



Richard Zitrin  
Lecturer in Law

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

direct 415.354-2701  
fax 415.391.3898  
[zitrinr@uchastings.edu](mailto:zitrinr@uchastings.edu)  
[richard@zitrinlawoffice.com](mailto:richard@zitrinlawoffice.com)  
[www.uchastings.edu](http://www.uchastings.edu)

October 18, 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 prior to October 21-22, 2016 meeting

Dear Chair Edmon and members of the Commission:

While I write on my own behalf, I do so consistent with the positions taken by the 55 law professors who provided their most recent letter and signatures to your Commission on September 21, 2016. Thus, I am here expressing views that I believe to be fully congruent with the views of those professors in that letter.

I. **Majority of work product.**

Once again, I reiterate what the "ethics professors' letter" has expressed: that overall, the work product of this Commission has been excellent, and just as importantly, the consideration of divergent views taken seriously and thoughtfully by both commission and staff. We have all applauded your efforts, and I reaffirm that here.

I was pleased and proud to be able to testify in front of the Board of Governors in strong support of the prosecutor rule, and was pleased and proud of the Commission that the rule passed with only one dissenting vote. Congratulations to the Commission are in order.

Below, I comment extensively on the item of greatest concern, and briefly on a few other rules.

[TEXT OMITTED]

[TEXT OMITTED]

**5. Model Rule 1.5.**

Here, the Commission and the ethics professors simply have a strong disagreement. Our letter makes an argument that need not be repeated here. I appreciate that the Commission considered seriously our position before rejecting it. We argued that “unconscionable” sets a higher bar than “unreasonable” even though there are State Bar formal positions that define “unconscionable” as “unreasonable.” The Commission has noted the *Herrscher* case, albeit over 80 years old, that uses what we see as the archaic “unconscionable” term.

But while the Commission fears that the use of “unreasonable” would “bog down the disciplinary system with ordinary fee disputes,” such has not proven to be the case in any of the ABA jurisdictions – virtually all if not all – that use the word “unreasonable.” In addition, while the term here does not control civil litigation, where most fee disputes are resolved, it certainly can be considered, and is used constantly by lawyers to claim the “higher” unconscionability standard.

It is of more than passing importance that OCTC, in its comment, in the Commission staff’s own words, “finds the term ‘unconscionable fee’ vague, difficult to understand, confusing, and very difficult to enforce.” Exactly. Everybody, on the other hand, understands “unreasonable.” This change should be made.

[TEXT OMITTED]