RE: Rule 1.8.6 [3-310(F)]
12/11&12/09 Commission Meeting
Open Session Agenda Item III.A.

Lee, Mimi

From: Marlaud, Angela
Sent: Monday, November 23, 2009 10:23 AM
To: CommissionerJ2@gmail.com; Difuntorum, Randall; hbsondheim@verizon.net; ignazio.ruvolo@jud.ca.gov; jsapiro@sapirolaw.com; kemohr@charter.net; kevin_e_mohr@csi.com; kevinm@wsulaw.edu; kmelchior@nossaman.com; Lee, Mimi; linda.foy@jud.ca.gov; Marlaud, Angela; martinez@lbbslaw.com; McCurdy, Lauren; mtuft@cwclaw.com; pecklaw@prodigy.net; pwvapnek@townsend.com; rlkehr@kscllp.com; slamport@coxcastle.com; snyderlaw@charter.net
Subject: Final RRC Agenda Submission 1.8.6 [3-310] - III.A. - December 11-12, 2009 Meeting Materials
Attachments: RRC - 3-310 [1-8-6] - Dash, Intro, Rule, Comment, Clean, Redline, PubCom -COMBO - DFT2.1 (11-13-09).pdf

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From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Sunday, November 22, 2009 3:44 PM
To: Marlaud, Angela
Cc: Robert L. Kehr; Kurt Melchior; Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi
Subject: RRC - 1.8.6 [3-310] - III.A. - December 11-12, 2009 Meeting Materials

Greetings Angela:

I've attached a single, scaled PDF file that includes the following documents for this Rule (please use this e-mail as the cover memo for the Agenda item):

1. Dashboard, Draft 2.1 (11/13/09)ML-RLK-KEM;

2. Introduction, Draft 4.1 (11/19/09)RLK-KEM;

3. Rule Chart, Draft 4.1 (11/19/09)RLK-KEM;

4. Comment Chart, Draft 5.1 (11/14/09)RLK-KEM;

5. Rule 1.8.6, Draft 7 (11/11/09), Clean version;

6. Rule 1.8.6, Draft 7 (11/11/09), redline, compared to Public Comment Draft [#6.6];

7. Public Comment Chart, Draft 2.1 (11/18/09)RD-RLK-KEM.

Please let me know if you have any questions. Thanks,

Kevin

--
Kevin E. Mohr
Professor

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Proposed Rule 1.8.6 [3-310(F)]
"Payments Not From Client"

(Draft #7, 11/11/09)

Summary: This proposed rule follows Model Rule 1.8(e) and current RPC 3-310(F) in requiring client consent when a lawyer is paid by anyone other than the client. However, it expands on the Model Rule by requiring "informed written consent", and it expands on the Model Rule and the current RPC by moving the consent forward to before the lawyer enters an agreement with or charges the payor. See Introduction.

Comparison with ABA Counterpart

Rule	Comment
☑ ABA Model Rule substantially adopted	☐ ABA Model Rule substantially adopted
☐ ABA Model Rule substantially rejected	☑ ABA Model Rule substantially rejected
☑ Some material additions to ABA Model Rule	☑ Some material additions to ABA Model Rule
☐ Some material deletions from ABA Model Rule	☐ Some material deletions from ABA Model Rule
☐ No ABA Model Rule counterpart	☐ No ABA Model Rule counterpart

Primary Factors Considered

☑ Existing California Law

Rules	RPC 3-310(F)
Statute	
Case law	

☐ State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

☐ Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(14 Members Total – votes recorded may be less than 14 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption ☐

Vote (see tally below) ☑

Favor Rule as Recommended for Adoption _____
Opposed Rule as Recommended for Adoption _____
Abstain _____

Approved on Consent Calendar ☐

Approved by Consensus ☐

Minority/Position Included on Model Rule Comparison Chart: ☐ Yes ☑ No

Stakeholders and Level of Controversy

☐ No Known Stakeholders

☑ The Following Stakeholders Are Known:

California Commission on Access to Justice; Legal Aid Association of California

Very Controversial – Explanation:

☐ Moderately Controversial – Explanation:

☑ Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.8.6* Payments Not From Client

November 2009
(Draft rule following consideration of public comment)

INTRODUCTION:

ABA Model Rule 1.8(f) and proposed Rule 1.8.6 begin from the same premise: a lawyer has a potential conflict of interest when the lawyer is compensated by someone other than the client. However, proposed Rule 1.8.6 expands in important ways on the protection afforded a client by the Model Rule. The Model Rule requires compliance before a lawyer *accepts* compensation from someone other than the client; the proposed Rule extends this by also requiring compliance before a lawyer *enters into an agreement with or charges* someone other than the client. The proposed revision is designed to include in the Rule events that would create the conflict of interest the Rule is intended to address. Proposed Rule 1.8.6 also requires a higher standard of lawyer conduct than is found in the Model Rule because proposed Rule 1.8.6 requires that the lawyer obtain the client's consent in writing. To facilitate access to justice, the proposed Rule also excepts from the Rule certain legal services provided by government agencies <u>or through non-profit organizations</u>. The latter exception was added following public comment.

* Proposed Rule 1.8.6, Draft 7 (11/11/09).

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.6 Payments Not From Client	Explanation of Changes to the ABA Model Rule
(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:	~~(f)~~a) A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:	**Revisions to Enhance Client Protection**. Both the ABA and proposed California versions of this Rule recognize the potential conflict of interest that arises for a lawyer who accepts payment from someone other than the lawyer's client. However, California's proposed Rule makes one substantive addition to the Model Rule to extend the reach of the Rule for better client protection. The Model Rule restricts only the acceptance of compensation from someone other than the client. The proposed Rule recognizes it is not only the fact of the payment – which might be delayed or deferred for various reasons - but also the lawyer's expectation of payment from the non-client that could lead the lawyer to look to the interests of the payor rather than to those of the client. The proposed Rule therefore forbids not only the acceptance of payment, as does the Model Rule, but also prohibits the lawyer (i) from entering into an agreement with the non-client for payment of the lawyer's fee or (ii) actually charging the other person: the lawyer may not do any of these three things without first complying with the proposed Rule. **Approaches in Other Jurisdictions**. There are a number of jurisdictions that have varied the wording or organization of the Model Rule without fundamentally altering the thrust of the Rule. These jurisdictions include Mississippi, North Dakota, Virginia, Washington D.C., and Wyoming.

* Proposed Rule 1.8.6., Draft 7 (11/11/09). Redline/strikeout showing changes to the ABA Model Rule

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.6 Payments Not From Client	Explanation of Changes to the ABA Model Rule
(1) the client gives informed consent;	(a~~1~~) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;	**Revisions to Enhance Client Protection**. Paragraph (a) provides for client consent. However, it does so with two substantive variations from the Model Rule. *First*, paragraph (a) utilizes California's more client-protective requirement that the consent be written. This additional requirement adds a safeguard for the client by placing the lawyer's disclosure and the client's consent in a relatively permanent form that the client can review and discuss with others before giving consent, and the formality of the writing underlines the importance of the lawyer's request for consent. This provision also provides appropriate protection for the compliant lawyer by making it harder for a client to claim that the lawyer made an inadequate disclosure or that the client gave no consent. *Second*, paragraph (a) includes a timing requirement for obtaining the client's written consent. This is important for the client to be able to maintain supervision and control over the lawyer's conduct. **Other Revisions That Enhance Access to Justice**. In addition, as in the current California rule [3-310(F)], certain public agency representations are excluded from the Rule. This exclusion has been expanded in response to public comment to include lawyers who provide legal services through non-profit organizations. See Comment [2], below. ~~because the concerns addressed by the Rule do not come into play in those situations~~. **Approaches in Other Jurisdictions**. Montana has included the requirement of "written" consent, and a number of states have excluded insurance and in some cases other situations in which a third-person compensates the lawyer. These states include Connecticut, Louisiana, Ohio, Wisconsin, and perhaps Minnesota (its Rule and Comment do not make this clear, but it appears likely). The Commission recommends limiting the exclusions to

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules	Commission's Proposed Rule* Rule 1.8.6 Payments Not From Client	Explanation of Changes to the ABA Model Rule
		the public agency, charitable, and insurance situations. The ~~former exclusion is~~ first two are included in the Rule itself because that can be done simply without altering the Model Rule syntax; the latter exclusion is included only in a Comment because this allows the Rule to adhere more closely to the lay out of the Model Rule, and the Comment that is proposed is similar to the language in the Discussion to California's current rule, language that appears already to be well understood. See proposed Comment ~~[3]~~ [4].
~~(2)~~(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	~~(2)~~(b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and	No change in the Model Rule language is proposed for this paragraph.
(3) information relating to representation of a client is protected as required by Rule 1.6.	~~(3)~~(c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).	**Revision Identifying California's Unique Confidentiality Statute**. Paragraph (c) identifies the duty of confidentiality as a special concern. The proposed version broadens the Model Rule's reference to Rule 1.6 to include California's unique and vital statutory duty of confidentiality.

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.6 Payments Not From Client Comment	Explanation of Changes to the ABA Model Rule
Person Paying for a Lawyer's Services [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).	~~**Person Paying for a Lawyer's Services**~~ [~~11~~1] ~~Lawyers are frequently~~A lawyer might be asked to represent a client ~~under circumstances in which a third~~when another client or other person will ~~compensate~~ pay the lawyer's fees, in whole or in part. ~~The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests~~ This Rule recognizes that ~~differ from those~~ any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including ~~interests in minimizing~~ the ~~amount spent on the representation and in learning how the representation is progressing~~ duties of undivided loyalty, ~~lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's~~ independent professional judgment, ~~there is informed consent from~~ competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has	Model Rule, Comment [11] and the Commission's proposed Comment [1] cover much the same ground. However, the Commission's proposed draft eliminates discursive Model Rule language that does not explain the meaning or application of the Rule. The proposed draft also contains a more specific statement of the duties of lawyers, including references to pertinent portions of the basic conflict of interest Rule, proposed Rule 1.7. No substantive change is intended.

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.6 Payments Not From Client Comment	Explanation of Changes to the ABA Model Rule
	a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (~~prohibiting~~ concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).	
	[2] Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with the Rule. These exemptions reflect policy decisions to not interfere with the functioning of public agencies that provide legal services to other public agencies or the public, or of non-profit organizations that provide legal services to the indigent and to others.	The Commission in response to public comment added an exception for lawyers when providing legal services through non-profit organizations. New Comment [2] has been added to clarify the reason for the exceptions to the Rule.
	[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.	Comment [3] clarifies the application of this Rule in a common situation that could prove confusing. Because a settlement agreement or court order obligating someone other than the client to pay the lawyer's fees would come at or near the end of the lawyer's representation of the client in the matter, the concerns addressed by this Rule either do not exist or are highly attenuated.

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.6 Payments Not From Client Comment	Explanation of Changes to the ABA Model Rule
	[4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].	Comment [4] clarifies the application of this Rule in the insurance context when the insurer appoints counsel to represent an insured. Under a large and well-developed body of California case law, this Rule normally will not apply to the arrangement under which an insurance company compensates counsel for its insured. This Comment also clarifies that, although this Rule normally does not apply in the appointed counsel situation, there are circumstances in which the appointed counsel will have a potential or actual conflict of interest and, if so, the lawyer must comply with Rule 1.7. A similar comment can be found in the Discussion to current rule 3-310.
	[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.	As noted, the Commission has expanded paragraph (a) to include a timing requirement that states when a lawyer must obtain the client's written consent to the lawyer's fee arrangement with another person: either before the lawyer enters the fee arrangement or as soon thereafter as is reasonably practicable. Comment [5] provides a common example of when the lawyer might not be able to obtain client consent before entering the fee arrangement. Under those circumstances, the lawyer may obtain client consent "as soon thereafter as is reasonably practicable." In response to public comment, the Commission has added a second example of when a lawyer might not immediately be able to comply with the Rule's timing requirements.

ABA Model Rule Rule 1.8(f) Conflict Of Interest: Current Clients: Specific Rules Comment	Commission's Proposed Rule Rule 1.8.6 Payments Not From Client Comment	Explanation of Changes to the ABA Model Rule

Rule 1.8.6 Payments Not From Client

(Commission's Proposed Rule – Clean Version)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

(b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).

Comment

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

[2] Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with the Rule. These exemptions reflect policy decisions to not interfere with the functioning of public agencies that provide legal services to other public agencies or the public, or of non-profit organizations that provide legal services to the indigent and to others.

[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

[4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].

[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, ~~, such as~~ when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.6 Payments Not From Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;

(b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).

Comment

[1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

[2] Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with the Rule. These exemptions reflect policy decisions to not interfere with the functioning of public agencies that provide legal services to other public agencies or the public, or of non-profit organizations that provide legal services to the indigent and to others.

[~~2~~ 3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

[~~3~~ 4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under this Rule when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [37].

[~~4~~ 5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, ~~, such as~~ when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

Rule 1.8.6 Third Party Payors. [Sorted by Commenter]						TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __
No.	**Commenter**	**Position[1]**	**Comment on Behalf of Group?**	**Rule Paragraph**	**Comment**	**RRC Response**
5	California Attorneys for Criminal Justice	M			CACJ believes that the proposed rule fails to recognize that parents and other family members commonly will retain counsel for a criminal defendant who is incompetent or otherwise and incapable of giving legal consent, either because of a mental condition or because he or she is a minor. We request that the proposed rule include the following comment: Comment [5] – In some limited circumstances, it may not be possible for a lawyer to obtain informed written consent from a client, for instance, in the case of incapacitation, or incompetency due to mental deficit or because the client has not yet reached the age of majority. When this occurs, paragraph (a) shall not apply. Representation will be permitted as long as the lawyer complies with all other provisions of this Rule.	The Commission disagrees and did not make the requested addition. If a client is unable to give consent, for example, because of minority or incompetence, the client will have acted through a representative in engaging the lawyer, and the representative can provide consent on behalf of the client. The same would be true with all other conflict rules, and there is no reason to single out this rule for special treatment.
4	California Commission on Access to Justice	M			We urge that this rule be amended by including in the exception non-profit charitable organizations which represent clients without a fee.	The Commission agrees. See the RRC response to the COPRAC letter.

[1] A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]

TOTAL =__ **Agree = __ Disagree = __ Modify = __ NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M		(a)	Concerned about the application of the proposed rule to lawyers employed by non-profit organizations to provide legal services to low-income clients. Suggests that the Rule exception for lawyers providing services on behalf of public agencies be broadened in order to exclude lawyers who provide legal assistance to low-income clients through non-profit organizations. The letter points for comparison to recently-adopted Rule 1-650, which covers lawyers who provide legal services "under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization."	The Commission agrees with this concern. It has modified paragraph (a) so as to exempt lawyer while rendering services through a non-profit organization and has added a new Comment [2] to discuss the exemption.
					Concerned about the application of the proposed rule to lawyers representing clients in certain commercial transactions. Suggests that Comment [4] be amended to identify the types of transactions where consent may be difficult to obtain before a fee agreement is signed.	The Commission agrees with this concern and has included in what now is Comment [5] a reference to certain commercial transactions.
8	Legal Aid Association of California	M		(a)	This Association's comment parallel's the first COPRAC comment	The Commission agrees. See the RRC response to the COPRAC letter.
7	OCTC	A			OCTC advises that payors often complain to it that the lawyers do not communicate with them, and it requests the addition of a	The Commission disagrees and did not make the requested addition. While OCTC's suggestion for lawyers is valid, the Commission has avoided

Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]

TOTAL =__ **Agree = __ Disagree = __ Modify = __ NI = __**

No.	Commenter	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment suggesting to lawyers that they advise in writing both the client and the payor that the lawyer's duty requires the lawyer to communicate only with the client.	wherever possible further burdening the already lengthy Comments with practice pointers of this sort. The Comments are intended to explain the Rules to which they are attached.
3	Sall, Robert K.	M			Concerns about the impact of third party payments on loyalty, confidentiality, and independent judgment can be handled by oral disclosure and oral consent. The requirement of informed written consent adds nothing to the principles we are truly trying to protect with this rule.	The Committee disagrees and has not made the requested change. The requirement of informed written consent is in current rule 3-310(F), and the Commission is not aware of it working any hardship. Further, the Committee believes that the requirement that the lawyer's disclosure be in writing, and that the client consent in writing, emphasizes to the client the importance of the payment arrangement and provides a potentially permanent reminder to the client of how the lawyer might be affected by the arrangement.
2	San Diego County Bar Association Legal Ethics Committee	A			Approves of the new rule.	No reply required
6	Santa Clara County Bar Association	A			The Santa Clara County Bar Association believes that the proposed changes to this rule are important changes for public protection reasons.	No reply required.

File List - Public Comments – Batch 4 – Proposed Rule 1.8.6

D-2009-264 COPRAC [1.8.6]

D-2009-275a State Bar OCTC [1.8.6]

D-2009-276a Jack Leer SDCBA Legal Ethics Comm [1.8.6]

D-2009-278a California Commission on Access to Justice [1.8.6]

D-2009-280a Legal Aid Assoc CA [1.8.6]

D-2009-281 The Sall Law Firm [1.8.6]

D-2009-285a Ted Cassman CACJ [1.8.6]

D-2009-287a Santa Clara County Bar [1.8.6]

THE STATE BAR OF CALIFORNIA

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2107

September 10, 2009

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.6 – Payments Not From Client

Dear Mr. Sondheim:

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

COPRAC has reviewed the provisions of proposed Rule 1.8.6 – Payments Not From Client. COPRAC generally supports the adoption of proposed Rule 1.8.6. However, COPRAC is concerned about the application of the proposed rule to lawyers employed by non-profit organizations to provide legal services to low-income clients and to lawyers representing clients in certain commercial transactions. With respect to the former, COPRAC suggests that the rule itself be broadened to include other providers of legal assistance to low-income clients. With respect to transactional work, COPRAC suggests that Comment 4 be amended to identify the types of transactions where consent may be difficult to obtain before a fee agreement is signed.

COPRAC is concerned that the rule, as drafted, may inadvertently create unnecessary hurdles for lawyers employed by non-profit organizations who provide free legal services to low-income clients. In an effort to "enhance access to justice," the current draft provides that lawyers "rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public" do not need to disclose that fact nor obtain informed written consent. COPRAC supports this provision. The problem, however, is that many providers of free legal services are employed by nonprofit organizations, not "public agencies." By excepting public agencies but not other organizations that provide these services, the rule may create impediments to providing access to justice for the majority of those lawyers who assist low-income clients without charge in civil cases.

We believe this problem can be solved by adding language to the rule that is consistent with the language in recently-adopted Rule 1-650. That rule covers lawyers who provide legal services "under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization." Substitution of that language for "on behalf of a public agency" in the current draft should eliminate ambiguity and, we believe, satisfy the stated intent of the drafters. (It may be possible to correct the problem merely by adding "or nonprofit organization" after "public agency" in the draft, but we prefer the more expansive language since we are not familiar with the organizational structures of the many providers of legal services to the poor.)

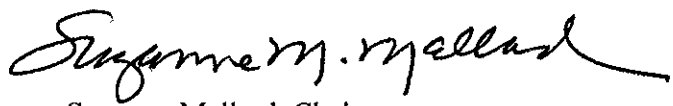
COPRAC also suggests that the comments to the rule be amended to recognize the practicalities and common practice in commercial transactions where a company (typically a corporate issuer of equity or debt securities) commits to pay the legal fees and expenses of counsel for one or more investors in such securities. Such arrangements are especially common in connection with corporate debt restructurings, where the debtor often pays the fees of counsel for a group or committee of existing creditors. Similarly, companies often pay the fees of designated counsel for investors in a securities offering (whether prior to or after the issuance of such securities), and sometimes pay the fees of

designated counsel for shareholders party to a transaction where such company is being sold in a stock transaction or merger. In such circumstances, it is not uncommon for counsel to be designated and to enter into a fee agreement with the company and be paid a retainer before the prospective client-investors are even identified. As investors enter the group of represented clients, they do so with the understanding that counsel represents them solely in their capacity as members of the group and that none of them are responsible for payment. The larger the group of investors, and the more fluid that group is (with investors joining or leaving the group), the more impractical it is for counsel to secure the informed written consent of each investor at the onset of the representation. While the context is quite different, the impracticality of the situation is not dissimilar to the situation (referenced in Comment [4]) when a lawyer is paid by a family member on behalf of an incarcerated client. Because such fee arrangements are not uncommon in commercial transactions, COPRAC suggests that RAD consider adding a specific reference to such commercial transactions in Comment [4]. Accordingly, we suggest that RAD consider adding the language to the following effect to the end of Comment [4]:

> "Similarly, in certain commercial transactions when the client is a lender or investor, or a group or committee consisting of several lenders or investors, the borrower or issuer of securities may agree to compensate the lawyer, and it may be impractical to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. In such transactions, it may not be reasonably practicable to obtain consent until the closing of the transaction or, if earlier, when the transaction-related documents are normally executed."

COPRAC thanks the Rules Revision Commission for its consideration of its comments.

Very truly yours,



Suzanne Mellard, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

THE STATE BAR OF CALIFORNIA

OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
Russell G. Weiner, Interim Chief Trial Counsel

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October 20, 2009

Randall Difuntorum, Director
Office of Professional Competence & Planning
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 Mr. Difuntorum:

Thank you for the opportunity to submit the comments of the Office of the Chief Trial Counsel to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in July 2009. Here are our comments:

Rule 1.8.6 Payments Not from Client.

1. The Office of the Chief Trial Counsel (OCTC) supports this rule. However, OCTC believes that a comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to the non-client and even with such a designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.

~~**Rule 1.8.7 Aggregate Settlements.**~~

~~1. OCTC supports the proposal to use the term "informed written consent" as that term is used in other California rules. However, OCTC finds the rule as written and the Commission's Comments confusing. For example, OCTC finds Comment 4, which is not in the Model Rules, very confusing and problematic. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement, then that should be in the rule itself, not in a Comment. OCTC also finds unclear and confusing what the Commission means by aggregate package deals in criminal cases. That might need some clarification.~~

~~Rule 1.15 Handling Funds and Property of Clients and Other Persons.~~

~~1.~~ ~~While OCTC supports some of the Commission's additions or changes to the Model Rules, such as the Commission's exclusion of trust accounts maintained in other jurisdictions, and there is merit to its explanation that costs are covered by the rule, OCTC finds most of the changes from the Model Rules confusing and potentially inconsistent. For example, OCTC supports the Model Rules provision requiring that advanced fees be placed in the Client Trust Account (CTA). This will prevent confusion and lack of consistency. Either every lawyer should be placing advanced fees in the CTA or no lawyer should be placing the advanced fees in the CTA. A rule requiring that advanced fees be deposited into the CTA will also protect clients. OCTC has many cases where the attorney does not return unearned fees and claims not to have the funds to do so. If this proposal is adopted, it may require a change to Comment 10.~~

~~2.~~ ~~OCTC finds very confusing and inconsistent the proposed rule as to when disputed funds need to be placed in the client trust account. (See proposed rules 1.15(d), (g), (h) and (i).) OCTC suggests deletion of the deviation from the Model Rules regarding these issues. This may require changes to Comments 12 – 14.~~

~~3.~~ ~~OCTC suggests that the term "inviolate" in proposed rule 1.15(e) be deleted as it is confusing and unnecessary in light of the rest of the sentence. All client funds should be maintained in a trust account until the time it is permitted to withdraw them.~~

~~4.~~ ~~OCTC finds confusing and inconsistent proposed rule 1.15(f). OCTC sees no compelling reason here to deviate from the Model Rules and, therefore, OCTC suggests that the first sentence of rule 1.15(a) of the Model Rules be reinstated. OCTC is particularly concerned that there are too many exceptions to the prohibition on the commingling of client funds and this will undermine the rule prohibiting commingling of client funds with the lawyer's own funds or allow such commingling if the attorney has the funds somewhere.~~

~~5.~~ ~~OCTC supports proposed rule 1.15(k) even though it is not in the Model Rules because it is essentially current rule 4-100(B). However, OCTC is concerned that subparagraph (6) is too limited as it does not provide for the Supreme Court or other court to issue an order for an audit. The rules should not determine jurisdiction or send a message that attorneys can violate a court's order. The Supreme Court has always provided that it has the right to involve itself at any stage of the disciplinary proceedings and investigation. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301; *In re Rose* (2000) 22 Cal.4th 430, 439; *Obrien v. Jones* (2000) 23 Cal.4th 40, 48. See also *In re Accusation of Walker* (1948) 32 Cal.2d 488, 490.) OCTC also believes that subparagraph (7) should add the word "authorized" to other person to make clear that only authorized persons can request undisputed funds.~~

~~6.~~ ~~OCTC is concerned that the language of rule 1.15(l) is too broad and, as written, no part of the rule applies to those attorneys and firms discussed in the subparagraphs. This seems counter to the purpose of the rule and public protection. OCTC is also concerned that subparagraphs (2) and (3) do not state, as subparagraph (1) does, that, if the rule does not apply in those situations, the firms and lawyers handle the funds in accordance with the law of the controlling jurisdiction. OCTC is further concerned how it would be able~~

~~to obtain copies of those out of state records and believes that the lawyers in those situations should have a disciplinable obligation to provide those to us or ensure that the financial institutions provide those records to us. Further, OCTC is concerned how this paragraph is impacted by the proposed Choice of Law rule in the September batch of proposed rules. (See proposed rule 8.5.)~~

~~Rule 3.3 Candor Toward the Tribunal.~~

~~1. OCTC is concerned that proposed rule 3.3 addresses only candor toward a tribunal. However, California law, unlike paragraph 3.3(a)(1), currently provides that an "attorney shall employ for purposes of maintaining causes confided to the member such means only as consistent with truth." Thus, the current rule covers, not just tribunals, but statements to others, including opposing counsel, parties, etc. Thus, unless this is covered in some other rule, OCTC believes that California's current rule should be incorporated into this rule or proposed rule 3.4. OCTC recognizes that proposed rule 3.4 is titled Fairness to Opposing Party and Counsel, but that proposed rule does not include this requirement of truth and candor either and that rule also is only designed to cover opposing parties and counsels.~~

~~2. OCTC is concerned that this proposed rule requires knowingly. It is unclear what that means, but if that requires intentional and not misstatements or concealment based on gross negligence, OCTC opposes it since that as is not consistent with California law. (See e.g. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280.) In fact, while good faith in the statement may be a defense to a charge of misrepresentation, an attorney's unqualified and unequivocal statements to judges under circumstances that should have caused him at least some uncertainty are at minimum deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Moreover, some of the proposed rules already permit violations for "knew or reasonably should have known." (See proposed rule 3.6.) For the same reasons, OCTC has concerns and disagrees with Comment 4. OCTC also wants to make clear that it believes the term material does not require that the attorney successfully misled court. Such an interpretation~~

~~3. OCTC is concerned that the proposed rule omits the term "artifice" as provided in current rule 5-200(b). If the Commission is intending to further limit the rule, OCTC opposes that. OCTC believes that word should remain in the rule. The proposed rule also omits the current rule that an attorney shall not intentionally misquote to a tribunal the language of a book, statute, or decision. OCTC is unsure if the Commission is intending to remove that, but OCTC believes that this language should remain and be added to the proposed rule. Likewise, the proposed rule omits the language that an attorney "shall not assert personal knowledge of the facts at issue, except when testifying as a witness." OCTC knows of no reason to omit that language and suggests that it be included in the proposed rule. In a similar vein, OCTC is concerned that nowhere in the proposed rules do they provide for 1) when an attorney states or alludes at trial to evidence that the attorney knows or reasonable believes is not relevant or admissible evidence or has already been ruled by the court inadmissible; 2) states the attorney's belief in the credibility of a witness; and 3) includes when an attorney violates discovery orders of a court. OCTC believes these belong in rule 3.3. OCTC recognizes that these are in rule 3.4 of Model~~

~~Rule, but believe that they belong here, although what is most important is that they remain in the rules. They or some of them appear to be at least implicitly currently in rule 5-200.~~

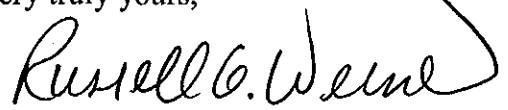
~~4. OCTC is concerned that Comment 3 is incomplete as written because FRCP and CCP 128.7 requires that statements in pleadings be made "after an inquiry reasonable under the circumstances." Likewise, the California Supreme court has written that "while an attorney may often rely upon statements made by a client without further investigation, circumstances known to the attorney may require an investigation." (*Butler v. State Bar* (1986) 42 Cal.3d 323, 329.)~~

~~Rule 6.4 Law Reform Activities Affecting Client Interests.~~

~~1. OCTC is concerned that, while this rule requires the lawyer to inform an organization in which he or she serves as a director, officer, or member when the reform may affect the interests of the client, nothing in the rule requires the lawyer to inform the client. Perhaps that is already required by the conflict rules, but it should be made clear here.~~

Again, thank you for the opportunity to comment on these rules.

Very truly yours,



Russell G. Weiner
Interim Chief Trial Counsel

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): Jack Leer

Old Rule No./Title: 3-310(f)

Proposed New Rule No./ Title: Rule 1.8.6

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

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.
Yes [X] No [ ]

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(3) Is the new rule **worded correctly and clearly**? If "yes, please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [X] No [ ]

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.
Yes [ ] No [ ]

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

Both the Model Rule and our existing Rule 3-310(f) prohibit the acceptance of compensation without the client's consent. The proposed rule would broaden the scope of the prohibition on accepting compensation to also include entering into agreements with, or charging, third parties without the client's consent. The intent of the change is to cover situations where the actual acceptance of the compensation may be delayed, but the expectation of compensation from a third party would still give rise to the conflict of interest. Such a change seems justified, as the same potential conflict exists in the situation where the attorney expects payment from a third party as it does where the

attorney actually accepts compensation.

The proposed rule also adds to the protections for the client by requiring written informed consent before the member enters into the agreement, charges the third party, or accepts payment (or as soon thereafter as is reasonably practical). Both the Model Rule and 3-310(f) are not specific as to when consent must be obtained, and the Model Rule does not require written consent. Again, the proposed change is warranted, as the requirement of written consent in advance affords the client a greater level of protection and also reduces the chance of disputes between the attorney and client regarding the required consent.

Like the existing Rule 3-310(f), the proposed rule includes an express exemption for a situation where the member works for a public agency that is providing legal services to other public agencies or the public. The Commission explains that the concerns covered by this Rule doe not "come into play" in such situations. From the drafting committee's comments, this exception to the rule appears intended primarily to cover situations where a public defender represents a criminal defendant. The drafting committee did not discuss this exemption in great detail (at least not that was apparent from their e-mails. This broad exception would seem to cover some situations where the concerns addressed by the rule do come into play and informed written consent should be obtained. As an example, a city attorney providing legal services to his/her city's retirement system, redevelopment agency, or other similar agency, would seem to have the same conflict of interest with respect to being paid by the city while representing the other agency. How is this different from the conflict arising when a private attorney accepts compensation from a third party, and why should the represented agency not be advised and consent to the potential conflict of interests? Notably, despite citing to case law holding the conflict does not apply where an insurer has the right to appoint counsel to defend the insured, the Commission does not include an express exemption for such situations, instead addressing them in the comments to the proposed rule. It is not clear why one exception is included in the rule itself, while the other is only worthy of a comment. Despite these concerns about the express public agency exception, the proposed Rule 1.8.6 is consistent with both the spirit and letter of the existing Rule 3-310(f) and the model rule.

CONCLUSIONS (pick one):

[X] 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.

CALIFORNIA COMMISSION ON ACCESS TO JUSTICE

c/o State Bar of California - 180 Howard Street - San Francisco, CA 94105 - (415) 538-2251- (415) 538-2524/fax

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Santa Clara University School of Law
Santa Clara

MARY LAVERY FLYNN
Director, Legal Services Outreach
State Bar of California
San Francisco

October 23, 2009

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

Re: Comment on proposed Rules 6.3, 6.4, 1.8.6, and 1.8.7

Dear Ms. Hollins:

On behalf of the California Commission on Access to Justice, I am writing to provide input to the rules identified above.

- **Proposed Rule 1.8.6** – The Access Commission recommends a minor revision to Rule 1.8.6 – to add to the exception those non-profit charitable organizations which represent clients without a fee.

  This rule, titled "Payments Not From Client", addresses the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company. The rule requires "informed written consent" from the client. The proposed Rule includes an exception that is in the current California rule (3-310[F]), but is not in the ABA rule. The exception says that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." The rationale for this exception is "…because the concerns addressed by the Rule do not come into play in those situations." While the exception will cover attorneys working with County Counsel who represent local school districts, and will also cover the Public Defender, it fails to cover legal services programs.

  The Commission's stated rationale for the exception -- enhancing access to justice -- also applies to legal services programs. If this rule goes into effect, legal aid programs would have to fully inform each client that any fees are paid by someone else, and then get the client's written consent, before rendering any service. Not only would this shut down hotlines and other phone-based services, but it would unnecessarily slow down in-person services and result in fewer low-income people receiving services. And nothing would be gained by making this Rule applicable to legal services programs. Therefore, the Access Commission urges that this rule be amended by including in the exception those non-profit charitable organizations which represent clients without a fee.

- ~~**Proposed Rule 1.8.7** - The Access Commission urges that this Rule on Aggregate Settlements be modified to permit attorneys to obtain prior approval from clients. While the proposed rule is only slightly more difficult than existing rule 3-310 (D), even the existing rule does not comport with the reality of aggregate litigation. When a suit is filed on behalf of multiple plaintiffs, such as employees, tenants, etc., the rule would require full, extensive disclosure to each client of considerable information, and the informed written consent of each client. When such a case is settled, for example on the courthouse steps, it is very common that not all of the clients are present. Therefore, the settlement would be delayed while all of the clients are located, the agreement is perhaps translated, and written consent is obtained from all. We believe that such a process would unduly restrict and even discourage potential settlements. Therefore, we believe that the Rule should permit attorneys to obtain prior consent to such settlements, and that a follow-up notification be required within a reasonable amount of time after the settlement is finalized.~~

- ~~**Proposed Rule 6.3** – This proposed rule has not existed in California in the past, and the Access Commission strongly supports its inclusion in our Rules of Professional Conduct. The rule as drafted is excellent, and it will help provide valuable guidance and protection for those wishing to serve on the boards of legal services programs. The mission of legal aid programs to serve the legal needs of low-income communities will often be in conflict with the interests of large corporations. But that should not be a barrier for an attorney who makes his or her living as a corporate attorney who wishes to provide public service by joining a legal aid board. We wholeheartedly support the adoption of this Rule.~~

- ~~**Proposed Rule 6.4** – Likewise, the Access Commission strongly supports the addition of proposed Rule 6.4. This Rule will encourage attorneys to participate in law reform organizations, and provides a reasonable procedure for them to follow whenever their clients might be benefited by the work of that organization. Working to improve the law is an important role for lawyers, and it is critical that lawyers feel that they can be involved in these activities without fearing ethical problems because of the potential impact on clients.~~

Thank you for this opportunity to comment. Please feel free to contact me if you have any questions.

Respectfully submitted,

Hon. Steven K. Austin
Co-Chair

"The Unified Voice of Legal Services"

VIA FACSIMILE (415) 538-2171

October 22, 2009

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

Re: Public Comment on proposed Rules 6.3, 6.4, 1.8.6 and 1.8.7

Dear Ms. Hollins:
I am writing on behalf of the Legal Aid Association of California (LAAC), and our member legal services nonprofit organizations, with comments on four of the proposed Rules of Professional Conduct.

Founded in 1984, the Legal Aid Association of California (LAAC) is a non-profit organization created for the purpose of ensuring the effective delivery of legal services to low-income and underserved people and families throughout California. LAAC is the statewide membership organization for more than 70 non-profit legal services organizations in the state.

Our members provide high-quality legal services to our state's most vulnerable populations. These services to low-income and other underrepresented individuals form an essential safety net in California and often ensure that the programs' clients have access to life's basic necessities, such as food, safe and affordable housing, freedom from violence, health care, employment, economic self-sufficiency, and access to the legal system.

Comments on Proposed Rule 6.3 - SUPPORT
LAAC supports the proposed Rule 6.3 on lawyers serving as a member or director of a legal services organization.

Comments on Proposed Rule 6.4 - SUPPORT
LAAC supports proposed Rule 6.3 regarding attorneys serving as directors, officers or members of an organization involved in the reform of the law or its administration.

433 California Street, Suite 815| San Francisco, CA 94108
Phone (415) 834-0100 | Fax (415) 834-0202

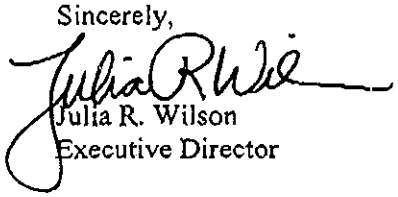
Comments on Proposed Rule 1.8.6 – SUPPORT IF AMENDED
This rule address the situation where someone other than the client is paying the attorneys fees, such as an employer, a family member, or an insurance company and requires "informed written consent" from the client. The proposed rule includes an exception that is in the current California rule (3-310[F]), such that "no disclosure or consent is required if the lawyer is rendering legal services on behalf of a public agency that provides legal services to other public agencies or to the public." This exception would cover situations such as a County Counsel who represents local school districts and Public Defender programs, but does not cover legal services nonprofit corporations.

The Commission's stated rationale for the exception, which it identifies as enhancing access to justice, is "because the concerns addressed by the Rule do not come into play in those situations." The same is true for legal services nonprofit organizations that represent clients without a fee. Legal services nonprofit corporations be included in this exception; without this, there is a significant risk that legal services nonprofits would be forced to eliminate critical hotlines and other phone-based services, that currently serve many low-income clients and could also slow down the provision of in-person assistance, such that many fewer low-income Californians would be able to receive the vital legal help they need. LAAC strongly recommends that the exception be modified to include non-profit charitable organizations that represent clients without a fee, as well as the public agencies already included in the proposed rule. LAAC supports proposed Rule 1.8.6 with this amendment.

Comments on Proposed Rule 1.8.7 - OPPOSE
While LAAC understands the ethical considerations that form the basis for this rule, the construct of the proposed rule simply does not comport with the reality of aggregate litigation. The requirements in the proposed rule would likely result many fewer such cases being resolved through settlement or settlements being significantly delayed. This important topic requires additional discussion and a rule that actually permits the efficient settlement of aggregate cases. The Commission should revisit and modify this proposed rule accordingly, including returning to the language of the ABA Model Rule, which requires informed consent, in a writing signed by the client.

Thank you for your kind consideration of these comments.

Sincerely,



Julia R. Wilson
Executive Director

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ROBERT K SALL

JAMES T BIGGS
LARA A.S CALLAS
BRANDON N KRUEGER

October 22, 2009

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

Re: Public Comment for Rules of Professional Conduct
Rule 1.8.6 – Third Party Payors

Dear Ms. Hollins:

I am a member of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association, and the Professionalism and Ethic Committee of the Orange County Bar Association. However, I am submitting these public comments in my individual capacity, and not as the comments of any of the committees on which I serve.

I have the following comments on Proposed Rule 1.8.6, and the recurring problem of accepting payment from third party payors.

I am normally a strong proponent of informed written consent, but Proposed Rule 1.8.6 is one area where I deviate. I believe that requiring informed written consent for accepting payment from a third party is an unnecessary burden and creates a trap for the unwary. While the Proposed Rule adds a limited impracticality exception to the requirement that the writing be obtained in advance, the rule nevertheless imposes a burden that is largely unnecessary.

The interests that are being protected here are loyalty, independent judgment and confidentiality. A lawyer does not violate those principles simply by accepting a check from a third party payor. Instead, there is merely a risk that the lawyer who accepts such payments will take directions from the third party or reveal confidences to the third party. The lawyer should not be subject to discipline for taking the payment. He or she should be subject to discipline only when the lawyer breaches confidence, loyalty or independent judgment.

Concerns about the impact of third party payments upon loyalty, confidences and independent judgment can be handled in an oral disclosure. These duties can be maintained whether or not there has been written consent. I have written these disclosure letters many times over the years and it is sometimes a silly exercise. What does the letter say? I will adhere to the duties I already have to maintain your confidences. I will not let Mr. Payor control my actions. I don't see how this advances already existing duties or independent judgment. It is merely a burden every time a client decides to have a brother, sister or parent send a check. And sometimes, the third party checks come in out of the blue, completely unanticipated. Suddenly the lawyer is supposed to monitor the bookkeeping department to catch the third party payment and hold the check until letters have been crafted, sent, signed and returned. The process is merely an exercise that doesn't accomplish its purpose.

It is enough here to provide oral disclosure and oral consent. The requirement of informed written consent, especially obtaining one in advance of cashing the check, adds nothing to the principles we are truly trying to protect with this rule.

Thank you for your consideration.

Very truly yours,

THE SALL LAW FIRM
A Professional Corporation

Robert K. Sall

RKS/jvb

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
PUBLIC COMMENT FORM

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

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation California Attorneys for Criminal Justice (

Commenting on behalf of an organization
- (•) Yes
- ( ) No

*** Name** Ted W. Cassman

*** City** Berkeley

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) cassman@achlaw.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]	Rule 3.3 [5-200]	Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)]	Rule 3.6 [5-120]	Rule 6.4 [n/a]
Rule 1.15 [4-100]	Rule 3.7 [5-210]	Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.6 Third Party Payors [3-310(F)]

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.

Attachments

You may upload up to **three** attachments commenting on the rule you selected from the drop down box in the previous section. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. **Files must be less than 1 megabyte (1,000,000 bytes) in size.** For help with uploading file attachments, click the ? next to **Attachment**.

Attachment ? Browse...

file: 1.8.6.pdf (53k) Upload

Attachment ? Browse...

Upload

Attachment ? Browse...

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Receive Mass Email?

☐ To receive e-mail notifications regarding the rules revision project, check the box indicating that you would like to be added to the Commission's e-mail list and enter your email address below. Email addresses will be used only to deliver the requested information. We will not use it for any other purpose or share it with others.

1.8.6 -- Third Party Payors. CACJ believes that the proposed rule fails to recognize that parents and other family members commonly will retain counsel for a criminal defendant who is incompetent or otherwise and incapable of giving legal consent, either because of a mental condition or because he or she is a minor. We request that the proposed rule include the following comment:

> Comment no. 5:
>
> (5) In some limited circumstances, it may not be possible for a lawyer to obtain informed written consent from a client, for instance, in the case of incapacitation, or incompetency due to mental deficit or because the client has not yet reached the age of majority. When this occurs, paragraph (a) shall not apply. Representation will be permitted as long as the lawyer complies with all other provisions of this Rule.

OFFICE USE ONLY.

* Date	Period	File :
10/23/2009	PC	D-2009-285a Ted Cassman CACJ [1.8.6].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required

THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT
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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: OCTOBER 23, 2009

Your Information

Professional Affiliation Santa Clara County Bar Association

Commenting on behalf of an organization
- (●) Yes
- ( ) No

*** Name** Jil Dalesandro, President

*** City** San Jose

*** State** California

*** Email address**
(You will receive a copy of your comment submission.) chrisb@sccba.com

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The following proposed rules can be viewed by clicking on the links below:

Rule 1.8.6 [3-310(F)]	Rule 3.3 [5-200]	Rule 6.3 [n/a]
Rule 1.8.7 [3-310(D)]	Rule 3.6 [5-120]	Rule 6.4 [n/a]
Rule 1.15 [4-100]	Rule 3.7 [5-210]	Batch 4 Discussion Draft (All rules)

*** Select the Proposed Rule that you would like to comment on from the drop down list.**
Rule 1.8.6 Third Party Payors [3-310(F)]

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.

The Santa Clara County Bar Association believes that the proposed changes to this rule are important changes for public protection reasons.

OFFICE USE ONLY.

* Date	Period	File :
10/30/2009	PC	D-2009-287a Santa Clara County Bar [1.8.6].pdf

Commented On:	Specify:	Submitted via:
		Online

* Required