

From: KEVINMOHR04@sprintpcs.com on behalf of [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [JoElla L. Julien](#); [Ellen Peck](#); [Ignazio J. Ruvolo](#); [Mark Tuft](#); [Kevin Mohr G](#); [Harry Sondheim](#)
Subject: RRC - 1.8.2 [3-100] - III.C. - Agenda Materials
Date: Monday, January 11, 2010 1:03:57 PM
Attachments: [RRC - 3-100 \[1-8-2\] - E-mails, etc. - REV \(01-19-10\) 21-22.pdf](#)
[RRC - 3-100 \[1-8-2\] - Public Comment Chart - By Commenter - DFT2 \(12-29-09\)KEM.doc](#)
[RRC - 3-100 \[1-8-2\] - Rule - DFT4 \(12-31-09\) - Cf. to DFT3.doc](#)

Greetings:

I've attached the following:

1. E-mail compilation of exchange amongst the drafters over the last week, in PDF.
2. Public comment Chart, Draft 2 (12/29/09)KEM, in Word.
3. Rule Draft 4 (12/31/09), redline, compared to Draft 3 (9/1/09), in Word.

Please include the above in the order listed.

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

Kevin

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January 4, 2010 KEM E-mail to Drafters, cc Chair & Staff:

I've attached the following for your review, both in Word:

1. Public Comment Chart, Draft 2, with proposed responses.
2. Rule, Draft 4 (12/31/09), redline, compared to Draft 3 (8/30/09).

Comments & Questions:

1. I do not recommend any changes to the Rule. All I've done is remove the brackets around phrases and rule references.
2. In the attached public comment chart, please review the other responses I propose to the public comment received. Do you agree with those?
3. Our deadline is **Monday, January 11, 2010, at noon**. Please provide me with any comments you might have by **Saturday at 5:00 p.m.** so I can make any changes to the introduction, comparison charts, etc. I will have limited time as the law school's new semester begins on that Monday.

Please let me know if you have any questions.

January 7, 2010 Tuft E-mail to Drafters, cc Chair & Staff:

I do not have a problem with the proposed responses to the public comments received. The explanation for the broader scope of information protected in proposed rule 1.8.2 in contrast to 6068(e)(1) is analytically sound. However, the responses received from OCTC and OCBA to this rule and from COPRAC to proposed rule 1.6 on what is meant by "information relating to the representation" illustrates the confusion the Legislature created in enacting 6068(e)(2) and 956.5 and which is now being carried forward in the rules. Although we inherited this problem, thus far we have not been able to satisfactorily resolve it either for this rule or for proposed rules 1.6 and 1.9. At some point, we should bite the bullet and point out in a comment the anomaly in the statute and what the terms "confidential information" and "information relating to the representation of a client" mean for purposes of the rules. Otherwise, lawyers will be even more confused in trying to decipher these terms among these various rules.

January 9, 2010 KEM E-mail to Tuft, cc Drafters, Chair & Staff:

I recognize that there is a potential problem of confusion in the different terms used in 6068(e)(1) and (e)(2). However, I continue to believe that we have satisfactorily addressed the problem, short of petitioning the legislature to revise either (e)(1) or (e)(2) [or both?], by including the second sentence to Rule 1.6(e), drafting comments [3]-[6] to Rule 1.6, and including a "definition" of "confidential information relating to the representation" in proposed Rule 1.0.1, which refers readers to those 1.6 comments. In short, assuming the use of different terms did create an anomaly, we have removed it by the foregoing steps. We could also include a cross-reference to those comments (or to the section of 1.0.1 that refers to them) in each of the Rules that uses the term, "confidential information relating to the representation." (e.g., 1.8.2, 1.14, 1.18, etc.), but I don't think we need a comment that explains the "anomaly," a

conclusion with which I disagree. We have already explained the meaning of the terms. I believe that Comments [3]-[6] to Rule 1.6 adequately explain the meaning of "confidential information relating to the representation."

I've attached the clean version of Rule 1.6 for the convenience of the recipients. Please review the last sentence of paragraph (a) and comments [3]-[6] and decide whether we have adequately addressed Mark's concerns. The comments create protection that is co-extensive with that presumably afforded by 6068(e)(1).

Attached:

RRC - 3-100 [1-6] - Rule - DFT10 (12-30-09) - CLEAN.doc

January 9, 2010 Peck E-mail to Drafters, cc Chair & Staff:

I *really* like this draft. I hope it meets Mark's concerns. Unless Mark wants to tweak the language or has other suggestions, I think it is good to go.

January 10, 2010 KEM E-mail to Drafters, cc Chair & Staff:

I assume I won't hear anything further concerning this rule and, unless I hear differently by 5:00 p.m. this evening, I will package the materials for submission to staff for the agenda package.

January 10, 2010 Tuft E-mail to Drafters, cc Chair & Staff:

I have limited Internet access from the UK and do not have sufficient access to the materials to make specific drafting recommendations. However, I continued to be concerned with the use of different terms dealing with the duty of confidentiality in rules 1.6, 1.8.2, 1.9 and 1.18, such as "confidential information relating to the representation," "information relating to the representation," and confidential information." I am also concerned that we are telling lawyers they have separate obligations under 6068(e)(1) and 3-100 implying there is a difference between the two, although 3-100(a) prohibits lawyers from revealing information protected under section 6068(e) except as provided in paragraph (b). The only express exception to section 6068(e)(1) is 6068(e)(2). We may think we are bringing clarity to the confidentiality in California, but I am worried the average practitioner may agree.

For these reasons, I am not sanguine with the draft agenda materials and remain a reluctant dissenter.

January 10, 2010 Peck E-mail to Tuft, cc Drafters, Chair & Staff:

I think the best thing to do is to authorize Kevin to go forward with the current draft and to note your reluctant dissent. I am assuming that that would be agreeable to you, given the need to get this onto the agenda. Therefore, I think Kevin can go forward along these lines. All the best and travel safely---you are very important to us.

January 10, 2010 Tuft E-mail to Peck, cc Drafters, Chair & Staff:

I concur.

**Rule 1.8.2 Use of Confidential Information [3-100, 3-310].
[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 ("CACJ")	M			Our proposal is to follow precisely the ABA Model Rule 1.8(b).	The Commission disagrees with precisely following Model Rule 1.8(b). First, the phrase, "or required," was deleted because there are no provisions in the Rules or the State Bar Act that <i>require</i> a lawyer to violate his or her duty of confidentiality. Second, a reference to the State Bar Act, which is also part of the regulatory landscape in California, has been added to remind lawyers of other obligations they might have. Finally, the Commission has added a "written" consent requirement because it provides an extra layer of protection by adding the formality of a writing, thus impressing upon the client the importance of the matter.
2	COPRAC	M			<p>COPRAC believes that written consent should be required, given the seriousness of the issue addressed by this rule, which involves a lawyer using confidential information of a client to the disadvantage of a client.</p> <p>We encourage the Commission to address in the rules, perhaps in the definitions, whether informed written consent includes an email from the client. A majority of the members of COPRAC believe that an email should be sufficient.</p> <p>In the third sentence of Comment [1], the</p>	<p>The Commission agrees. No response necessary.</p> <p>The Commission has not made a change to this Rule. If COPRAC's suggestion is considered, it should be done with reference to the definition of "informed written consent" in proposed Rule 1.0.1.</p> <p>The Commission disagrees. The syntax is taken</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.8.2 Use of Confidential Information [3-100, 3-310].
[Sorted by Commenter]

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [1]	phrase "in competition with the client" should be moved to the end of the sentence. Recommending that another client make a purchase would not violate the rule unless such a purchase disadvantaged the client.	verbatim from the Model Rule and is correct. The end of the sentence states: "...or to recommend that another client make such a purchase." The use of the word "such" refers back to a purchase "in competition with the client," which is disadvantageous to the client.
6	Los Angeles County Bar Association, Professional Responsibility and Ethics Committee	A			We support the Commission for the Revision of the Rules of Professional Conduct's Proposed Rule 1.8.2.	No response necessary.
7	Office of Chief Trial Counsel ("OCTC"), State Bar of California				OCTC believes that the phrase "relating to the representation" not be used "because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it." OCTC also supports the idea of written	The Commission disagrees for the same reasons that it has recommended the use of the phrase in proposed Rule 1.6 concerning the duty of confidentiality. See RRC Response to COPRAC in Rule 1.6 Public Comment Chart. ² No response necessary. The Commission agrees

² The Response to COPRAC re proposed Rule 1.6 provides:

The Commission did not make the requested change. Contrary to COPRAC's position, the term "relating to the representation" does not limit the duty of confidentiality as stated in B&P Code § 6068(e)(1). First, the second sentence of paragraph (a) clarifies that the term "relating to the representation," which is found not only in the Model Rule counterpart but also in Evid. Code § 956.5, encompasses all information that is protected by Bus. & Prof. Code § 6068(1). Second, Comments [3]-[6] reiterate what is stated in the second sentence of paragraph (a): the protection afforded a client's confidential information is extremely broad. See especially, Comment [5], sentences 3 through 5. Third, nothing in the legislative history of section 6068(e)(2) or the proceedings leading to rule 3-100 suggests that the use of that phrase in those provisions was intended by either the legislature or the Court "to restrict the ambit of information [that could be communicated] even in the face of a threat of death." See Submission of Michael Judge, below. The use of that language was simply an attempt to conform section 6068(e)(2)'s language to that in the similar provision in the Evidence Code. See Evid. Code § 956.5.

**Rule 1.8.2 Use of Confidential Information [3-100, 3-310].
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					consent in this Rule because it impresses upon the client the importance of the decision and assists in the enforcement of the Rule.	with requiring informed consent.
1	Orange County Bar Association	M			<p>The OCBA believes the language “information relating to representation of a client” should be replaced with the language used in proposed Rule 1.6(a), specifically, “information protected from disclosure by Business and Professions Code section 6068(e)(1).” Currently, there is no statement in proposed Rule 1.8.2, as there is in proposed Rule 1.6(a), to explain the correlation between the phrases, nor does proposed Rule 1.8.2 contain the definition included in Comment [3] of proposed Rule 1.6.</p> <p>Adopting the same language as used in proposed Rule 1.6 not only ensures consistency between the two Rules, but also provides lawyers with more definitive guidance on how to comply with the Rule. The OCBA suggests adding to Comment [1] to proposed Rule 1.8.2 a reference to the definition in Comment [3] of proposed Rule 1.6.</p> <p>The OCBA proposes that the Rule be clarified as applying only to a “current” client’s information, as indicated in the Commission’s</p>	<p>The Commission disagrees and has made no change. As noted in the first sentence of Comment [1], the Rule applies whether or not the information is confidential. The broader term is used in this Rule because the principal underlying value fostered by the Rule is the lawyer’s duty of loyalty to the client.</p> <p>The Commission is unsure what OCBA is requesting. The rule applies only to a current client’s information, as reflected in the title. The</p>

**Rule 1.8.2 Use of Confidential Information [3-100, 3-310].
[Sorted by Commenter]**

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>introductory statement and in the title of the proposed Rule.</p> <p>The OCBA agrees with the Commission's proposed modification to the Model Rule, adopting the "informed written consent" language.</p> <p>The OCBA suggests that proposed Rule 1.8.2 be modified to read as follows:</p> <p>"A lawyer shall not use a current client's information protected from disclosure by Business and Professions Code section 6068(e)(1) to the disadvantage of that client unless the client gives informed written consent, except as otherwise permitted by these Rules or the State Bar Act."</p>	<p>word "client" is used throughout the Rules to refer only to a current client.</p> <p>No response necessary.</p> <p>See RRC Response, above.</p>
3	San Diego County Bar Association Legal Ethics Committee	A			We approve of the new rule in its entirety.	No response necessary.
4	Santa Clara County Bar Association	A			Agrees with the proposed rule.	No response necessary.

Rule 1.8.2 Use of Current Client’s Information Relating to the Representation

A lawyer shall not use information {relating to representation} of a client to the disadvantage of the client unless the client gives informed {written} consent, except as permitted by these Rules or the State Bar Act.

Comment

[1] Use of information relating to the representation, whether or not confidential, to the disadvantage of the client violates the lawyer’s duty of loyalty. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency’s interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of client information unless the client gives informed {written} consent, except as permitted by these Rules or the State Bar Act. See Rules {1.6}, 1.9(c), and {4.1(b)}.

Rule 1.8.2 – Public Comment – File List

E-2009-292c OCBA [1.8.2]

E-2009-293c State Bar OCTC [1.8.2]

E-2009-310e COPRAC [1.8.2]

E-2009-351c SDCBA [1.8.2]

E-2009-358c Santa Clara County Bar [1.8.2]

E-2009-368c CACJ [1.8.2]

E-2009-370c LACBA [1.8.2]

Hollins, Audrey

From: Trudy Levindofske [trudy@ocba.net]
Sent: Friday, November 06, 2009 2:53 PM
To: Hollins, Audrey
Cc: 'Garner, Scott'; 'Shawn M Harpen'
Subject: Orange County Bar Comments Re Proposed Rules of Professional Conduct
Attachments: OCBA Comments to Commission Nov 2009.pdf

Dear Ms. Hollins:

Attached are comments being sent on behalf of the Orange County Bar Association regarding ten (10) of the eleven (11) proposed new or amended Rules of Professional Conduct of the State Bar of California as developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct. We appreciate the work of the Commission and the opportunity to provide these comments, which are attached in PDF format.

- Proposed Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
- Proposed Rule 1.6 – Confidentiality of Information
- Proposed Rule 1.8.2 – Use of Current Client's Information Relating to the Representation
- Proposed Rule 1.8.13 – Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9, and 1.8.12
- Proposed Rule 1.9 – Duties to Former Clients
- Proposed Rule 1.10 – Imputation of Conflicts – General Rule
- Proposed Rule 1.14 – Client with Diminished Capacity
- Proposed Rule 2.1 – Advisor
- Proposed Rule 3.8 – Special Responsibilities of a Prosecutor
- Proposed Rule 8.5 – Disciplinary Authority; Choice of Law

Please let me know if you require any additional information or if you prefer that these comments are provided in a different format.

Trudy C. Levindofske, CAE
Executive Director
Orange County Bar Association
Orange County Bar Association Charitable Fund
(949)440-6700, ext. 213

MEMORANDUM

Date: October 16, 2009

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.8.2 – Use of Current Client’s Information Relating to the Representation**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism & Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

The OCBA supports the adoption of proposed Rule 1.8.2, subject to the comments set forth below.

The OCBA believes the language “information relating to representation of a client” should be replaced with the language used in proposed Rule 1.6(a), specifically, “information protected from disclosure by Business and Professions Code section 6068(e)(1).” Currently, there is no statement in proposed Rule 1.8.2, as there is in proposed Rule 1.6(a), to explain the correlation between the phrases, nor does proposed Rule 1.8.2 contain the definition included in Comment [3] of proposed Rule 1.6.

Use of the language “information relating to the representation of a client” in both the proposed Rule and Comment [1] is vague, overbroad and potentially confusing for attorneys. The language potentially subjects attorneys to disciplinary action for failing to recognize that information somehow “relates” to the representation of a client. While the duty of loyalty and duty of confidentiality both dictate that an attorney should not use his or her own client’s information to that client’s disadvantage without informed written consent, expanding the obligation to include within its scope any and all information potentially relating to the representation is not warranted.

While the stated purpose of proposed Rule 1.8.2 is to provide a standard for the use of a current client’s information, whether confidential or not, the language “confidential information relating to the representation,” as interpreted elsewhere in the Rules and by California case law, has been construed broadly to include any information “gained by virtue of the representation of a client, *whatever its source*, that . . . is likely to be embarrassing or detrimental to the client.” *See* Comment [3] to Proposed Rule 1.6. Adopting the same language as used in proposed Rule 1.6 not only ensures consistency between the two Rules, but also provides lawyers with more

definitive guidance on how to comply with the Rule. Consequently, the OCBA suggests adding to Comment [1] to proposed Rule 1.8.2 a reference to the definition in Comment [3] of proposed Rule 1.6.

Additionally, the OCBA proposes that the Rule be clarified as applying only to a “current” client’s information, as indicated in the Commission’s introductory statement and in the title of the proposed Rule.

Finally, the OCBA agrees with the Commission’s proposed modification to the Model Rule, adopting the “informed written consent” language. The “informed written consent” language is consistently applied in California, and the OCBA does not urge any divergence from that standard here. Thus, the OCBA suggests that proposed Rule 1.8.2 be modified to read as follows:

A lawyer shall not use a current client’s information protected from disclosure by Business and Professions Code section 6068(e)(1) to the disadvantage of that client unless the client gives informed written consent, except as otherwise permitted by these Rules or the State Bar Act.



THE STATE BAR OF CALIFORNIA

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November 4, 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 (OCTC) to the proposed amendments to the Rules of Professional Conduct that were released for public comment by the Board of Governors in September 2009. Here are OCTC's comments:

Rule 1.2 Scope of Representation and Allocation of Authority.

1. The Office of the Chief Trial Counsel (OCTC) is concerned that paragraphs (a) and (b) of proposed Rule 1.2, although in the Model Rules version, are not really rules subject to discipline and, thus, do not belong in the Rules of Professional Conduct. OCTC believes that the Rules of Professional Conduct should only address rules that are disciplinable. Otherwise, it can create confusion among the state's lawyers and make enforcement of the rules more difficult. Further, OCTC believes that the concepts in paragraphs (a) and (b) are already implicitly included in the rules regarding competence and the duty to communicate.
2. OCTC is concerned that, while paragraph (c) permits limited scope representations if the limitation is reasonable under the circumstances, it does not specifically prohibit limited scope representations when they are not permitted by law. In *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520-521, an attorney raised the issue of limited scope representation as a defense to charges of incompetence and failing to perform. The court rejected that defense because it found that federal law did not permit limited scope representations in immigration cases and, therefore, the attorney could not defend the charges by asserting a limited scope representation. The court concluded that because the law prohibited limited scope representations the duty to fully and competently represent the client may not be modified by an agreement between the attorney and the client even if the parties expressly noted the limited scope of the representation. That may be what Comment 8 is trying to explain, but, it should be specifically in the rule, not just a comment.

3. OCTC also believes that the consent in paragraph (c) should be in writing. There already are rules requiring that fee agreements and consent to certain fee agreements be in writing. (E.g. Business & Professions Code sections 6147 and 6148 and current Rule 2-200 of the Rules of Professional Conduct.) OCTC recognizes that Business & Professions Code sections 6147 and 6148 are not considered by themselves a basis for discipline (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279-280), but unless the fee agreements are in writing they are voidable and under current rule 4-200 (proposed rule 1.5) a client must be fully informed of the terms of a fee agreement. Moreover, although California has not made Business & Professions Code sections 6147 and 6148 disciplinable offenses on their own, the Model rules and many other jurisdictions have made the lack of a written agreement disciplinable for contingent fees. (See e.g. Model Rule 1.5 (c); *Statewide Grievance Comm. v. Timbers* (Conn App. Ct. 2002) 796 A.2d 565.) Likewise, current rule 2-200 of the Rules of Professional Conduct has made it a disciplinable violation when the attorney does not obtain the client's written consent to the attorney sharing fees with another attorney. Further, making it in writing prevents future arguments between the attorney and client about the scope of the representation and impresses upon the client the importance of the limitation. A similar purpose was among the purposes noted by the Supreme Court in refusing to honor a fee agreement between attorneys without the informed written consent of the client, in violation of current rule 2-200. (See *Chambers v. Kay* (2002) 29 Cal. 4th 142.) Given that limited scope representation is the exception, it would be better policy and more enforceable to require that it be in writing.
4. OCTC agrees with paragraph (d)'s broadening of current rule 3-210 to include criminal and fraudulent conduct as well as any law, rule, or ruling. However, paragraph (d), unlike current rule 3-210, does not specifically provide for the defense of good faith or appropriate steps. While the Commission's Comments make clear that it intends to keep that defense, OCTC believes that it should be in the rule and not in a comment.
5. OCTC is also concerned with Comments 1 and 2's statement that an attorney is required to consult with the client regarding the means by which the attorney handles the client's matter. These Comments appear to be overbroad and could be interpreted to change current law. The current law is that a lawyer must advise the client of significant developments and that the client has the authority over significant matters, such as settling a case. However, it has never been that the attorney must consult (or advise) on every step and action, just the significant ones. In fact, it is well established that as a general rule an attorney, not a client, controls the presentation of a case. (See e.g. *People v. Hamilton* (1989) 48 Cal.3d 1142, 1163; *People v. Mattison* (1959) 51 Cal.2d 777, 788.) Proposed rule 1.4 requires reasonable consultation, but the Comments to proposed rule 1.2 could be interpreted to change the law and suggest that every means or action by the lawyers requires this consultation. OCTC thinks these Comments need clarification so that only significant means should require consultation and specific communication; and that nothing is intended to change current law about who controls the presentation of cases.
6. OCTC believes that Comment 8 needs clarification to make clear that limited scope representations are not permitted unless allowed by law. OCTC suggests that the Comment reference *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct.

Rptr. 498, 520-521 for this proposition. OCTC is also concerned that nowhere in the Comments are attorneys advised that the courts have found that even where the scope of the representation is expressly limited, the attorney may still have a duty to alert the client to reasonable apparent legal problems outside the scope of the representation. (See *Janik v. Rudy, Exelrod, & Zieff* (2004) 119 Cal.App.4th 930, 940.)

Rule 1.6 Confidentiality of Information.

1. OCTC is concerned that this proposed rule might create confusion and enforcement problems since Business & Professions Code section 6068(e) already addresses the issues raised in proposed rule 1.6. For example, OCTC is concerned that paragraph (a) of proposed Rule 1.6 uses the term information but not the term confidences or secrets, which is used in Business & Professions Code section 6068(e)(1). If California is to have a rule to cover this issue, OCTC suggests that paragraph (a) use the same terms as Business & Professions Code section 6068(e)(1) to ensure that the rule is not interpreted to change the duty of an attorney to preserve the confidences and secrets of a client as provided in Business & Professions Code section 6068(e). For the same reason, OCTC believes that paragraph (a) should refer to all of Business & Professions Code section 6068(e) including (e)(2)'s statement when an attorney may reveal the information ordinarily protected under section (e)(1).
2. OCTC is further concerned that paragraph (b)(1) does not address what happens if any further changes occur to Business & Professions Code section 6068(e). Even if the Supreme Court later changed paragraph (b)(1) to be consistent with any changes in section (e) the delay would be substantial before that occurred. Paragraph (b)(1) currently mirrors the language of Business & Professions Code section 6068(e)(2), but does not specifically refer to Business & Professions Code section 6068(e)(2). To prevent the problems that would occur if the Legislature changed Business & Professions Code section 6068(e)(2) OCTC suggests that, if California is to have a Rule of Professional Conduct to cover the same concerns as already addressed in Business & Professions Code section 6068(e), paragraph (b)(1) of proposed Rule 1.6 simply state that a lawyer may reveal confidential information as permitted under Business & Professions Code section 6068(e). This would prevent conflicting rules, avoid any confusion, and allow for enforcement of this important provision.
3. OCTC agrees with the concerns of the Minority of the Commission that paragraph (b)(3) permits disclosure to establish a claim or defense on behalf of the lawyer without a court determination. We believe a court, not an attorney, should make this determination. This will also aid in the enforcement of violations of this paragraph.
4. OCTC disagrees with the removal from paragraph (b)(4) of the term "other law" and agrees with the Model Rule drafters that this term should be included in this paragraph. OCTC does not believe that the term "other law" is too vague or imprecise. It simply provides that if there is other law preventing or permitting disclosure, it will be complied with. It should be followed in California's rule. There are statutes that require certain disclosures and the rules should not encourage disobedience of those statutes. OCTC also believes that the term court order should be in this paragraph. Thus, OCTC agrees with the majority view regarding proposed paragraph (b)(4)'s use of the term court order because an attorney should not be disobeying a court order. Such disobedience violates

Business & Professions Code section 6103, brings disrespect to the court, and demeans the profession. It also mocks the court's authority and sends a message that juries may also disobey the judge's directives and ignore the law. (See *People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The Supreme Court has stated that an attorney's disobedience of a court order is one of the most serious violations of professional duties. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Thus, no rule should permit or encourage disobedience of a court order. There should not be an exception to obeying court orders for an attorney's claim of attorney-client confidences. The court, not the lawyer, should be the final decider of what must be disclosed. Further, this type of behavior is subject to serious abuse by attorneys who simply use this as an excuse to violate court orders and frustrate the proper administration of justice, no matter how frivolous their assertions. A court, not an attorney, should be the final arbiter of when an attorney can refuse to disclose matters. In fact, OCTC has recently experienced cases in the State Bar Court where attorneys attempted to disrupt, delay, and frustrate our proceedings by refusing to obey court orders to answer questions by making frivolous claims of attorney-client confidences. Thus, unless an attorney obtains an immediate stay or a writ is granted, he or she should not be allowed to disobey a court order. The minority view would in our opinion result in chaos in and disrespect to the court and the law.

5. As to paragraph (b)(5), OCTC refers to its discussion of proposed rule 1.14(b).
6. OCTC has some concerns about paragraph (e). It appears paragraph (e) is an attempt to carry forward the concept in Business & Professions Code section 6068(e)(2) that an attorney may but is not required to reveal some information. The problem is that proposed paragraph (e) is too broad. It covers all of proposed paragraph (b), but that would include that an attorney could not be disciplined for disobeying a law or court order to reveal the information. (See our discussion of paragraph (b)(4).) Although the Commission states this paragraph is just what current rule 3-100(E) states, proposed paragraph (b)'s language is much broader than current rule 3-100(B). Proposed paragraph (e), as written, unlike current rule 3-100, includes allowing an attorney to refuse to reveal confidences required by a court order, apparently even after all the appeals have been completed. It seems to OCTC that this paragraph needs clarification and that it should be a violation to disobey a court order or law.
7. OCTC also has some concerns about the Comments. In general, OCTC thinks there are too many and that some are not necessary. Further, OCTC finds Comment 9 confusing. It states that the overriding value of life permits disclosure otherwise protected by Business & Professions Code section 6068(e)(1), but Business & Professions Code section 6068 (e)(2) already provides for this. More importantly, OCTC does not think the rules should be adding Comments that are explaining a statute passed by the Legislature. OCTC recommends that this Comment be stricken.
8. Comment 15 is overly narrow and seems to imply that the rule of limited disclosure when disclosing information applies only to prevent criminal conduct. If that is what is meant, OCTC strongly disagrees and believes that is contrary to established law. OCTC would strike the Comment or significantly modify it. Comment 19 could result in a claim that, in an investigation commenced under the State Bar's own authority and not the result of a client's complaint, the respondent does not have to provide certain information. It does

not explain what it means by cooperation. What if OCTC subpoenas the client? Comment 21's last sentence could be interpreted as implying that an attorney can disobey a court order or law, even if not appealing it. As previously discussed, OCTC has concerns with that. Likewise, Comment 23 has the problem that it appears to allow a lawyer to disobey a court order or a law.

Rule 1.8.2 Use of Current Client's Information Relating to the Representation.

1. The Commission has asked for comments as to whether it should exclude the term relating to the representation and whether it should require written consent. As to relating to representation, OCTC would suggest that the rule not use that term because the lawyer may learn client secrets not related to the representation but as a result of the representation or otherwise and the lawyer's duty of loyalty would still suggest that the lawyer should not be able to use it. Further, it would undermine the relationships of attorneys and clients and inhibit candid communications between the client and the lawyer. OCTC also supports the idea of written consent as it prevents future disagreement and, as the Supreme Court noted on a difference subject in *Chambers v. Kay* (2002) 29 Cal.4th 142, it impresses upon the client the importance of the decision. Moreover, the State Bar believes that it assists in the enforcement of the rule.

Rule 1.9. Duties to Former Clients.

1. OCTC is concerned with paragraphs (a) and (b) of proposed Rule 1.9 because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. Thus, it would appear to be a significant change in the law. Moreover, while the term "materially adverse" is in the Model Rules version, the proposed paragraph does not state what that means and why the lawyer, not the client, should decide whether it is material. That should be left to the clients to decide, not the lawyers. Further, it creates uncertainty for the lawyers and makes it more difficult to prosecute for a violation. OCTC also agrees with the Minority of the Commission that paragraph (b) might narrow the duty of confidentiality because it refers to the confidentiality rules in the Rules of Professional Conduct but not Business & Professions Code section 6068(e). OCTC believes that the rule should reference Business & Professions Code section 6068(e) as well.
2. OCTC is concerned about the phrase "except as these Rules or the State Bar Act would permit . . . or when the information has become generally known" in paragraph (c)(1). This concern goes back to our concern whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Further, it is unclear what is meant by "information generally known." Business & Professions Code section 6068(e) has traditionally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) Is California now going to allow lawyers to use that information against the former client even though they learned of it during or because of the representation? OCTC does not think California should. It opposes any change in the law that allows lawyers to use information obtained from the client as a result of a representation, even if it is already in the public record. Further, the paragraph would make the disclosures prohibited by the rule more difficult to prosecute as OCTC would have to prove the information was not

“generally known.”

3. Further, paragraph (c)(2) references the exception to current clients. Like paragraph (c)(1), paragraph (c)(2) has the issue of whether the confidentiality rules should require some disclosures, such as when the court or law requires them. Unlike paragraph (c)(1), paragraph (c)(2) does not include the language “or when the information is generally known.” Although this proposed language is also in the Model Rules version, OCTC is not sure when paragraph (c)(1) applies or when paragraph(c)(2) applies. This needs more clarity.
4. OCTC has problems with some of the Comments to this proposed rule, particularly Comment 5. Comment 5 states or implies that the substantial relationship test applies in disqualification cases, but “might not be necessary” in disciplinary proceedings or civil litigation. (The substantial relationship test states that when an attorney’s former representation is substantially related to a current representation it is conclusively presumed that the attorney received and knows of confidential information from the first client.) However, the statement in Comment 5 that the presumption might not be necessary in disciplinary proceedings or civil litigation is contrary to State Bar decisional law. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747, the court held that the substantial relationship test applies in attorney discipline cases. It wrote: “Actual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client. (Citation omitted.)” (Id at 747.)

If there is to be a change in the law, it should be in the rule, not a comment. Further, OCTC disagrees with the analysis in Comment 5. Comment 5 states that the reason for this suggested difference is that in a disciplinary proceeding or in civil litigation the new client may not be present and so the attorney can provide the evidence concerning information actually received. However, these are public proceedings; and so the new client can learn of them even if not present. Further, nothing prevents the new client from being present or reading the pleadings or a transcript. The new client may also be a witness.

Moreover, the courts have held that this conclusive presumption is a “rule of necessity.” Thus, the presumption exists because it is not within the power of the client (or anybody else) to prove what is in the mind of the attorney. Nor should the attorney have to engage in a subtle evaluation of the extent to which the lawyer acquired relevant information and the actual use of that knowledge and information. (See e.g. *Global Van Lines Inc v. Superior Court* (1983) 144 Cal.App.3d 483, 489; *Western Continental Operating Co v. Natural Gas Co.* (1989) 212 Cal.App.3d 752, 759.) The Commission’s Comment excluding the presumption in disciplinary and civil cases would force OCTC and the other party to try to prove what was provided to the attorney and what is in the attorney’s mind. It would create numerous disputes as to what the client really told the lawyer. In fact, OCTC’s experience is that the lawyers often claim that no confidences were disclosed, no matter how absurd that claim is. In fact, that is exactly what attorney Lane claimed in his State Bar matter. (See *In the Matter of Lane*, supra, 2 Cal. State Bar Ct. Rptr at 747.)

Further, the conflicts rule is intended to prevent the use of confidential information, not just its disclosure, and it is also intended to prevent the attorney from being put in the position of having to resolve conflicting obligations. Thus, the presumption is just as necessary in State Bar and civil cases as in disqualification motions.

Moreover, the presumption springs from the fact that all attorney-client communications are presumptively confidential and any communication between the lawyer and the client in the first representation must necessarily have been material to the ongoing matter in which the lawyer has switched sides. (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 328.) That is, it springs from the common sense notion that clients necessarily provide confidential information material to the lawyer's representation of the client. Thus, the duty of confidentiality complements the evidentiary presumption that communications from client to attorney during their professional relationship are confidential and involves public policy of paramount importance which is reflected in various statutes as well as the Rules of Professional Conduct. (See *In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at 189-190; *In re Jordan* (1972) 7 Cal.3d 930, 940-941.)

In addition, while the primary purpose of the presumption is to protect client confidences, the presumption also exists to preserve the attorney's duty of loyalty to the client. (See *City National Bank v. Adam, supra*, Cal.App.4th at 328; *In re I Successor Corp* (Bkrcty S.D.N.Y. 2005) 312 B.R. 640, 656.) Any concern about tangential matters being covered by this presumption is already addressed in the presumption. In recent years, there has arisen a limited exception to the presumption in those rare instances where the lawyer can show that there was no opportunity for confidential information to be divulged. However, the limited exception is not available when the lawyer's former and current representation is on the opposite sides of the very same matter or the current matter involves the work the lawyer performed for the former client. (*City National Bank v. Adams, supra*, 96 Cal.App.4th at 327-328.) There is no reason to exclude the presumption in disciplinary cases since the basis for the disqualification is the same as the basis for attorney discipline: the need to maintain ethical standards of professional responsibility. (See *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135, 1145.)

Most importantly, without the conclusive presumption, OCTC would be forced to require from the client or the attorney in a public forum the very disclosure the rule is intended to protect. The courts have held that it is the possibility of the breach of confidence, not the fact of the breach, which triggers the rule. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) While *Woods* addresses a disqualification motion, its point is equally applicable in discipline and civil cases. Without the conclusive presumption, OCTC would be forced to require the disclosure of the very information the rule was intended to protect.

5. Comment 6 also presents some concerns for OCTC. The Comment's statement is too narrow in defining "substantially related." It, again, does not reference Business & Professions Code section 6068(e). Yet, Comment 7, unlike Comment 6, references Business & Professions Code section 6068(e). The difference in these Comments could create some confusion and uncertainty. Comment 11 refers to paragraph (c). OCTC is

concerned that, like in the proposed paragraph (c) itself, what is meant by “generally known information” and this Comment appears not consistent with the established law that Business & Professions Code section 6068(e) is broader than the attorney-client privilege. Business & Professions Code section 6068(e) has generally been understood to preclude attorneys from disclosing information they obtained from the client that might be of public record. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189-190.) This needs to be clarified and OCTC opposes any change to the requirement that Business & Professions Code section 6068(e) precludes an attorney from disclosing or using information provided by a client to the attorney that might be in the public record.

Rule 1.10 Imputation of Conflicts.

1. OCTC is concerned that paragraph (b) leaves out a reference to Business & Professions Code section 6068(e). Further, Comment 1 simply states that whether two or more lawyers constitute a firm depends on specific facts. OCTC is concerned that the proposed rule is not a rule subject to discipline and, further, that neither the rule nor Comment 1 provides guidance as to what constitutes a law firm. OCTC believes that either California follow the Model rules version or come up with a more definitive definition, or the Commission should strike the Comment completely. Current rule 1-110 defines a “[l]aw [f]irm” as “two or more lawyers whose activities constitute the practice of law, and who share its profits, expenses, and liabilities.” The Supreme Court discussed the definition of law firm, partnership, etc in *Chambers v. Kay* (2002) 29 Cal.4th 142, although not in a conflict context, and if there is a comment on the definition of law firm the Comment might reference that case and the Supreme Court’s discussion of the meaning of the term “of counsel” in *People ex rel Department of Corporations v. Speedee Oil Change Systems* (1999) 20 Cal.4th 1135.)
2. OCTC is not sure what the purpose of Comment 3 is. OCTC suggests either it be clarified or stricken. Comment 4 discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people. Comment 9 seems unnecessary and is confusing to OCTC. It needs more clarification or should be stricken.

Rule 1.14 Client with Diminished Capacity.

1. OCTC is concerned that, while this rule attempts to address some important issues, it does not appear to be an enforceable rule as written and appears to undermine the other confidentiality rules. OCTC is concerned that paragraph (b) leaves too much discretion to an attorney’s unqualified personal assessment of a client’s abilities and using that unqualified assessment to permit the attorney to reveal a client’s confidences. Further, it appears to be broadening what Business & Professions Code section 6068(e) allows.
2. Comment 1 is problematic as to when and how to utilize the rule. The problem here is when and who decides when a client is not capable of making decisions - - and how and to whom does the attorney reveal this. If the client is not capable of making the decisions, is the lawyer able to give advice, take direction, or do anything on the client’s behalf as to the matter? Comment 3 attempts to address this, but in such broad terms that it is vague and leaves too much discretion to the attorney. It also states that the attorney

may in appropriate situations seek the advice of a diagnostician. While this may be appealing, the Comment creates its own exception to confidentiality not specifically in the rule. OCTC believes this is not appropriate for a Comment. It either should be stated specifically in the rule or not at all. Moreover, the Comment does not define diagnostician. Is it a psychiatrist, a psychologist, a marriage counsel, a priest, or some other person? If this exception is to be permitted, it should be in the rule and more specific.

3. Comment 4 states that before taking any action on this rule the lawyer should take all reasonable steps to preserve the client's confidence and decision-making authority, including explaining to the client the need to take such action and requesting the client's permission to do so. However, the Comment states that, if the client refuses or is unable to give this permission, the lawyer may still proceed under paragraph (b). The Comment then lists a number of considerations for the lawyer in making the decision to reveal the client's confidences. There is, however, nothing in the rule that specifically provides for these considerations. OCTC is concerned that this Comment may make enforcement of the confidentiality rules much more difficult.
4. Comments 5 and 6 states the lawyer may discuss these matters with the client's family members, although the lawyer must keep the client's interests foremost. Again, the question is to what extent is this consistent with Business & Professions Code section 6068(e) and this Comment may make enforcement of the confidentiality rules much more difficult. Comment 7, which is different than the Model Rules Comment 7, explains that section (b) is a balancing between the interest of preserving client confidences and of protecting a client with significantly diminished capacity. It also states that a lawyer who reveals such information is not subject to discipline. This would prevent discipline from almost any attorney who claims that he or she revealed the confidences because they believed it was appropriate under this rule. Thus, what safeguards exist for the client?
5. Comment 8 states that the lawyer may not file guardianship or conservatorship or similar action or take actions that would violate proposed rule 1.7 (current rule 3-310.) Thus, according to this comment, an attorney may reveal confidences to others that may take this action, but not do it themselves. The reason for this is not explained. Is it better to disclose the confidences than to file under seal a motion to the court disclosing the confidences?

Rule 2.1 Advisor.

1. OCTC is concerned that this is not an enforceable rule. OCTC does not believe the rules should have rules that are not enforceable.

Rule 3.8 Special Responsibilities of a Prosecutor.

1. OCTC is concerned that paragraph (a) of proposed Rule 3.8 does not explain what it means by recommending for prosecution. Does a prosecutor's advice to his or her supervisor to prosecute constitute a disciplinable offense? Does this apply when the investigation is not finished? Are we going to prosecute differences in opinion? What if the opinion is based on differences about what is admissible evidence?
2. OCTC is also concerned about paragraph (b)'s requirement that a prosecutor make reasonable efforts to assure that the accused has been advised of the right to and the

procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel. This section fails to address that in most situations the police, not the prosecutor is involved in this. The police, at least in California, are usually independent of the criminal prosecutor. Further, to what extent is this impinging on certain investigative tools and the role of the prosecutor in them? The same concern seems to apply to section (c) which prohibits a prosecutor from obtaining from an unrepresented accused a waiver of important pretrial rights, such as a preliminary hearing, unless the tribunal has approved of the appearance of the accused in propria persona.

3. Likewise, OCTC is concerned with paragraph (f)'s requirement that the prosecutor use reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements that the prosecutor would be prohibited from making under proposed rule 3.6. While in principle laudable, this Comment seems to have the same problem of not addressing the thorny issue of when law enforcement, such as the police, is independent of the prosecutor. This is particularly difficult when the Chief Law Enforcement officer is an elected position.
4. OCTC is concerned that paragraph (e) does not discuss how the prosecutor is to deal with a waiver of the privilege or the work product doctrine.
5. OCTC agrees with the majority of the Commission regarding paragraph (g) and supports this paragraph.
6. OCTC believes that if there are Comments to this rule, the Commission might consider having a Comment to advise prosecutors and former prosecutors and their partners of their duties under Business & Professions Code section 6131. This is an important but often forgotten provision affecting prosecutors and former prosecutors and their partners.

Rule 8.5 Disciplinary Authority: Choice of Law.

1. OCTC agrees with the policy behind this rule, but has concerns that the rule as written is in conflict with Business & Professions Code section 6049.1. Business & Professions Code section 6049.1(b)(2) provides that discipline in another jurisdiction will constitute a basis for discipline in California unless as a matter of law the member's culpability in the other jurisdiction would not warrant discipline in California under the laws or rules binding upon members of the State Bar of California at the time the misconduct was committed. Thus, how can we now enforce a rule that permits discipline based on another jurisdiction's rules if those rules are in conflict with California's rules? Is rule 8.5 changing Business & Professions Code section 6049.1 and its intent? While this concern would not be true in all cases where the choice of law was the other jurisdiction's law, it would occur in those cases where the other jurisdiction's rules are in conflict with California's rules. This needs to be discussed and addressed in this rule and its Comments.

Letter to Randall Difuntorum @ Office of Professional Competence & Planning
November 4, 2009
Page Number 11

Again, we thank you for the opportunity to present our views. If you have any questions, please feel free to contact us.

Very truly yours,

A handwritten signature in black ink that reads "Russell G. Weiner". The signature is written in a cursive style with a large, sweeping initial "R".

Russell G. Weiner
Interim Chief Trial Counsel



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

November 9, 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 1.8.2

Dear Mr. Sondheim:

The State Bar Standing 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 1.8.2 and offers the following comments.

COPRAC generally supports Proposed Rule 1.8.2 concerning use of confidential information.

COPRAC believes that written consent should be required, given the seriousness of the issue addressed by this rule, which involves a lawyer using confidential information of a client to the disadvantage of a client.

COPRAC encourages the Commission to address in the rules, perhaps in the definitions, whether informed written consent includes an email from the client. A majority of the members of COPRAC believe that an email should be sufficient.

Finally, COPRAC recommends one minor change to Comment [1]. In the third sentence, the phrase “in competition with the client” should be moved to the end of the sentence. Recommending that another client make a purchase would not violate the rule unless such a purchase disadvantaged the client.

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

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**SAN DIEGO COUNTY
BAR ASSOCIATION**

November 11, 2009

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

Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 5)

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit
the attached comments to Batch 5 of the Proposed Amendments to the Rules of
Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics
Committee, and have been approved by our Board of Directors.

Sincerely,

Jerrilyn T. Malana, President
San Diego County Bar Association

Enclosures

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

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- Conference of Delegates of
California Bar Associations
District Nine Representative**
James W. Talley

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

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

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

LEC Rule Volunteer Name(s): [sic]

Old Rule No./Title: 3-100, 3-310

Proposed New Rule No./ Title: I.8.2 – Use of Confidential Information

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

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

Yes [] No []

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

Yes [] No []

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

Yes [] No []

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

Yes [] No []

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

The Commission minority believes that the proposed rule should not require a client’s informed consent to be “written.” The minority distinguishes disadvantageous use from conflicts on the ground that an inexperienced client will readily perceive the adverse effects of the former but not necessarily of the latter. This distinction, however, is an illusion because disadvantageous use is a form of conflict of interest, at least in a broad sense relevant here. Moreover, the adverse effects of a disadvantageous use of information will not always be readily apparent to a client. Finally, the requirement that informed consent be written serves protective and evidentiary purposes that transcend the degree to which adverse effects are perceptible. Given California’s embrace of written consent in other contexts, the minority’s objection should be overruled.

CONCLUSIONS (pick one):

[] We approve the new rule in its entirety.

We approve the new rule with modifications.*

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

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

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

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



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: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

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

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

[Rule 1.2 \[n/a\]](#)

[Rule 1.9 \[3-310\]](#)

[Rule 2.1 \[n/a\]](#)

[Rule 1.6 \[3-100\]](#)

[Rule 1.10 \[n/a\]](#)

[Rule 3.8 \[5-110\]](#)

[Rule 1.8.2 \[n/a\]](#)

[Rule 1.12 \[n/a\]](#)

[Rule 8.5 \[1-100\(D\)\]](#)

[Rule 1.8.13 \[n/a\]](#)

[Rule 1.14 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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

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 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: NOVEMBER 13, 2009

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

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

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

- | | | |
|-----------------------------------|----------------------------------|--|
| Rule 1.2 [n/a] | Rule 1.9 [3-310] | Rule 2.1 [n/a] |
| Rule 1.6 [3-100] | Rule 1.10 [n/a] | Rule 3.8 [5-110] |
| Rule 1.8.2 [n/a] | Rule 1.12 [n/a] | Rule 8.5 [1-100(D)] |
| Rule 1.8.13 [n/a] | Rule 1.14 [n/a] | Discussion Draft [all rules] |

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

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.

Proposed Rule 1.8.2 Use of Current Client's Information Relating to the Representation:

Our proposal is to follow precisely the ABA Model Rule 1.8(b).



LACBA

**LOS ANGELES COUNTY
BAR ASSOCIATION**

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November 12, 2009

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

Re: Comment Regarding Proposed Rule of Professional Conduct 1.8.2 - Use
of Current Client's Information Relating to the Representation

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (PREC) has reviewed Proposed Rule 1.8.2. PREC supports the Commission for the Revision of the Rules of Professional Conduct's Proposed Rule 1.8.2.

Thank you for the opportunity to comment on this batch of proposed new and amended Rules of Professional Conduct.

Sincerely yours,

James I. Ham
Chair, LACBA Professional
Responsibility and Ethics Committee