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Hon. Lee Smalley Edmon, Chair
and all members
Second Commission for the Revision of the Rules of Professional Conduct
State Bar of California
BY EMAIL ONLY c/o Lauren.McCurdy@calbar.ca.gov

Re: Proposed draft of Rule 1.7 and 1.8.1

Dear Chair Edmon and members of the Rules Revision Commission:

I am writing this letter for two reasons. First, thank you, Madam Chair especially, and all the Commission members, for your kind consideration of my presentation of the position of the ethics professors who cosigned the recent letter about rule 1.7. You granted me patience, ears focused on listening, and healthy discussion.

Second, I want to make some brief observations about the (generally excellent) modifications to Rule 1.7 and also to remind this commission of the ethics professors' position on rule 1.8.1. I have not polled the ethics professors in this regard because such polling is difficult and intrusive, and because I have their stated positions already. Thus, I write on my own behalf, though I believe these thoughts accurately reflect the professors' stated positions.

As to Rule 1.7, by and large the changes you have made are excellent and conform to our suggestions. There are two matters at variance and of concern. First, the "menu" of items in section (b), drawn essentially from former Rule 3-310(b), should make it clear that these items are not exclusive. This could be done by saying, in section (b), "including but not limited to" Second, the phrase in (c), "informs the client in writing," does not conform to the usual language of disclosure and consent. I believe that the Commission should reconsider this language before sending it out for public comment.

~~As to Rule 1.8.1, there are more serious concerns that the ethics professors have previously expressed. It is simply bad for clients to allow lawyers to change their fee agreements without requiring the client to have the opportunity and time to seek independent counsel. And the fact that a client may already have counsel – for instance, a business lawyer whose understanding of fee agreements is non-existent – is of no moment. As currently drafted, this is a rule that is designed to protect lawyers, not clients.~~

~~Here in its entirety is the comment of the 55 ethics professors in their letter to the Supreme Court of March 3, 2014 – the same comment previously sent the State Bar board. It was the longest and most detailed of all the comments in that letter:~~

~~1. Rule 1.8.1 – Doing business with a client~~

~~their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.~~

~~The phrase relating to modifications of fee contracts in Comment ¶ 5 must be stricken.~~

C. Inappropriate use of independent counsel

~~The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule – with limiting language that is absent from the ABA rule, MR 1.8(a)(2) – states that if the client is already represented by independent counsel, there need be no notice. This, read together with Comments 13 and 14 of the proposed rule, substantially diminishes client protection.~~

~~Comments 13 and 14 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction. Moreover, under the ABA's Comment, ¶ 4, written disclosure is still required from one of the involved lawyers. This is not true of the current California comments.~~

~~In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA rule language in MR 1.8(a)(2) and Comment ¶ 4 should replace the ill-advised Commission language.~~

Again, thank you for your kind attention.

Respectfully yours,



Richard Zitrin