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III.P. ATT7 Rule 8.4.1 Zitrin Letter  
August 26, 2016  
Open Session

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August 24, 2016

Hon. Lee Smalley Edmon, Chair  
Second Commission for the Revision of the Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
**BY U.S. MAIL and EMAIL c/o Lauren.McCurdy@calbar.ca.gov**

Re: Cover letter to revised ethics professors' letter

Dear Chair Edmon:

On behalf of a total of 50 California law professors from 19 different California law schools who teach or have recently taught legal ethics or professional responsibility, I am sending you the so-called "second ethics professors' letter" in revised form.

In our one revision, we now recommend a position with respect to proposed Rule 8.4.1, the anti-harassment and anti-discrimination rule. Our modification recommends approval of Alternative One but with added language that would make it clear that "a lawyer may restrict the types of people who will be accepted as clients for legitimate practice based reasons."

We agree with those who argue that there should be no pre-adjudication requirement prior to a disciplinary finding against a harassing or discriminating lawyer. However, we also believe that if there are no prior requirements, there also need to be legitimate practice-based justifications when it comes to discretion in client selection. The revised comment attempts to navigate successfully between these goals.

The modified language of the comment now appears on pages 9 and 10 of the revised letter.

Thank you.

Respectfully yours,

Richard Zitrin

A handwritten signature in blue ink, appearing to read "Richard Zitrin", written over the typed name.



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August 24, 2016

Hon. Lee Smalley Edmon, Chair  
and all members  
Second Commission for the Revision of the Rules of Professional Conduct  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
**BY U.S. MAIL and EMAIL c/o Lauren.McCurdy@calbar.ca.gov**

Re: Comment on proposed rules of professional conduct

Dear Chair Edmon and members of the Commission:

Please consider this comment on behalf of each of the undersigned, each currently or in the recent past a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and, in some cases, other significant identifying information. The information is for identification purposes only.

**Introductory remarks:**

Preliminarily, groups of ethics professors have written to the State Bar Board in 2010 and the Supreme Court in 2014<sup>1</sup> concerning the first rules commission's work product. We note the following points made in those letters:

First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law.

Second, we believe that in the past, taken as a whole the proposed rules have fallen short in their charge, first and foremost, to protect clients and the public. Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

We now add to those points. Thus, third, we applaud much of the work product of this second commission. It is significantly more client- and public-protective than the first commission's work product. We also commend this commission for its ability to get these rules

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<sup>1</sup> Respectively, Letter of June 15, 2010 to State Bar Board of Governors signed by 30 California law professors who teach legal ethics; and Letter of March 3, 2014 to each member of the California Supreme Court, signed by 55 California law professors who teach legal ethics. These letters are substantively identical. We will refer to them here as the "first ethics professors' letter."

to public comment on a tight timetable while still seeking to meet the goals of both the rules and the charge from the California Supreme Court. There are still important issues – see below, Part II – but many positive steps have been taken.

Fourth, we believe that within the Court's charge to the second commission, the black-letter rules and brief comments should serve not only as rules of discipline for those lawyers accused of offenses, but as guidance for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Few California lawyers have the level of sophistication that members of the Rules Commission have, and they need this guidance. For the most part, we believe the commission has successfully provided it.

Three preliminary notes:

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about this rules draft. There are a number of issues we have left unaddressed, such as proposed rules 6.1 (not adopted), 3.10, 1.8.10, the chapter 5 series, and others.

2. While the signatories have all concurred in the entire text of this letter, some would have expressed their agreement in somewhat different language than the drafters have used. Additionally, when we refer to other, earlier ethics professors' letters and reference the pronoun "we," this should not be taken to mean that the signatories here are identical to those on other letters. We use it for convenience; the signatures on each letter including this one speak for themselves. This letter will be updated during public comment as new signatories are added.

3. We have divided the letter into three parts: first, proposed rules that have been modified since the first commission with which we largely agree; second, rules where we still have significant concerns and thus specific recommendations for modifications; and third, rules on which we have commented without a recommendation either way. **Bolded** rules relate to those rules we believe are most significant.

I. **Positive rules modifications.**

1. **Definition of "tribunal" in Rule 1.0.1(m):**

The expanded definition of "tribunal," although not quite as broad as the ABA definition that we suggested in the first ethics professors' letter, is a marked improvement over the first rules commission's draft.

2. **Model Rules 1.1 and 1.3:**

We are gratified to see that, as the first ethics professors' letter strongly urged, this commission has seen fit to include separate rule on diligence, along, significantly, with a definition of diligence. As that letter stated:

Although proposed Rule 1.1 pays lip service to the concept of diligence in subsection (b) and Comment ¶ 2, this is not close to adequately replacing the diligence rule.... [I]mportant components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work

overload (ABA Rule 1.3, Comment ¶ 2), procrastination and delay (ABA Comment ¶ 3), and following through on matters to completion (ABA Comment ¶ 4).

Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: paying adequate attention.

Moreover, the commission has corrected the overly narrow standard required for a violation of both MR 1.1 and MR 1.3 by adding the phrase “gross negligence” to the rule itself, and eliminating the comment to MR 1.1 that stated the rule was “not intended to apply to a single act of negligent conduct or a single mistake....” These are two changes that our first ethics professors’ letter specifically recommended.

3. **Model Rule 1.7:**

We applaud the commission for adopting in principal part not only the first ethics professors’ letter’s recommendations, but also the bulk of the recommendations made in our letter of February 16, 2016, co-signed on short one-week notice by 46 California professors who teach legal ethics, and the testimony Richard Zitrin of UC Hastings gave in connection with that letter.

These changes are a major and important step in the protection of client rights. In particular, (1) the general ABA approach has been adopted; and (2) subsection (b) now requires informed written consent. We do have some concerns about particular elements of this rule, which we address in Part II, *infra*.

4. **Model Rule 1.10:**

Although Rule 1.10 was not addressed by the first commission or in the first ethics professors’ letter, the second commission is to be commended for properly limiting screening relatively narrowly to the guidelines laid out in *dicta* in *Kirk v. First American Title Ins. Co.*, 183 Cal.App.4th 776 (2010). While we have concerns that *Kirk* itself may provide too broad a path towards screening, your proposed rule follows the thoughtful memorandum of commission member Mark Tuft on this issue, as well as the recommendation of principal letter author Richard Zitrin, made individually to the commission on June 2, 2016. As such, the commission has happily resisted the temptation, argued by some on the commission, to use a broader screening rule that do a disservice to the public and to clients.

5. **Model Rule 1.14:**

The commission has excelled in its handling of Model Rule 1.14. Not only has this important rule been added to the roster of codified ethics rules, but the commission has wisely avoided the pitfalls of the similar ABA rule by developing a nuanced position that protects the sanctity of the attorney-client confidential relationship while at the same time providing alternatives to help deal with serious dangers to clients who are not fully able to make decisions by themselves. The ABA should take note of this commendable approach.

6. **Model Rule 1.17:**

We again commend the commission for removing the possibility of sale of a geographic portion of a practice. As we wrote in our first letter, the first commission clearly misinterpreted current ABA rule in a manner that was ripe for doing damage to clients. We do have one narrow concern remaining, set forth in part II, *infra*.

7. Model Rule 3.3:

The first ethics professors' letter recommended that the duty of candor must continue until the conclusion of the proceeding. Allowing candor to conclude upon termination of the representation was a recipe for disaster. As we wrote, "the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor."

The commission has now removed the offending language. We congratulate the commission for this decision.

8. Model Rule 3.7:

The commission has appropriately maintained in its proposal Model Rule 3.7(c), which allows lawyers to testify on behalf of their clients with the clients' informed consent. This pro-client departure from the ABA rule is valuable and, in our view, correct.

9. Model Rule 3.8:

In crafting the excellent Rule 3.8, the commission has understood the duties of the prosecutor as well as the dangers of power that that position holds. Through its clear statements adopting the ABA language and reaffirming the right to counsel while requiring prosecutors to go "beyond *Brady*" by providing to the defense all *information* that "tends to negate the guilt of the accused or mitigates the offense [or] sentencing," the commission has simultaneously protected the rights of criminal defendants while properly defining the role of prosecutors.

10. Model Rule 4.1:

The first commission did not include this important rule. As we noted in the first ethics professors' letter, "issues about the integrity of California bar members are raised by the absence of Model Rule 4.1. This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior."

We commend this commission for including this rule.

II. Rules requiring revision.

1. Model Rule 1.2.1:

We do not understand why assisting in a "crime" is not part of the MR 1.2.1(b) prohibition. We note that it is, correctly in our view, part of the comment, paragraph 1. This important comment, emphasizing the "critical distinction" also noted in the comment to the ABA rule,



includes both “crime” and “fraud.” The rule should too.

2. **Model Rule 1.5:**

We see no justification for use of the bizarre term “unconscionable.” We repeat our comment from the first ethics professors’ letter:

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word “unconscionable” to define the propriety of fees... The ABA uses the far more intelligible word “unreasonable.” Moreover, California’s own Business & Professions Code, in evaluating fee recoveries without written contracts, also uses the “reasonable” standard. Finally, the term “unconscionable” appears to create a higher threshold than “unreasonable,” thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation and at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with “unreasonable.”

3. **Model Rule 1.7:**

As noted *supra*, in principal part, we commend the commission’s current draft and note that it is largely consistent with our own suggestions in 2010, 2014, and 2016. There remains a modest amount of work to do.

A. **Model Rule 1.7(b):**

Proposed rule 1.7(b)(3) states in pertinent part that a lawyer may not represent a client without informed consent where the lawyer has a relationship with someone known to “be affected substantially by resolution of the matter.” Use of the word “resolution” is a vestige of the current 3-310(b). It is, however, too limited a term. This subsection should more simply require informed written consent should the person “be affected substantially by the matter,” whether it is the matter’s resolution or some other interlocutory issue. Moreover, some matters, such as wills and trust modifications, are never truly “resolved,” or finally completed.

B. **Model Rule 1.7(c):**

More significantly, by adding MR 1.7(c), the commission has folded in another existing rule, Rule 3-320, into the basic conflicts rule. However, this rule, which deals with conflicts relating to a lawyer’s family or “intimate” relationships, only requires “inform[ing] the client in writing.” This level of disclosure is insufficient and poorly defined. We believe that this rule should be moved and included as a sub-part of Rule 1.7(b), requiring informed consent.

4. **Model Rule 1.8.1:**

Perhaps the most lawyer-protective and anti-client rule in the current work product of this commission is the unjustifiable language of MR 1.8.1 and its first comment. There are two substantial problems, reflected below.

First, the first comment paragraph has been changed, and is at variance from the ABA rule, as noted in legislative form below:

Rule 3-300 is not intended to apply to ~~the agreement by which the member is retained by the client,~~ the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client.

Second, section (b) of the proposed rule has added language to the existing rule – also distinguishing it from the ABA Model Rule, as follows:

The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

A. Modification of fee contracts:

Under the comment to the current rule, 3-300, there was an ambiguity whether the language “retained by the client” referred only to the initial retainer (meaning that all contract modifications would be covered by the rule, or whether “retained” could include such modifications. It is clear, however, as we wrote extensively in the first ethics professors’ letter, that once a fiduciary duty has been established by initiating an attorney/client relationship, it is not only counter-intuitive but extremely anti-client, to allow a modification of a fee agreement without meeting the requirements of this rule.

The first ethics professors’ letter evaluated this rule extensively, as follows below. While this draft is less overt in its lawyer-protectionism than the first commission’s draft, the net effect is the same.

Any subsequent modification of a fee agreement with a client 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, [whether or not it involves] 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.

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.... In essence, then, the Commission’s draft sets up a conflict between common law principles of fiduciary duty and the ethics rules themselves.....

We note that the current proposal has eliminated language noting the potential conflict between the rule and common law principles of fiduciary duty. This makes the current draft even worse, because this conflict is now not even acknowledged in the rule. Moreover, the comment interpreting the rule as not applying to modifications of fee agreements is legislative, or rules-like, and thus at odds with the charge to this commission given by the California Supreme Court.

B. Inappropriate use of independent counsel:

The gratuitous and harmful language added to Part (b) of the rule is also exceptionally anti-client. The current draft is different from that of the first rules commission, but it is no better. In effect, it states that if the client is already represented by independent counsel, there need be no Rule 1.8.1 notice. Under Comment 2, independent counsel standard is met so long as the counsel is independent of the lawyer the client is engaging.

As we noted in the first ethics professors’ letter, even if a client has independent counsel, such “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.

Take for example a family-owned small business – a restaurant, hardware store or hair salon LLC – that has a lawyer who regularly works with the company giving tax and general employment advice. The company hires a separate lawyer for a particular purpose – an IP dispute over a logo, or a contract issue with a supplier. Under the current draft, there need be no advisement at all to this client about the right to an independent lawyer – since the company already has one – to examine either a business transaction (including a fee modification) or an adverse pecuniary interest (e.g., a promissory note secured by the businesses assets and profits).

The absence of the notice of the right to independent counsel makes it clear, as we wrote in the first ethics professors’ letter, that “having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction.”

5. Model Rule1.9:

Model Rule 1.9, as proposed, tracks the ABA rule. In MR 1.9(C)(1) an exception to the use of confidential information by a former lawyer when the information is “generally known.” Although this tracks the ABA rule, the word “generally” is not otherwise defined. In order to truly secure client confidence and secrets, we recommend the rule state the exception as



information that is “generally and widely known.”

6. **Model Rule 1.17:**

As we noted *supra* this rule is substantially better. However, as we noted in the first ethics professors’ letter, we remain concerned about the use of the word “solely”:

Section (e) of the current proposed rule says that the fee to the client shall not be increased “solely” by reason of the purchase of the practice. Section (d) of the ABA rule makes this fee increase absolute. We strongly believe that the California language should also be absolute, and that the word “solely” should be stricken.

Fees in these circumstances should not be increased, period.

7. **Model Rule 1.18:**

The most recent ABA rule is MR 1.18, which explores the duties to prospective clients. This rule is particularly important because it codifies what common law supports: that a prospective client who does not “mature” into a client is still entitled to confidentiality. The rule notes that that confidentiality may result in receipt of information that could disqualify a lawyer from representation “adverse to those of a prospective client in the same or a substantially related matter.” This is a rule that protects the public by allowing people to seek representation without fear that a consulted lawyer can use the confidential information received against that client. The absence of this rule favors lawyers over the public.

8. **Model Rule 3.9:**

As we wrote in the first ethics professors’ letter, while the commission has adopted Rule 3.9, “inexplicably, [this] version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5.... Such compliance is required by ABA MR 3.9.”

We cannot understand the commission’s reluctance to remind practitioners of common requirements of attorney honesty. As we first wrote, “Given the reputation of lawyers in today’s marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings.”

9. **Model Rule 8.4(c):**

While for the most part our criticisms of the draft proposed rules relate to better public and client protection, our concern about this rule is different.

ABA Model Rules 8.4(b) and (c) define misconduct as both commission of “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer,” or engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.” Proposed California rule 8.4(C) combines both of these phrases. However, it adds engaging in “conduct involving moral turpitude” to both phrases. This may be redundant with respect to crimes.

However, we are seriously concerned whether there exists conduct beyond “dishonesty, fraud, deceit or reckless or intentional misrepresentation” that warrants being subject to discipline under the vague and broad catch-phrase “moral turpitude.” Moreover, Business & Professions Code § 6106 states that conduct “involving moral turpitude, dishonesty or corruption” may constitute discipline. We do not believe that “moral turpitude” should exist beyond the “fraud, deceit or reckless or intentional misrepresentation” further described in Rule 8.4(c).

One of the most important functions of the modified rules is – as trial counsel have themselves pointed out – to provide clear and ascertainable disciplinary standards. However, proposed rule 8.4(c) does the contrary as presently drafted. Rather, it gives bar prosecutors a prosecutorial hammer through a vague, catch-all category that vests almost unfettered discretion in what trial counsel determines to be “moral turpitude.” This phrase should be stricken.

### III. **Other comments and observations.**

#### 1. **Model Rule 2.1:**

As was the case with the first rules commission, this commission has contemplated but has yet to draft a Rule 2.1, addressing the lawyer as advisor and, most importantly, the lawyer’s exercise of “independent professional judgment.” This is an important rule.

ABA Model Rule 2.1 reads as follows:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

We do not offer specific language to modify this rule, nor language for a comment consistent with the state’s high court’s advisement to this commission. However, we note that it is exceptionally important to include the term “independent professional judgment” in the rules. However, as we noted in the first ethics professors’ letter, commission should fully vet a definition of this term, and must appreciate to not “equate ‘independent professional judgment’ with ‘loyalty’ – two vital and important concepts that are nevertheless not the same.”

#### 2. **Model Rule 8.4.1:**

An anti-harassment rule and anti-discrimination rule is vital. Making discrimination in the workplace and elsewhere subject to discipline is an appropriate step that we applaud. There is no place for such behavior in our profession.

We note that there are two alternative proposed rules presented for public comment. After considerable thought and discussion about these two alternatives, we recommend Alternative One, *but* with the proviso that there be a carve-out for appropriate discretion permitted in client-selection.

The primary difference between the two alternatives is that the second alternative requires, in the words of Comment 4 to the Alternative Two, that:

In order for harassment or discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law.

Although current Rule 2-400 does have such a requirement, that does not mean a new rule should. We agree that no such requirement should exist.

However, if Alternative One is chosen, lawyers in appropriate circumstances should be able to choose their clients despite certain “protected characteristics” under the rule. MR 8.4.1(a) currently states that “in terminating or refusing to accept” a client the lawyer “may not unlawfully discriminate.” The term “unlawfully” is only vaguely defined in section (c)(3) of the rule. This would give trial counsel huge discretion in determining what is “unlawful.” (We note the unusually dense and lengthy nature of the rule itself, which will make interpretation difficult, may also serve to vest even more interpretive discretion in trial counsel.)

In choosing Alternative One, therefore, the commission should change the language “in terminating or refusing to accept...” to read “in terminating or accepting...” We believe this modification must be accompanied by the following language (or similar) to be inserted into one of the comment paragraphs: ““A lawyer may restrict the types of people who will be accepted as clients for legitimate practice-based reasons.”

For example, consider:

- A lawyer supervising a legal clinic at a law school affiliated with a battered-women’s shelter would be violating this rule by accepting only women clients in the clinic;
- An Afghani-American lawyer in a busy sole practice focused on immigration rights of people from Afghanistan could be disciplined for declining to represent refugees from Latin America or Syria;
- A lawyer supervising a disability rights clinic who refuses to accommodate an individual without disabilities who seeks help regarding perceived discrimination against him might arguably violate this rule.

Should these lawyers be subject to discipline? We think the answer is no.

#### IV. **Conclusion:**

The second rules commission has made enormous strides in advancing the public interest. This is particularly true in comparison to the first commission’s work product. Thus, we have begun this letter with all that the second commission has done right.

There remain, however, several current proposed rules in which important issues, primarily of public protection, have not been addressed. We have outlined those specifically above, and strongly encourage this commission to build on its largely excellent work product by making further modifications to support the interests of clients and the public.

Respectfully submitted,

**Drafters:**

Geoffrey C. Hazard

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