

May 6, 2010

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

Re:

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

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Rule 3.8	Special Responsibilities of a Prosecutor
Rule 3.9	Advocate in Non-adjudicative Proceedings *BATCH 6*
Rule 3.10	Threatening Criminal, Administrative, or Disciplinary Charges
Rule 4.1	Truthfulness in Statements to Others *BATCH 6*
Rule 4.2	Communication with a Person Represented by Counsel
Rule 4.3	Dealing with Unrepresented Person
Rule 4.4	Respect for Rights of Third Persons *BATCH 6*
Rule 5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers
Rule 5.2	Responsibilities of a Subordinate Lawyer
Rule 5.3	Responsibilities Regarding Nonlawyer Assistants
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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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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:

Proposed New Rule No./ Title: Rule 6.2 – Accepting Appointments

(5) Proposed Rule 6.2 is substantively identical to the ABA Model Rule.

The Commission notes that some of its members do not recommend this Rule, because it would allow a lawyer to reject an appointment to represent a client the lawyer considers “repugnant.” This minority argues that lawyers are traditionally obliged to represent people they may consider “repugnant,” such as some criminal or unpopular clients.

However, the policy behind proposed Rule 6.2 correctly recognizes that, in some cases, a client may be so repugnant to a lawyer as to impair the lawyer’s ability to represent the client. In these cases, it would be a conflict of interest for the lawyer to represent the client. Thus, Rule 6.2, while it permits lawyers to decline appointments by a tribunal in limited circumstances, does so for a proper purpose—and a purpose that may be in the “repugnant” client’s best interests. After all, another appointed attorney may not find the client so repugnant that the attorney-client relationship would be impaired.

Furthermore, the comments to the proposed rule contain a substantive exception that helps to address the minority’s concerns. Specifically, Comment 1 to proposed Rule 6.2 contains a cross-reference to Cal. Bus. & Prof. Code § 6068(h), which states that it is the duty of a lawyer “[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.” Thus, the comments acknowledge that an attorney cannot decline an appointment simply because a client is unpopular.

CONCLUSION: We approve the new rule in its entirety.

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

Old Rule No./Title: CRPC 1-650 Limited Legal Services Programs

Proposed New Rule No./ Title: CRPC 6.5 Limited Legal Services Programs

(5) Proposed CRPC 6.5 largely embodies recently adopted CRPC 1-650. This is not surprising. The Rules Revision Commission was involved in the rule’s inception in the spring of 2009, approval and adoption of which was pursued on an expedited basis under the auspices of meeting a demand for *pro bono* legal services in view of the recent economic downturn. Existing CRPC 1-650 was adopted by the California Supreme Court by order dated June 29, 2009, modified by the Court for clarification.

Its objective is to relax the general application of conflict of interest rules, and their imputing effects in connection with provision of “short-term limited legal services to a client without [reasonable] expectation by either the lawyer or the client that the lawyer will provide continuing representation in the manner.” For its own sake, MR 6.5, upon which the proposed California rule is based, has evoked little controversy, and has been adopted little variation in nearly all Model Rule jurisdictions.

As was true with CRPC 1-650, the coverage of proposed CRPC 6.5 is slightly broader than its

Model Rules counterpart, not limited to non-profit programs, but defined to include programs “sponsored by a court, government agency, bar association, law school or non-profit organization.”

The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted and, its proposal in this context follows conclusions based on that deliberate process, (2) it has since been approved (following pointed, deliberate modification) by the California Supreme Court (3) it is consistent with a national standard that developed without California’s participation, but which promotes worthy public and professional interests worthy of California’s joinder.

CONCLUSION: We approve the new rule in its entirety.

~~LEC Rule Volunteer Name(s): David McGowan~~

~~Old Rule No./Title: 1-700 (Member as candidate for judicial office)~~

~~Proposed New Rule No./ Title: 8.2 “Judicial and Legal Officials”~~

~~(5) The proposed rule requires candidates for judicial office to comply with the canons of judicial ethics and requires that lawyers not lie about judges. The proposed rule tracks the ABA rule except that it adds provisions for appointed rather than elected judges.~~

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

May 16, 2010

2715 Alcatraz Ave.
Berkeley, CA 94705

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

Re: Comments on proposed new or amended rules of Professional Conduct:
adjustments needed for non-litigators and government attorneys

Dear Ms. Hollins:

I appreciate this opportunity to comment on the draft new or amended rules of Professional Conduct under consideration by the Special Commission for the Revision of the Rules of Professional Conduct. I have been a member of the California bar for 28 years, much of that time as a non-litigating, in-house attorney for a non-regulatory governmental agency, and I comment from that perspective.

The proposed rules, understandably, are meant to apply to attorneys in California in all types of public and private employment. In a number of places, the proposed rules do recognize unique considerations applicable to attorneys engaged in differing types of work. But I believe that several proposed rules could be strengthened by specifying the particular manner in which they are meant to affect public, in-house attorneys, or by the addition of clarifying, official comments. I have described some potential problems below, and have made some suggestions.

- ~~1. Proposed Rule 1.7 (Conflict of Interest: Current Clients). The proposed Rule should be modified slightly to more fully recognize additional types of potential conflicts faced by some public sector attorneys.~~

~~Governmental attorneys employed by one public agency, are sometimes asked or expected by their employer to provide advice, often transactional or other non-litigation advice, on a long-term, continuing basis to one or more other, especially small, agencies that lack or cannot afford their own counsel— a city and a port district or a redevelopment agency, a county and a resource conservation district, two or more different boards that may have overlapping subject or geographical jurisdiction. In these situations, potential or actual conflicts of interest may arise at any time, at the very least risking a material limitation on the scope of the representation to one entity or the other. The~~

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Comments on Draft Rules of Professional Conduct

~~conflict issues are not always foreseeable before they arise or before one entity or the other has confided in the attorney. Under the Rule, an attorney may sometimes proceed, but only upon obtaining the informed consent of both entities. Yet an “informed” consent by the two entities in advance, pertaining to a contemplated, general course of conduct for the indefinite future, is almost a contradiction, and difficult to invent.~~

~~The first question in these situations is, who is the attorney’s client? The employer public agency only, or also the other public entity to which the employer asks the attorney to provide services? Who may rely or can reasonably expect to rely on the advice? Who may confide and rely on the confidentiality of the communication?~~

~~These issues arise in at least two ways in non-litigation contexts: first, in direct relations between the two entities—for example a contract between the two entities that requires legal review. Second, and more usually, with respect to legal advice related to intended agency positions on substantive governmental issues, competition for budgets, or competing desires of the two potential “masters,” each of which may expect undivided loyalty. Further complicating the matter is the fact that most public agencies must act “on the record”; a complete discussion and informed consent might well require revealing confidential information at a public meeting, thus posing an awkward problem, as well as a paradox, possibly to the detriment of the two entities.~~

~~While the draft official comments do mention conflicting instructions and inconsistent interests (see draft official comment [29], for example), they do not adequately address potential conflicts that can arise at any time during the long-term assignment of a public attorney to also provide advice to a second, non-employing entity. As a practical matter, to allow the provision of adequate legal services to small public agencies, I suggest a limited exception to the client-consent requirement, allowing the public attorney to inform the two agencies in writing generally about the types of conflicts that could arise. The Rule could also specify that it is not meant to apply to non-litigation representation of public agencies.~~

- ~~2. Proposed Rule 1.6 (Confidential Information of a Client). The proposed Rules should be augmented to allow a limited public attorney right to breach confidentiality in the public interest.~~

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~~Not all governmental agencies in California are subject to “whistleblower” statutes, and even where these statutes do apply to public agency employees generally, the State Bar has declined, so far, to sanction a whistleblower exception to attorney confidentiality requirements. In the public interest, the Rule should be augmented to allow public attorneys to reveal confidential information as a matter of conscience where the attorney concludes that there are no other reasonable, effective means of protecting the public interest.~~

- ~~3. Proposed Rule 1.16 (Declining Or Terminating Representation). The proposed Rule should be clarified as to the meaning of the term “a representation.”~~

~~In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the particular matter, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to the overall relationship between an in-house public counsel and his or her employer.~~

- ~~4. Proposed Rule 3.1 (Meritorious Claims and Contentions). The proposed Rule should be clarified as to the meaning of the term “proceeding.”~~

~~Under subdivision (a), “[a] lawyer shall not bring, continue or defend a proceeding. . . unless there is a basis in law and fact for doing so that is not frivolous. . . .” Official comment [4] states that “[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings.” But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines “proceeding.” (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an “adjudicative proceeding”; and Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6]: “A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding. . . .”~~

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~~(Emphasis added.) Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others).~~

- ~~5. Proposed Rule 4.2 (Communication With a Person Represented By Counsel). The proposed Rule should clarify which public employees may be contacted by an outside attorney without permission of agency counsel.~~

~~Existing Rule 2-100 (Communication With a Represented Party) provides in subdivision (A) that a member may not “communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter. . . .” Subdivision (C)(1) provides an exception for “Communications with a public officer, board, committee, or body[.]” Perhaps because of the ambiguities inherent in the existing rule, it is often honored in the breach; outside lawyers frequently contact general public agency staff members regarding matters on which the agency is represented, without permission of agency counsel.~~

~~Proposed Rule 4.2 (Communication With a Person Represented By Counsel) provides in subdivision (a) that “a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter. . . .” Subdivision (c) states that the rule “shall not prohibit: (1) Communications with a public official, board, committee or body[.]” Unlike the existing rule, which does not define “public officer,” the proposed rule then defines “public official” in subdivision (g) as a “public officer of the United States government, or of a state, or of a county, township, city, political subdivision, or other governmental organization, with the equivalent authority and responsibilities as the non-public organizational constituents described in paragraph (b)(1).” Subdivision (b), in turn, identifies a “person” as: “(1) A current officer, director, partner, or managing agent of a corporation, partnership, association, or other represented organization[.]”~~

~~The proposed rule is more clear than the existing rule that it applies to non-litigation situations as well as to litigation situations, and that not all non-~~

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Comments on Draft Rules of Professional Conduct

~~attorney governmental employees may be contacted by an outside lawyer without permission. However, the rule is still not adequately clear as to which governmental employees an outside lawyer may contact directly without violating the rule. "Officer" and "director" are reasonably clear. But "partner" and "managing agent" are not clear in the context of a governmental agency. "Partner" would not seem to apply at all. As for "managing agent," official comment [12] states that the term means "an employee, member, agent or other constituent of a represented organization with general powers to exercise discretion and judgment with respect to the matter on behalf of the organization. A constituent's official title or rank within an organization is not necessarily determinative of his or her authority."~~

~~Public agencies generally have supervisors, and sometimes a separate class of "managers" or "management employees." Lower level "line" staff often exercise at least some "discretion and judgment" with respect to their work, for example, the initial proposed content of a contract under negotiation. So, does the exception allowing contact by an outside attorney apply to all management employees? To supervisors? To all staff who exercise some judgment with respect to a particular matter? Public agencies and attorneys representing parties who deal with them need more clarity about whom they may contact without permission of agency counsel. A better approach would be to define "public official" in subdivision (g) with more detail, and independent of the cross-reference to business entities in subdivision (b). Outside lawyers should need to obtain permission of agency counsel before discussing most legal matters with non-attorney public agency staff.~~

- ~~6. Rule 6.1 (Voluntary Pro Bono Publico Service) [BATCH 6]. While attorneys should be encouraged to provide pro bono services, Rule 6.1 should not be included in the Rules of Professional Conduct, for several reasons.~~

~~Our society has many unmet needs, legal and otherwise. Whether and how these needs are met is a question of economics, the study of production and distribution of goods and services; and, primarily, politics. The Rule takes a particular political position, perhaps inadvertently, and is subject to political controversy and attack from both left and right. Should social production of wealth be distributed in a different manner, through revisions to the tax system and otherwise? Is an attempt to encourage or force attorneys to provide free services a form of indentured servitude? The Bar should avoid entangling itself in these disputes.~~

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Comments on Draft Rules of Professional Conduct

~~Second, the Rule would appear to apply equally to very differently situated attorneys, including those who work for large private firms. After several decades of work, attorneys who have chosen to devote their careers to public service or nonprofit organizations often earn less than first-year associates at these private interest firms. There is something untoward about purporting to equally require affluent attorneys in large, private firms and less affluent attorneys engaged full time in public service to donate time to pro bono work, or, alternatively, donate money as part of "professional responsibility."~~

~~Third, as a practical matter, many public sector attorneys have donated many hours to their work, working during mandatory furlough days, weekends, and otherwise. They also, typically, do not receive time off to perform pro bono work, unlike many in private practice. Further, the State of California does not pay its attorneys for continuing legal education unrelated to an attorney's work, so that a state attorney seeking to perform pro bono work in another field would need to find additional time for training and funds to pay for it. The time and money required for this and the pro bono work itself are a far greater burden to less-affluent, governmental attorneys.~~

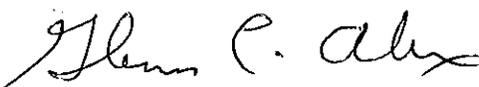
~~Finally, the Rule is largely written for litigation attorneys; non-litigation attorneys are not as well placed to provide direct representation to the indigent, at least not without substantial additional training to ensure competence.~~

~~The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.~~

7. Proposed Rule 6.5 (Limited Legal Services Programs) [BATCH 6]. Subdivisions (a)(2) and (b), and official comments [1], [3], [4], and [5] refer to Rule 1.10, which does not seem to be included in the draft Rules.

Thank you again for the opportunity to comment on the draft Rules.

Yours truly,



Glenn C. Alex



**THE STATE BAR OF
CALIFORNIA**

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June 15, 2010

Audrey Hollins, Director
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Development
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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.

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Rule 6.5. Limited Legal Services Programs.

1. OCTC finds Comments 1-4 more appropriate for treatises, law review articles, and ethics opinions. It supports Comment 5.