



Richard Zitrin  
Lecturer in Law

University of California  
Hastings College of the Law  
200 McAllister Street  
San Francisco, CA 94102

phone 415.391.3911  
fax 415.391.3898  
direct phone 415.354-2701  
[zitrinr@uchastings.edu](mailto:zitrinr@uchastings.edu)  
[rzitrin@ccplaw.com](mailto:rzitrin@ccplaw.com)  
[www.uchastings.edu](http://www.uchastings.edu)

April 26, 2016

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

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only after inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any subsequent modification of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on ongoing fiduciary duties to the client. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a conflict between common law principles of fiduciary duty and the ethics rules themselves. In advising lawyers to "consult case law and ethics opinions" about

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