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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
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.

2. **Model Rule 1.8.1 - modification of the fee contract only.**

As I testified before the Commission, this rule as then drafted was the most serious adversely affecting client rights remaining in the proposed work product. Our comment is already of record. Since that hearing, I have seen some changes made, particularly to paragraph [5] of the comment. The Commission has added the phrase highlighted below: "unless the agreement or modification **amounts to a business transaction or** confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client."

This is an improvement, but it leaves this rule as the most serious concern to clients in the entire rules revision. At best, comment paragraph [5] is a confused and confusing statement that does not meet the requirements of our comment, nor the requirement of client protection.

Consider a brief history of what has happened with this piecemeal rules revision:

- (A) The rule now, 3-300, says in the first comment paragraph that “Rule 3-300 is not intended to apply to the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client.” (My emphasis.)
- (B) That was modified (now paragraph 5) to add the highlighted language “This Rule does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer’s hiring or compensation, or to the modification of such an agreement unless the agreement or modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client.” It was this draft that we commented on strongly.
- (C) Now, instead of simply removing the offending word “modification” and going back to the largely excellent original rule but unfortunately ambiguous comment, the Commission has added more verbiage, to wit, “amounts to a business transaction, or”.... This makes an already dense comment even harder to understand, and makes interpretation of the rule exceptionally difficult.

Moreover, the term “business transaction” is not specifically defined, and – I know from my own experience – provides lawyers like me and commission members Tuft, Langford, Kehr and others hefty fees testifying as experts about what is or is not a business transaction. Finally, the comment may now be over-inclusive by including arms-length *ab initio* “business transactions” within the rule, though no fiduciary duty has attached.

There is, however, a much simpler and cleaner fix that would meet the goal of the ethics professors and, I believe, those of the Commission. Simply clarify the original comment paragraph 1 in Rule 3-300, as follows:

“[This rule] is not intended to apply to the agreement by which the member is originally retained by the client in an arms-length transaction unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client.”

This solution goes back to the original rule, and has these advantages:

- (1) It strikes “modification” and the need to then explain it;
- (2) It avoids having to figure out whether a fee agreement or modification is or is not a business transaction;
- (3) It makes the comment more clearly consistent with existing fiduciary duties, which do not apply to an initial retainer, but do apply once the attorney-client relationship is initiated.

In short, this language simply declines to deal with modifications, and states the “arms’ length rule clearly and concisely. This single sentence is not only a more accurate statement of California case law, but is far easier to understand than the current changes, which pile changes upon changes.

The Commission, in its comments on my recent testimony and, indirectly, the ethics professors' letter, makes these principal points:

- (1) The rule is "designed to govern the possible disciplinary consequences" of certain actions – from which I inferred that collateral civil consequences may be less important.
- (2) A lawyer has the right to modify a fee agreement with a client consistent with existing authority.
- (3) "A rule placing all fee modifications within the Rule would be grossly overbroad and would govern countless harmless events."

Let me address these points in reverse order. As to the third point, one must ask what the rule does or doesn't require. The rule as the ethics professors suggest it does not require a disciplinary remedy at all so long as the lawyer provides a simple disclosure and obtains a *pro forma* consent. My personal view is that it "grossly" overstates our position to describe it as "grossly overbroad."

Bus. & Profs. Codes §§ 6147 and 6148 already require that almost all fee agreements with individuals – the principal concern here – be in writing lest they be "voidable" at the client's election. Adding to this writing the simple advisements required by 1.8.1, and a place for the client to initial his or her consent is hardly onerous and is indeed *pro forma*.

As to the second issue, implicit in this question: What of a simple modification of a fee agreement that raises hourly fees? Should the requirements of 1.8.1 be necessary? My own view is "no." We are concerned about lawyers who change the deal for their clients, sometimes at the last moment, in ways that are considerable and harmful. Any minor overbreadth is more than offset by the need for protections.

However, here, there is a simple solution available – citation to *Severson & Werson v. Bollinger*, 235 Cal.App.3d 1570 (1991). In *Severson*, an oft-cited, well-established case, the Severson law firm's contract "did not specify what its 'regular hourly rates' were," or that they would change. When they changed without notice, the court held that change invalid, stating that a lawyer's "professional responsibility" "precludes any changes in agreed-upon [hourly] rates without notification" to the client.

In light of this, I suggest that the Commission consider adding a sentence to Comment 5 so it would then read as follows:

"[This rule] is not intended to apply to the agreement by which the member is originally retained by the client in an arms-length transaction unless the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client. **This rule is not intended to apply to an ordinary change in a lawyer's regular hourly rates if the client has been notified in advance of such a change. See *Severson & Werson v. Bollinger*, 235 Cal.App.3d 1570 (1991)....**

Citing *Silverton* and similar cases might also be beneficial.

As to the first issue above, it is true that these are rules of discipline and it is true that the Supreme Court's charge to this Commission instructs the Commission to focus on that.

Nevertheless, this Commission should not be blind to the fact that extensive litigation occurs over these matters, particularly the issue of what is a business transaction.

3. Model Rule 1.8.1 – “independent counsel”.

As to the issue of independent counsel, having seen the Commission's reaction to the ethics professors' letter, I am personally persuaded by the Commission's argument that by stating the client “is represented in the transaction or acquisition by an independent lawyer of the client's choice” that is sufficient protection so long as that does not mean that general counsel for a small business is deemed to be “representing client in the transaction or acquisition” merely by being GC. Accordingly, a one-sentence addition to Comment paragraph 2 to that effect is necessary, along the lines of:

“The fact that an entity has a general counsel does not by itself fulfill the requirement that the client is represented in the transaction or acquisition in question.”

[TEXT OMITTED]