate reasons for a lawyer to access and view certain metadata.

Other examples of usually hidden metadata are the formulas and comments in a spreadsheet, usually not visible in a printed copy. Likewise, with metadata, one may trace the Internet route of an e-mail—by viewing the “full header” (a.k.a. Internet header)—or one may see who was sent a blind copy (bcc) of an e-mail. A document's metadata also include a hash value, which is a kind of digital fingerprint that will change if any part of the document, including its other metadata, is changed.

⁵ Businessman Derrick Max, reacting to Democrats' outrage when his e-mailed Congressional testimony revealed input from the Republican Social Security Administration, vented that, “The real scandal here is that after 15 years of using Microsoft Word, I don't know how to turn off ‘track changes.’” Zeller, Tom, Jr., *Beware Your Trail of Digital Fingerprints*, N.Y. Times (Nov. 7, 2005) <nytimes.com/2005/11/07/business/07link.html?_r=1&pagewanted=print>. See generally Robert D. Brownstone, *Metadata: To Scrub or Not To Scrub; That is the Ethical Question*, Cal. B.J. (Feb. 2008) <<http://metadata-mcle-2-1-08.notlong.com/>> (written by LPMT Executive Committee Chair-Elect for 2010-11) .

Regarding metadata received from opposing counsel, even outside the context of litigation, several state ethics opinions prohibit the receiving party's viewing of **any** metadata. This prohibition may even apply to metadata that ordinarily would not be considered confidential – for example, the “full header” (a.k.a. “Internet header”⁶) of a non-confidential email.⁷

Many states' ethics opinions decry such viewing of received metadata as unethical and worse.⁸ The heart of the matter is that such state ethics opinions presume that metadata is *per se* confidential to its author. Thus, even if the on its face the document is not confidential, these ethics opinions presume that the associated metadata is.

There is a broad debate among attorneys who focus on technology and rules of professional conduct regarding those states' ethics opinions. Many criticize them as not comprehending the nuances of metadata. It should be noted that several jurisdictions have not adopted – or have specifically rejected – the proscriptions describe above. [See *infra* LPMT's comments on Proposed Rule 8.5 regarding the difficulties that would arise if a rule such as Proposed Rule 4.4 were part of the CPRC's extraterritorial scope.]

(c't'd)

⁶ **Header:** In information technology, a header is, in general, something that goes in front of something else and is usually repeated as a standard part of the units of something else. A header can consist of multiple fields, each containing its own value. In email it is the part of the message containing information about the message, such as the sender, date sent and other brief details. *The Sedona Conference® Glossary: E-Discovery & Digital Information Management* (2d ed. Dec. 2007).

⁷ See, e.g., New York State Bar Association Opinion 749 (Dec. 14, 2001) (concluding that, “A lawyer may not make use of computer software applications . . . to trace e-mail.”).

⁸ By describing the viewing of metadata not on the face of a document as surreptitious, the New York State Bar Association (NYSBA) implies that such viewing is unseemly and deceptive. See, e.g., New York State Bar Association Opinion 749 (Dec. 14, 2001) (concluding that “[a] lawyer may not make use of computer software applications to surreptitiously ‘get behind’ visible documents or to trace e-mail”) <<http://NYSBA-Op-749-2001.notlong.com>>. By describing the viewing of metadata not on the face of a document as surreptitious, the New York State Bar Association implies that such viewing is unseemly and deceptive. “Something *surreptitious* is stealthy, furtive, and often unseemly or unethical: *the surreptitious mobilization of troops preparing for a sneak attack.*” *The American Heritage® Dictionary of the English Language* (4th Ed. 2002) (in the note regarding synonyms of “secret”). But note that, several years later, the NYSBA recognized that the focus of metadata inadvertent-disclosure ethics should be on the need for the *sending* attorney to exhibit “reasonable care.” NYSBA Op. 782 (Dec. 8, 2004) <<http://NYSBA-Op-782-2004.notlong.com>>.

CONCLUSION

California should follow the law as it evolves and not begin to discipline lawyers as prescribed by Proposed Rule 4.4. The rule is unnecessary in light of existing statute and case law. In addition, it is premature and likely unwise considering the many related but unacknowledged issues re e-discovery, including the appropriateness of accessing metadata in a document received from another party or its attorney.

For the foregoing reasons, we recommend that Proposed Rule 4.4 be removed from the Commission's proposed revisions.



**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.

Rule 4.4. Respect for the Rights of Third Persons.

1. OCTC is concerned that this proposed rule deviates substantially from the ABA rule by eliminating the ABA's subparagraph (a), which prohibits an attorney from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violates the legal rights of such a person. The Commission noted that they are concerned regarding the vagueness and over breadth of such terms as embarrass, delay, or burden a third person in the ABA rule and the resulting chilling effect the ABA's rule would have on legitimate litigation activities. OCTC finds this concern unwarranted; and when balanced against the need to prevent litigation abuse, OCTC believes the ABA has it correct.

Further, the State Bar Act already prohibits counseling or maintaining actions, proceedings, or defenses only as appear to him or her legal or just (section 6068(c); advancing no fact prejudicial to the honor or reputation of a party or witness (section 6068(f)); and not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest (section 6068(g)). The current Rules of Professional Conduct already prohibit an attorney from bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal without probable cause and for the purpose of harassing or maliciously injuring any person (rule 3-200(A).) The Ninth Circuit has held that a rule prohibiting attorneys from conduct unbecoming a member of the bar is not unconstitutionally vague. (*United States v. Hearst* (9th Cir. 1981) 638 F2d 1190, 1197.)

In fact, subparagraph (a) of the Model Rules would prohibit some of the type of clear misconduct that former section 6068(f) [offensive personality] was attempting to reach. It would do so without the constitutional problems that the Ninth Circuit had with the term "offensive personality." While some of this misconduct can be handled under other rules, not all of it can or should be and this would give better guidance to the attorneys in this state. OCTC believes that California should follow the rest of the country and that ABA's paragraph (a) should be adopted.

2. OCTC believes both the Commission's language in paragraph (b) and the ABA's language are equally adequate and are consistent with the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp* (2007) 42 Cal.4th 807, 818. We find either acceptable.
3. Comments 1 and 3 seems more appropriate for a treatise, law review article, or ethics opinion. Comment 2 is too long and covers at least two distinct concepts. It could be two comments.



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,

A handwritten signature in cursive script that reads "Richard Zitrin / by son".

Richard Zitrin

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.¹ 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:

¹ 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 ¶¶ 33.² 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~~

² 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.

~~The Commission in its May 2010 Non-Adoption Summary argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.~~

~~We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.~~

~~3. Rule 3.3 – Duty of candor~~

~~Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.~~

~~Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.~~

~~The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.~~

~~Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.~~

~~4. Rule 3.9 – Advocate in non-adjudicative proceeding~~

~~Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance is required by ABA MR 3.9.~~

~~We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")~~

~~This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.~~

~~5. Rule 4.4(a) – Barring use of embarrassment, delay, or burden~~

~~Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the May 2010 Non-Adoption Summary – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule~~

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 2004.⁴ 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.~~

⁴ ~~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.~~