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RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	
Commenting on behalf of an organization	No
Name	andre agassi
City	Pac Palisades
State	California
Email address	andredagiant@gmail.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.0 [1-100] Purpose and Function of the Rules of Professional Conduct
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	State no preference.
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I do not want to attach files or get specific about people, places, or certain situations, however I wanted to express the experiences I have suffered through over the last 5 years with attorneys here in CA have been horrific. I have been lied to, have had lawyers take 3, 5, and often more thousands of dollars and do zero, or disappear without a care, as they know there is very little one not versed or even versed can do. I have had attorneys enter fabricated, forged, and false documents into court and judges who rule in their favor, I have had a judge rule against me because he and my lawyer were lovers and when he wasn't happy with their sexual encounters he naturally expressed that on her client.</p> <p>I have had a lawyer who moved my case in order to get props with a certain judge and lie about it, only to turn around and admit it 3 mins later via email.</p> <p>The legal industry and judicial system in this great state is 150% not for those in the private sector, or those non lawyers and the word is out, a sure way to endure more grief is to enter into a situation with either entity.</p> <p>I apologize for my frankness but not really as this is an unsustainable, unfair, unethical group and you have a daunting task ahead, good luck.</p>
Attachment	
Attachment	
Attachment	
Date	12/15/2016
File :	Agassi Andre Y-2016-5-[general]-FS
Submitted via:	Online

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	on behalf of American Immigration Lawyers Association - Northern California, Southern California, Santa Clara Valley and San Diego Chapters
Commenting on behalf of an organization	Yes
Name	Olivia Lee
City	San Francisco
State	California
Email address	chair@ailanorcal.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Please see attachments
Attachment	Addl_Comments_Rule_1.15.pdf (778k)
Attachment	AILA_Rule_1.15_Letter.pdf (273k)
Attachment	
Date	
File :	
Submitted via:	



Northern California Chapter



Southern California Chapter



San Diego Chapter



Santa Clara Valley Chapter

January 9, 2017

Board of Trustees, State Bar of California
Public Comment Submitted Online

Re: Proposed Rule of Professional Conduct 1.15

Dear Trustees:

We are writing on behalf of the California Chapters of the American Immigration Lawyers Association (AILA) to comment on the proposed new Rules of Professional Conduct. The California Chapters of AILA include the Northern California Chapter, Southern California Chapter, Santa Clara Valley Chapter and San Diego Chapter. Together, we have more than 2500 attorney members in the state of California.

In particular, we are concerned about the impact of subsections (a) and (b) of proposed Rule 1.15, which would create a default requirement to deposit all advanced flat fees in a client trust account unless the client opts out of that requirement. All of the AILA members who have contacted AILA about the proposed rule have serious concerns about how it would impact their ability to provide low-cost legal services for consumers. Copies of their concerns are enclosed.

Specifically, we ask the Board of Trustees to consider the following:

- Modify Comment [3] of Proposed Rule of Professional Conduct 1.15
- Further study of the potential impact on the public and access to justice before implementation of Rule 1.15
- Clarification on whether Rule 1.15 would require amendment of existing fee agreements

We discuss each point in-depth below.

Modify Comment [3] of Proposed Rule of Professional Conduct 1.15

To address our access-to-justice concerns, the Commission for the Revision of the Rules of Professional Conduct modified the proposed rule to not require signed written consent for fees not exceeding \$1,000, and the Board of Trustees adopted the rule as modified. We agree that the modification is an improvement upon the proposed rule. **AILA would point out, though, that Comment [3] needs to be amended to conform to the modified rule.** Subsection (b)(2) of Rule 1.15, as amended by the Committee and adopted by the Board, provides:

If the flat fee exceeds \$1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing signed by the client.

Comment [3] to that rule, however, makes no reference to the exemption from the signed writing requirement if the fee does not exceed \$1,000.00. It states:

Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

We recommend that Comment [3] be amended to reflect that an agreement in a writing signed by the client is not always necessary. One way of accomplishing that would be to amend the language to the comment as follows:

Absent written* disclosure and the client's agreement in a writing* signed by the client ~~as provided in~~ if required by paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

Even as modified, however, our members still believe that proposed Rule 1.15 would adversely affect the ability of low-income consumers to access the justice system. I have attached to this letter the comments from our members. Those comments highlight just how disruptive the proposed rule would be to the everyday practice of solo practitioners and small firms serving low- and middle-income families. These lawyers, as well as the nonprofits who would also be affected, are able to offer relatively inexpensive legal services only by requiring advance payment of a flat fee. This allows them to focus on providing legal services, rather than on billable hours, bookkeeping, or collecting past-due accounts.

Further study of the potential impact on the public and access to justice before implementation of Rule 1.15

Further, the timing of the implementation of proposed rule needs to be considered, as we expect a surge in demand for immigration services in 2017. The president-elect has promised to ramp up immigration enforcement efforts, which has created a level of fear among immigrant communities that is already increasing the demand for our services. A change in the rules at this point would be very disruptive to our ability to serve these clients. We recommend that the Board further study the potential impact on the public before implementing Rule 1.15.

Clarification on whether Rule 1.15 would require amendment of existing fee agreements

Another potential oversight from the rushed implementation of the new rules also can be seen by the failure to address whether proposed Rule 1.15 would apply to existing fee agreements. Neither the text of the rule nor the comments address that issue. It is a significant issue, though. The majority of AILA members charge flat fees and require advance payment of those fees.

January 9, 2017

And, due to the high-volume nature of immigration practices, we expect the number of existing clients that would be impacted by the rule change would number in the hundreds of thousands. We expect there would be a similar impact on attorneys practicing bankruptcy, landlord-tenant, criminal defense, and other consumer-oriented areas of the law. The Board owes it to these clients to address whether the rule change would require amendment of their existing fee agreements and how.

CONCLUSION

In sum, AILA requests that the Board consider the momentous impact of proposed Rule 1.15 on the public, particularly immigrants who likely will face an urgent need for legal services under the new administration. We ask that you not rush through changes that could disrupt our ability to serve these clients just when they need our help the most.

Sincerely,



Olivia Lee, Chair
Northern California Chapter
American Immigration Lawyers Association



Maggie Castillo, Chair
Southern California Chapter
American Immigration Lawyers Association



Andrew Nietor, Chair
San Diego Chapter
American Immigration Lawyers Association



Nicole Abramowitz Weber, Chair
Santa Clara Valley Chapter
American Immigration Lawyers Association

Additional Comments from AILA members

Under California law, a lawyer needs a written fee agreement if it is foreseeable that the total expense to the client will exceed \$1,000. See Business and Professions Code section 6148(a). This is unless the client is a corporation, the services are being provided in an emergency to avoid foreseeable prejudice to the client or the contract would be impractical, an agreement is implied based on the lawyer having provided similar services to the client in the past, or the client consents after full disclosure of the requirement for a written contract for legal services. See Business and Professions Code section 6148(d). Meanwhile, under Proposed Rule 1.15, as amended, the client must agree in writing before the lawyer may be allowed to deposit a flat fee into the lawyer's operating account, except if the flat fee is \$1,000 or less. In that case the proposed rule would only require the lawyer to provide a written disclosure of rights to the client.

Business and Professions Code section 6148 covers flat fee as well as hourly and statutory fee arrangements. As the proposed rule is currently written, there will be situations where a written agreement is needed to comply with Proposed Rule 1.15 but not Business and Professions Code section 6148. For example, in cases involving flat fees where the total expense to the client would foreseeably exceed \$1,000, a lawyer would not commit a violation of section 6148 by foregoing a written fee agreement with a client who is a corporation or in the case of an emergency, but would be subject to discipline if the lawyer did not obtain a written agreement permitting the lawyer to deposit the flat fee into the lawyer's operating account.

Therefore, to ensure consistent enforcement of policy and improve access to legal services, the statutory exceptions set forth in Business and Professions Code section 6148(d) should be incorporated into Proposed Rule 1.15, so that if a written contract for legal services would not be required under the statute, one would also not be required under the proposed rule.

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January 5, 2017

Via email only – chair@ailanorcal.com
Olivia Lee, AILA Norcal Chair

RE: Proposed changes to CRPC 1.5(d) and 1.15

Dear Ms. Lee:

I write to express my concerns over the proposed revisions to California Rules of Professional Conduct 1.5(d) and 1.15.

Although I have no doubt the revisions are intended to benefit the public, I likewise have no doubt that these rules, as proposed, will have the opposite effect. They will hurt the public in need of effective, competent and cost-effective legal assistance by driving away otherwise available legal services providers. These rules as proposed will add a layer of unnecessary administrative burden on lawyers in solo and small practices and will cause an increase in costs to potential clients to fairly compensate an attorney for the additional time it will take to explain what is required under the proposed rules. Increased costs will hurt the folks in need of low-cost service and could very well lead to a flight of attorneys providing needed services to avoid the administrative headache that would be visited upon them by the proposed rules.

The proposed rules also demonstrate a lack of sensitivity to the realities of solo and small firm practice. Proposed rule 1.5(d) appears oblivious to the purposes of advance fees. Many small firms utilize advance fees as combination retainer and advance fees to retain attorneys for work to be done during a very short period and to assure payment for work that is started and completed almost immediately. Without such a mechanism, work would have to be done without the assurance of payment or the cost increased to cover the administrative burdens for relatively small transactions. Limited income clients, who are very often looking for the best price, would be driven into the hands of notarios.

Similarly, proposed rule 1.15 would needlessly complicate the attorney/client transaction by requiring an explanation of rights that are extraneous to the matter for which the attorney is retained. Practices dealing with non-English and/or unsophisticated communities would be hard pressed to assure the client adequately understood the nature of the written consent required by the rule. Additional time explaining the nature and purpose of the consent would certainly drive up costs; it would also undermine the trust in the attorney/client relationship and detract from the central purpose of the engagement, i.e. to obtain competent and effective representation at an

Olivia Lee
January 5, 2017
Page 2

affordable cost. Driving potential clients from competent legal representation to the hands of potentially unscrupulous and ill-prepared notarios or document preparers would not be in the public interest.

The proposed rules require further thought before adoption. They are certainly well-intentioned, but as currently written they will very likely cause problems that have yet to be fully contemplated.

Thank you in advance for your anticipated attention to these issues.

Sincerely,

AILA Member # 23279

From: chair@ailanorcal.com on behalf of
Sent: Thursday, January 05, 2017 12:02 PM
To: chair@ailanorcal.com
Subject: Proposed State Bar Rule 1.15

Follow Up Flag: Follow up
Flag Status: Completed

To: State Bar of California
Re: Proposed State Bar Rule 1.15

I operate a law firm as a sole practitioner, with the assistance of a part time attorney, a paralegal and an admin. I serve small clients and businesses in the field of intellectual property. I also do pro bono immigration work (AILA member) and am considering representation of veterans.

The proposed rule increases the cost of legal services by imposing additional bookkeeping, invoicing and contractual agreements with clients. I charge \$150, paid in advance, for an initial interview of 45 minutes, to which the client agrees. If I could not collect \$150 in advance, I would lose more than I already lose in initial consultation because clients would not pay the \$150, as happened before I started charging in advance. It is not worth my time to try to collect. Many of the projects that I undertake are short projects where advance payment is requested, sometimes due to the credit history of the client. Amounts up to \$20,000 can be involved, particularly for projects where large out-of-pocket costs are involved, such as the filing for foreign patents where I need to pay a foreign law firm for translations and foreign filing fees. In the instance of out-of-pocket disbursement of fees, the disbursements are not all at one time, but incremental. There is no doubt that the additional bookkeeping requirement would increase the cost of my services. I have significant funds in my client trust account but those funds are only occasionally disbursed. Frequent disbursements from my client trust account would require 2 accounting systems, one for earned fees and one for unearned fees, with attendant complexity, mistakes and time.

I am 78 years old and have practiced law in California for 45 years. I have resisted retiring in order to serve people that need legal assistance. However, the proposed rule has significant administrative and accounting impact on sole practitioners and pushes me toward retirement.

I oppose the proposed rule.

AILA Santa Clara Valley Chapter Member

From: chair@ailanorcal.com on behalf of
Sent: Thursday, January 05, 2017 11:29 AM
To: chair@ailanorcal.com
Cc:
Subject: Comments on Proposed Rule 1.5

Follow Up Flag: Follow up
Flag Status: Completed

To whom it may concern:

I have been practicing law since 1987, and I frequently represent persons of very modest means, and this means that I am also a lawyer of very modest means. I do so in the immigration context and also in civil litigation, or in administrative/governmental matters. Often the fees for these cases are under \$1,000, but sometimes I will charge a flat fee of more than that, or a flat fee payable in installments of over \$1,000. Sometimes the clients are "difficult" people, i.e. persons with little experience in the law, with misconceptions about the law or lawyers, or persons who require a lot of hand-holding and follow-up, and sometimes they can even be obstreperous, although that is the exception where they are treated with dignity and compassion -- as I make it my practice to do. Sometimes they are in desperate straits and may only have a small chance of success, which of course I always advise them of, but they may not fully accept or realize that fact, because of course they are right (and sometimes they are clearly right but it will be prohibitively expensive to fully vindicate their rights, and sometimes it is less predictable) or so-and-so had an attorney who did this-and-that for them and of course "I believe you can do the same for me." Sometimes the client does not verbalize any of this (where they do, of course, I caution them). Just because clients are "down and out" or marginalized, and may have some of the above traits or other sometimes associated with the poor people, doesn't mean that they don't merit counsel. And the truth is, I don't do well representing wealthy people nor are they beating a path to

my door, in part because of a history of representing controversial people and causes. In my view I am performing a much-needed public service when I represent a person of limited income or means for a flat fee.

Without the ability to deposit flat fees directly into my operating account, my own viability as counselor and advocate for my immigrant and other low-income clients will be adversely affected. If I must advise the client in writing of the client's right to deposit funds in a trust account and a right to a refund of any "unearned" fees, or obtained signed consents where a flat fee exceeds \$1,000, it will prove administratively non-viable and will simply create headaches. In order to be able to refund "unearned" fees, for example, there must be some ready mechanism for tracking what is "earned" and what is "unearned," and that simply is not practical or expedient in a case where hourly billing is not possible, and where it may take me a great deal of work -- or I may have to commit myself to a lot of aggravation -- before the last of the services are performed. I may have actually "earned" my flat fee of \$1,500 in the first week of work on the case, or even by making myself available for a high-risk case (the risk might be that I have to spend more time than expected), but as far as the client knows I haven't done anything for him or her yet. Lawyers should not be expected to confer on clients "equal" rights where there are not equal risks. Of course, in a case where the fee is earned on receipt or in the first few days of representation, but where the visible services occur later, my clients eventually get what they bargain for, whether it be handling a hearing, or preparation of some application and supporting documents, or conclusion of research or analysis, or something else, but by that time I am serving my client not because there is any further for me to gain, but because I made a commitment to the client. And I can be relied on to do that, and (granted that some lawyers cannot be, for which the discipline system must be stronger) that must be the working assumption of the Bar.

The problem with the State Bar right now is not that more good lawyers need to be regulated, but that bad lawyers are not receiving sufficient

discipline. I have personally witnessed this when I have dealt with the Bar on bad actors.

Moreover, no one will want to hear this, especially lawyers who are used to working in large firms with institutional clients or sophisticated and educated individual clients -- and those may be the persons largely in control of the Bar -- but lawyers and MANY clients can never be put on a level plane, and there is a certain amount of benevolent paternalism (or maternalism as the case may be) inherent in a lawyer's relationship with poor individual clients. One of course tries to educate the client and of course honor the client's wishes, but let's face it, folks, we didn't go to law school and spend our years practicing law without creating an inherent imbalance in savvy. The poor are already an underserved community, and when a lawyer actually succeeds in a practice which includes representation of many persons in this community, it is a rarity, and those lawyers do NOT need to be saddled with burdens that can only destroy the relationships or make them more difficult, or drive them out of business, which Proposed Rule 1.5 will assuredly do.

I strongly oppose the adoption of proposed rule 1.5 even as amended with the input of certain AILA groups and other organizations.

Sincerely,

AILA Member # 7560

From: chair@ailanorcal.com on behalf of
Sent: Thursday, January 05, 2017 11:15 AM
To: chair@ailanorcal.com
Subject: Propose Rule 1.15

Follow Up Flag: Follow up
Flag Status: Completed

I would like to submit my comments re: proposed rule 1.15. I have been a solo practitioner for more than 15 years, after having worked for more than 10 years at small and medium-sized law firms. It is my belief that the proposed rule would impede the access of consumers to my legal services. In particular, the proposed rule would make it more difficult for me to provide services on low-fee matters, such as consultations and applications for employment authorization, travel documents, etc. The added difficulty of providing these services might result in fewer lawyers or nonprofits providing them and a corresponding increase in those services being provided by unlicensed notarios. I urge AILA and AILA Norcal to share my concerns with the Bar Association. Thank you.

AILA Member ID 9454

From: chair@ailanorcal.com on behalf of

Sent: Tuesday, January 03, 2017 3:57 PM

To: chair@ailanorcal.com

Subject: Comment re Proposed Rule 1.15

Follow Up Flag: Follow up

Flag Status: Completed

Hello NorCal Chair:

Thank you for taking the time to work on this matter.

One question: Would this rule apply to ALL attorneys in CA or only to Immigration Attorneys? I assume it will apply to ALL attorneys in CA.

My main comment is that we Immigration Attorneys are not the main problem in this arena. The CA Bar should invest more energy going against the Notarios. Most of us, Immigration Attorneys, provide our clients with a contract that spells out the money issue.

To require that even a consultation fee be deposited into a Trust Account until the work is completed, is not only unreasonable, but dangerous. A consultation fee is just that, it has been earned by the time the consult is completed. To require that even a consultation fee be deposited into a trust account until the work is completed would encourage unscrupulous clients to consult with attorneys and then cancel the contract. The unscrupulous clients will demand all their money back (including the consult fee) knowing that most of us will not litigate in order to keep the consultation fee that has been deposited into the trust. Who in his or her right mind will litigate in order to keep a couple of hundred dollars related to a consultation fee? Most of us would likely roll over and refund the consultation fee deposited into the trust account. The CAR BAR rules should not encourage unscrupulous consumers to extract free consults from attorneys. Those of us who don't practice in the area of Contract Law will have to consult with a contract specialist to meet this new requirement. I hope that at the end, the CA BAR will give us suggested language to include in our Attorney-Client Contracts.

Regards,

AILA Member # 19797

From: chair@ailanorcal.com on behalf of
Sent: Tuesday, January 03, 2017 2:24 PM
To: chair@ailanorcal.com
Subject: Proposed fee change
Attachments:

Follow Up Flag: Follow up
Flag Status: Completed

I have been practicing immigration law for over 30 years.

I primarily provide services to counties outside the Bay Area and Sacramento metropolitan areas. Many of my clients are poor.

This rule is an attack on small law firms and sole practitioners. It is in total disregard for the way in which we practice law to provide services to individual clients.

The State Bar says they want to help sole practitioners and also help the poor with access to legal representation. However, this rule would effectively harm both in implementation.

Most immigration fees for individuals (I am not talking about Silicon Valley) are flat fees. I discount my fees substantially to meet the needs of poorer Hispanic clients and try in every way to keep the administrative costs down.

This measure increases those administrative costs. More importantly, the rule makes it much harder to practice immigration law because of the forced administrative interruption in the cash flow of a small service business.

The larger question that the Bar has completely left open is :

Who is to decide when the fees are earned?

Immigration cases have many steps and sometimes take many years. Some cases can get quite complicated with the immigration and criminal record histories.

Does the Bar really want to get into the business of evaluating at what stage of the immigration proceeding a portion of the fee is earned? This makes no sense. Who is the decision maker?

The imposed hassle and cost makes no sense when most cases are less than 2500.00 to begin with.

The whole point of the flat fee is to avoid the time and expense associated with timed billing and invoicing.

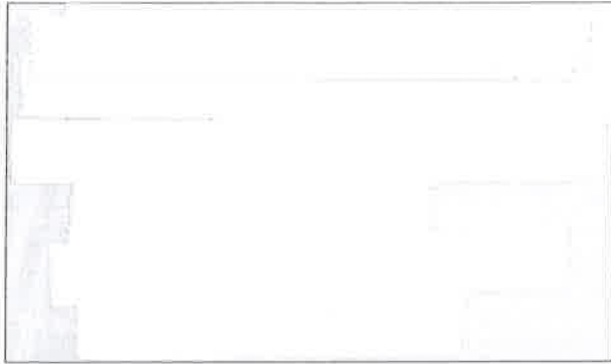
More importantly, my clients want, no insist on a flat fee. They want to know exactly how much it is going to cost. Every dollar matters to these clients.

This rule will make it much harder to provide legal services to the people who need them the most.

The bottom line is there are a lot of cases that I will just have to stop taking. The little stuff I do to provide public service and build community rapport-- such as replacing lost documents, obtaining work authorization and getting travel documents-- will simply not be worth the hassle imposed by this rule.

This rule will have the practical effect of hurting the very people it is designed to protect. That tells me that not enough thought has gone into this rule.

It is a sad testament to this idea that we can impose virtue through regulation.



ALA member # 2208

From: chair@ailanorcal.com on behalf of
Sent: Thursday, December 29, 2016 7:37 PM
To: chair@ailanorcal.com
Subject: State Bar proposed reg - CRPR 1.15

Follow Up Flag: Follow up
Flag Status: Completed

Olivia,

As you say, this proposal is onerous. In addition to the comments you explained, I have this to add.

1. 25-50% of client payments to our office are now made by credit or debit card. All those payments now go into our operating account, whether they are unearned or earned. Are we going to have to have two credit card machines, one to take payments that go into our trust account and one into our operating account? This is ridiculous. Our staff, who take the payments, many by telephone, are not going to know into what account to transfer the payment. It is going to take an inordinate amount of staff and attorney time to direct the payment into the correct account.
2. One compromise option would be to make an attorney comply only after a successful complaint has been made to the State Bar for client payment abuse. A successful complaint is one where the attorney refused to reimburse unearned fees. However, this compromise doesn't solve the credit card payment conundrum.

AILA Member # 1689

From: chair@ailanorcal.com on behalf of
Sent: Thursday, December 29, 2016 12:19 PM
To: chair@ailanorcal.com
Subject: New rule

Follow Up Flag: Follow up
Flag Status: Completed

Thanks for fighting back on this. Here is the comment I sent to the State Bar:

This proposed rule imposes one more useless burden – trust accounting - on attorneys who provide flat fee arrangements for clients who often would not otherwise have access to legal services. The client agrees to pay in advance (and perhaps at a later date as well) a fixed fee, and the attorney agrees to provide the defined representation. Under the proposed rule, the attorney is charged with the impossible task of determining when each part of the fee is due, and then moving money in and out of a trust account to avoid rule violation. It effectively turns a flat fee case into an hourly rate case, creating massive inefficiencies and uncertainties for attorney and client alike.

For the attorney to take flat fee cases and for them to be profitable, it is necessary at some point in the case for the attorney to say that the fee has been earned and is nonrefundable, even though all of the work has not yet been done. For example, in an immigration case, the balance of the flat fee will be due upon approval of a visa petition, even though additional work must still be done in the case to secure the visa. The fee is completely earned, even if the client should change her mind and decide at that point that she does not want the visa. Is that permitted under the proposed rule (work on the case after the fee has been earned)? The concept of the flat fee is that some cases will take longer than others, and require more work, and to some extent the cases that can be resolved quickly subsidize cases that get bogged down and take more resources to complete. That provides the client with certainty and a cap on the fee, and makes the lawyer more efficient because she does not have to account for each and every action as in a billable hour case.

This rule seems to be a solution looking for a problem. Although “consumer protection” is cited as the reason for the rule, there is no evidence that the consumer needs additional protection in this sphere (beyond the myriad rules that already protect the consumer). I have been a legal fee arbitrator for a decade, and have never seen a dispute or fee issue that trust accounting would have solved.

The State Bar is not just a consumer watchdog, but is also our professional organization. It should make the jobs of its members easier, or at least not make them more difficult, unless there is a compelling reason to do so. I do not see any compelling reason to upset decades-old practices, and to impose significant burdens, costs and liabilities on its members in this case.

Regards,

AILA member # 896

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Association of California Water Agencies
Commenting on behalf of an organization	Yes
Name	Whitnie Wiley
City	Sacramento
State	California
Email address	whitniew@acwa.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 3.5 [5-300, 5-320] Contact with Judges, Officials, Employees, and Jurors
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	State_Bar_Letter_-_09Jan17.pdf (449k)
Attachment	ACWA_proposed_changes_rule_3.5.pdf (42k)
Attachment	
Date	
File :	
Submitted via:	

January 9, 2017

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

VIA STATE BAR WEBSITE

Re: Proposed Rule of Professional Conduct 3.5 – Comments of Association of California
Water Agencies

Dear Ms. Hollins:

The Association of California Water Agencies (ACWA) appreciates the opportunity to comment on the proposed revised Rules of Professional Conduct and, particularly, on proposed Rule 3.5. That proposed rule concerns contacts with judges, other adjudicatory officers and staff members who are assisting those judges and officers in making their decisions. ACWA is very concerned that the proposed Rule 3.5 would create significant uncertainties and problems for attorneys who represent ACWA's members in quasi-adjudicatory proceedings, such as proceedings before the State Water Resources Control Board (the SWRCB) and local agencies. We have attached proposed edits to the proposed Rule 3.5 that would address these concerns.

Background

ACWA is a non-profit statewide association whose members are the hundreds of local government agencies who collectively provide water service to a majority of California's residents. ACWA's mission is to assist its members in promoting the development, management and reasonable beneficial use of good quality water at the lowest practical cost in an environmentally beneficial manner. In fulfilling this mission, ACWA identifies issues of concern to its member cities and special districts and the public they serve, accumulates the best available information on those issues and facilitates the development of consensus on those issues among its members and with the broader stakeholder community. When consensus is not possible, ACWA advocates for its members' interests with policymakers. This advocacy includes substantial work on federal and state legislation with Congress, California's Legislature and executive officers and departments, as well as work with state regulatory agencies, such as the SWRCB and the Department of Water Resources. ACWA has established a Legal Affairs Committee comprised of 45 attorneys representing each of ACWA's 10 regional divisions throughout the State. The Legal Affairs Committee monitors litigation, regulatory developments and other legal matters of significance to ACWA's member agencies. That committee has considered proposed Rule of Professional Conduct 3.5 and has authorized this comment letter on behalf of ACWA as a whole. ACWA's concerns with proposed Rule 3.5 are two-fold and concern proceedings at both the state and local levels.

Effect of Proposed Rule 3.5 on State Proceedings

At the state level, ACWA is primarily concerned about the potential impact of proposed Rule 3.5 on attorneys' ability to participate in proceedings before the SWRCB. The SWRCB has broad authority

over both water-right and water-quality matters in California. Among other things, the SWRCB has the exclusive authority to: 1) issue new appropriative water-right permits in California; 2) consider proposed changes to existing water-right permits and licenses that were issued after 1914; and 3) adopt environmental rules for waterways under the Porter-Cologne Water Quality Control Act. During the recent drought, the SWRCB exercised emergency authority to, among other things, adopt mandatory statewide water conservation standards for urban water suppliers and to temporarily revise water-right rules that govern exports of water from the Sacramento-San Joaquin Bay-Delta (Bay-Delta), which is a water source for millions of Californians and millions of acres of farmland. The SWRCB is currently conducting an adjudicatory hearing involving hundreds of parties that concerns the Governor's proposal – California WaterFix – to build tunnels under the Bay-Delta to enable more efficient exports of water from the Sacramento River.

The intertwined relationship between the California WaterFix hearing and another very significant SWRCB proceeding demonstrates the potential problems that proposed Rule 3.5 would cause for attorneys practicing before the SWRCB. The other significant proceeding concerning the Bay-Delta that is pending before the SWRCB is a proposed update to the Bay-Delta Water Quality Control Plan. That plan can establish standards for how much water must flow into the Bay-Delta from the Sacramento and San Joaquin Rivers, as well as how much water must flow out of the Bay-Delta into the Carquinez Strait and San Francisco Bay and how much water may be exported out of the Bay-Delta to southern California, the San Joaquin Valley and the Central Coast. While that plan update and the California WaterFix hearing are closely related, the hearing is a quasi-adjudicatory matter and the plan update is a quasi-legislative matter. If the State Bar were to adopt proposed Rule 3.5 without amendment, it could subject attorneys practicing before the SWRCB to uncertainty about how to comply with their ethical obligations and still adequately represent their clients – and ACWA's members – in intertwined water proceedings. For example, presentations in the quasi-legislative Bay-Delta proceeding theoretically could be interpreted as “indirect” communications with the SWRCB's members related to the Bay-Delta issues presented in the quasi-adjudicatory California WaterFix hearing.

ACWA believes that there is a simple solution to this problem. The SWRCB – and other agencies operating under the state Administrative Procedure Act – have *ex parte* communication rules that prohibit anyone from having substantive contact with agency decision-makers while the proceeding is pending. (See Gov. Code, §§ 11430.10-11430.80; Cal. Code Regs., tit. 23, § 648, subd. (b) (SWRCB regulation incorporating APA sections by reference).) Attorneys and all other participants in such administrative proceedings must obey those rules. ACWA's proposed amendments to proposed Rule 3.5 would make it clear that, if an attorney were to obey an agency's applicable *ex parte* rules, then that attorney also would comply with the Rules of Professional Conduct's requirements concerning contacts with administrative decision-makers.

Effect of Proposed Rule 3.5 on Local Proceedings

ACWA's concerns with the effect of proposed Rule 3.5 on local proceedings are similar to our concerns with that proposed rule's effect on state proceedings. Local agencies hold a variety of quasi-adjudicatory proceedings, such as hearings on land use permits and their related environmental documents prepared under the California Environmental Quality Act. Along with many other types of professionals and members of the public, attorneys participate in those proceedings as advocates for their clients, which may include ACWA members. Adopting a Rule of Professional Conduct that would apply potentially unique restrictions to attorneys in having contact with local decision-makers in such proceedings could put attorneys and their clients at a disadvantage in those proceedings and subject

attorneys to the risk of ethical violations if they were to incorrectly gauge how the rule applies. Just as the Administrative Procedure Act establishes rules about contacts with state-agency decision-makers in quasi-adjudicatory proceedings, there is a substantial body of law concerning contacts with local decision-makers in such proceedings. (See *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4 81, 90-98 (discussing case law).)

In the case of local agencies, ACWA recommends that the State Bar revise the proposed Rule 3.5 to state that those agencies' decision-makers are not "administrative bodies" within the scope of the rule. The variety of local decision-making bodies, and forums in which they consider matters, is too broad to state a single rule to establish an ethical rule to cover attorneys' interactions with all of them. Given the body of common law governing all parties' *ex parte* contacts in such situations, ACWA recommends that the State Bar rely on that law to govern attorneys' interactions with those decision-makers.

Conclusion

Once again, ACWA appreciates the opportunity to comment on the proposed Rule of Professional Conduct 3.5. We believe that the attached proposed edits to that proposed rule appropriately address the problems that it potentially could create in state and local quasi-adjudicatory proceedings.

Kind regards,



Whitnie Wiley
State Bar No. 212726
Staff Liaison, ACWA Legal Affairs Committee

Rule 3.5 [5-300, 5-320] Contact with Judges, Officials, Employees, and Jurors –
[Public Comment]

(a) Except as permitted by statute an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge or judicial; ~~officer~~, ~~or employee of a tribunal~~.^{*} This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation to a public office pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except: (1) in open court; or (2) with the consent of all other counsel in the matter; or (3) in the presence of all other counsel in the matter; or (4) in writing* with a copy thereof furnished to all other counsel in the matter; or (5) in ex parte matters; or (6) in accordance with statutes, regulations or rules applicable to adjudicatory proceedings of that tribunal.

(c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who advise the tribunal in making its decision, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if: (1) the communication is prohibited by law or court order; (2) the juror has made known* to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation,

coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This Rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings. (l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

(l) As used in this Rule, "administrative body" does not include a board or body of a city, county, city and county, special district, or other local public agency.

Comment [1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 (listing statutes with the act).) State agencies also may adopt their own regulations and rules governing lawyers' communications with members or employees of a tribunal*. [2] For guidance on permissible communications with a

juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206. [3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Member of the California State Bar
Commenting on behalf of an organization	No
Name	James A. Bach
City	San Francisco
State	California
Email address	jbach@immilaw.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule

<p>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</p>	<p>This proposed rule imposes one more useless burden – trust accounting - on attorneys who provide flat fee arrangements for clients who often would not otherwise have access to legal services. The client agrees to pay in advance (and perhaps at a later date as well) a fixed fee, and the attorney agrees to provide the defined representation. Under the proposed rule, the attorney is charged with the impossible task of determining when each part of the fee is due, and then moving money in and out of a trust account to avoid rule violation. It effectively turns a flat fee case into an hourly rate case, creating massive inefficiencies and uncertainties for attorney and client alike.</p> <p>For the attorney to take flat fee cases and for them to be profitable, it is necessary at some point in the case for the attorney to say that the fee has been earned and is nonrefundable, even though all of the work has not yet been done. For example, in an immigration case, the balance of the flat fee will be due upon approval of a visa petition, even though additional work must still be done in the case to secure the visa. The fee is completely earned, even if the client should change her mind and decide at that point that she does not want the visa. Is that permitted under the proposed rule (work on the case after the fee has been earned)? The concept of the flat fee is that some cases will take longer than others, and require more work, and to some extent the cases that can be resolved quickly subsidize cases that get bogged down and take more resources to complete. That provides the client with certainty and a cap on the fee, and makes the lawyer more efficient because she does not have to account for each and every action as in a billable hour case.</p> <p>This rule seems to be a solution looking for a problem. Although “consumer protection” is cited as the reason for the rule, there is no evidence that the consumer needs additional protection in this sphere (beyond the myriad rules that already protect the consumer). I have been a legal fee arbitrator for a decade, and have never seen a dispute or fee issue that trust accounting would have solved.</p> <p>The State Bar is not just a consumer watchdog, but is also our professional organization. It should make the jobs of its members easier, or at least not make them more difficult, unless there is a compelling reason to do so. I do not see any compelling reason to upset decades-old practices, and to impose significant burdens, costs and liabilities on its members who provide flat fee legal services, and who require payment in advance to insure they get paid.</p>
Attachment	
Attachment	
Attachment	
Date	12/06/2016
File :	Bach James Y-2016-1-[1.15]-FS
Submitted via:	Online

December 9, 2016

Via Online Public Comment Form Submission

Audrey Hollins
Office of Professional Competence, Planning
and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: **Public Comments on Proposed Rules of Professional Conduct 1.5, 1.18, 2.1 and 8.4.1**

Dear Ms. Hollins:

This letter is being sent on behalf of the Legal Ethics Committee of The Bar Association of San Francisco ("we" or the "Committee") to submit our comments on Proposed California Rules of Professional Conduct, Rules 1.5, 1.18, 2.1 and 8.4.1. Because our Committee only meets once per month and we are required to obtain approval to submit this letter from The Bar Association of San Francisco ("BASF") at its monthly Board meeting, we did not have sufficient time to comment on all of the proposed new or amended rules of professional conduct. Therefore, we limit our comments to those proposed rules that generated the most interest among our active members and those for which we were able reach a majority consensus.

I. Proposed Rule 1.5 (Fees for Legal Services):

A. Subsection (b)(1) (Unconscionability Factors)

We appreciate the consideration given to our comment relating to the use of the term "overreaching" in subsection 1.5(b)(1). However, the synopsis of the Committee's comment, as stated in the Executive Summary released by the Commission for the Revision of the Rules of Professional Conduct ("Commission") did not reflect why we find this term ambiguous. Although we understand that this term has been used in case law, we are concerned about the meaning of "overreaching" in regard to the negotiation of an initial fee agreement. The negotiation of an initial fee agreement is generally considered an arms-length transaction, and "absent issues of duress, unconscionability and the like, [a client] has no cause to complain that the terms [the lawyer] negotiated were favorable to [the lawyer]." *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913. Accordingly, the use of "overreaching" in subsection (b)(1) appears to undermine this general principle. We are, therefore, clarifying this point in case the Commission misunderstood it.

B. Subsection(e) (Flat Fees)

We appreciate the Commission's consideration of our comment relating to the clause "as long as the lawyer performs the agreed upon services" in subsection (a) and support the revision made to incorporate this comment.

II. Proposed Rule 1.18 (Duties to Prospective Client)

Our Committee supports the Commission's proposed Rule 1.18 because it provides important guidance to lawyers practicing in California on what duties are owed to prospective clients in contrast to former clients. We also believe the proposed Rule will enhance the ability of lawyers and clients to communicate regarding potential new matters. While the Committee recognizes that a few California cases¹ address duties to prospective clients in the disqualification context and that California Evidence Code § 951 addresses this duty in regard to the attorney-client privilege, there is otherwise no clear guidance for California lawyers. As part of their risk management practice, members of our Committee have counseled clients on duties to prospective clients and recommended that prospective clients be included in the law firms' conflict check procedures. Law firms that do not include prospective clients as part of their conflict check procedures may be unaware they have a conflict of interest in accepting a new representation. As a result, the firms may unknowingly accept a new representation that is materially adverse to the interests of a prospective client, or fail to implement effective screening measures to avoid the conflict of interest. Alerting lawyers to duties owed to prospective clients through Proposed Rule 1.18 will require lawyers and law firms to incorporate such risk management best practices in order to comply with the rule, and, consequently, will help to avoid imputation of confidential information and late discovery of such conflicts.

III. Proposed Rule 2.1 (Advisor)

Our Committee supports the Commission's proposed Rule 2.1 because the professional responsibility to exercise independent professional judgment and to render candid advice is recognized as a core duty of a lawyer that should be included within the California Rules of Professional Conduct. Adding this rule will stress the importance of this essential professional responsibility. All other jurisdictions, except California, have adopted a rule derived from Model Rule 2.1. Further, incorporating Rule 2.1 will remove any ambiguity concerning whether the duty of independent professional judgment exists beyond the limited situations regulated by current Rules 1-600 (legal service programs) and 3-310(f) (accepting compensation for representation from one other than the client). The Committee recognizes that detractors of this rule argue that it should not be adopted as a disciplinary rule because it is unnecessary and provides for advice that is beyond a lawyer's expertise, ultimately carrying the possibility of discipline for a lawyer who otherwise gives competent and complete advice. However, the same could be said for a number of professional responsibility rules. This proposed rule is an improvement on the version contemplated in 2010. It is not only more concise and in line with Model Rule 2.1, but Comment [1] clarifies that the rule may impose a duty only when such advice appears to be in the client's best interest. Importantly, as

¹ See, e.g., *Kirk v. First American Title Insurance Co.*, 183 Cal.App.4th 776 (2010); *Marriage of Zimmerman*, 16 Cal.App.4th 556 (1993); see also Los Angeles County Bar Ass'n Formal Opn. 506 (2001).

with the other rules, our State Bar has discretion to abate should the facts and circumstances of a particular instance not warrant discipline.

IV. Proposed Rule 8.4.1 (Prohibited Discrimination, Harassment and Retaliation)

Our Committee supports the most recent revisions to Proposed Rule 8.4.1 as written. The revisions are consistent with the meaning and purpose of the previously proposed ALT 1 version of this rule, eliminating the pre-condition, pre-litigation requirement found in current Rule 2-400(C) and the proposed ALT 2 version, for which this Committee expressed support in its September 2016 comments.

Respectfully,

BAR ASSOCIATION OF SAN
FRANCISCO, ETHICS COMMITTEE

By: _____/s/_____
Sarah J. Banola, Chair
Kendra L. Basner, Vice Chair

Dain R. Birkley, J.D.

3921 Carver Road, Modesto, CA 95356 | 209-491-2523 (Home/Fax) 209-605-2009 Cell | drbirkley1717@gmail.com

November 18, 2016

Daniel Evan Eaton, Esq.
Seltzer Caplan McMahon Vitek
750 B St #2100
San Diego, CA 92101

Re: Dissent to Recommended Adoption of Proposed Rule 5.3.1.

Dear Mr. Eaton:

I want to express my deepest gratitude for your well-reasoned and thoughtful dissent to the Recommended Adoption of Proposed Rule 5.3.1. That anyone cared enough to take the time to analyze and advocate against this harsh and extremely punitive rule is heartening. Perhaps, there is some hope that this rule, which prevents many experienced, well trained and highly skilled former bar members from earning a living, may finally be understood as being, for all practical purposes, an economic death sentence. Apparently, the public comment period has passed, but should you have a chance for further input, I hope that the content of this letter can aid your advocacy.

The issues raised in your dissent are valid, and your recommendation, that all but paragraph (b) of Rule 5.3.1 be deleted, should be adopted. As a "Restricted lawyer" who has struggled to find employment despite a long and successful career in the law, I can attest that the draconian impact of Rule 5.3.1 is not the result of paragraphs (a), (b), (c), (e), or (f). As you point out, except for (b), those provisions are redundant and superfluous. Your accurate synopsis of the mandates of paragraph (d) explains why Rule 5.3.1 effectively ends a restricted lawyer's chances for future employment.

It is not problematic that a potential employer must file the State Bar form advising of the pending employment of a restricted lawyer. Rather, it is the notice requirement that positively and instantly ends job possibilities. As a shareholder of a substantial firm, consider the cost of implementing paragraph (d) mandating that every client in your office on whose matter the restricted lawyer might work must be informed that you have hired a restricted attorney might work on their file, and what the restricted attorney will not do. The costs are the attorney time drafting the letter, the time of the staff to print the letters, the time of the staff to prepare envelopes and mail them, the cost of postage, the staff cost of collecting and obtain the proofs of service, and the cost of records management. If a law firm such as yours has 300 clients, the cost is in the thousands of dollars.

The justification for this onerous requirement, that every client should have the right to refuse to have a restricted lawyer work on the file, is cynical and thoughtless. Consider State Farm Insurance. The hundreds of local defense files from throughout the Bay area are handled by the in-house legal department, Phillip M. Anderson and Associates. Paragraph (d) would require the notification of hundreds of "clients" against whom a claim has been filed before the restricted lawyer could begin work. Those types of clients do not care who handles their files so long as they receive the proper defense and coverage. The State Bar ethics hotline has issued an opinion to my attorney that every file in the State Farm's in-house counsel's office must receive the Rule 5.3.1 (d) notification. Is it any wonder that even though I was outside, retained litigation counsel for State Farm for almost 20 years that I get hired as a paralegal? If a restricted lawyer were to be employed by PG&E in a rate modification matter, is PG&E required to notify every consumer of services that a restricted attorney could be working on their case? It is enigmatic that a group whose professional mission in life is to achieve justice can be so blind to the injustice inflicted by this rule.

There has been a recent movement for criminal justice reform. The error of automatically imposing lengthy prison sentences just because the crime involved crack cocaine is now understood. Rule 5.3.1 is the parallel to the mandatory sentencing for crack cocaine. The Rule is applied to every "Restricted lawyer" equally, whether the underlying reason for restriction involved misconduct in the practice of law or not, whether the crime was morally reprehensible or not, whether the offender has been fully paid his debt to society and been rehabilitated or not, and whether the offender might have been adjudged to have lead an upright life and blameless life qualifying for a Certificate of Rehabilitation. This rule lumps all restricted lawyers into the legal world's equivalent of a "basket of deplorables."

These restrictions are especially cynical in the light of the approved practice of outsourcing legal work to foreign countries where the research and writing are done by non-lawyers. The rationale, as stated by your own San Diego Bar Association, for allowing outsourcing is that the work must be approved by a member of the bar before submission. Yet when you raised this same argument in support of changing Rule 5.3.1, it was ignored. Does it make sense to bar a former member of the bar, who may have a record of years of competent work as an attorney, from performing legal work that foreign non-lawyers are approved to perform? The only reasonable explanation is that the State Bar would rather punish a restricted attorney than promote the quality of legal services provided the client. Over and above the penalty that a restricted attorney has paid in loss of freedom and assets, Rule 5.3.1 (d) effectively renders restricted attorneys unemployable and robs them of their right to earn a living for life. Rule 5.3.1 (d) is not just.

Thank you for your efforts.

Very truly yours,

Dain R. Birkley, J.D.

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	UC Berkeley
Commenting on behalf of an organization	No
Name	Stephen M Bundy
City	BERKELEY
State	California
Email address	sbundy@berkeley.edu
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	New Comment [6] is a mistake and should be deleted or modified. See attached letter.
Attachment	Bundy_Letter_to_Commission_Rule_5.1_1-9-17.pdf (51k)
Attachment	
Attachment	
Date	
File :	
Submitted via:	

January 9, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers (Revised
Version Adopted October 21-22, 2016)

Dear Justice Edmon:

I appreciate the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

I agree with most of proposed Rule 5.1, including most of the changes approved by the Commission on October 21-22.

I believe, however, that new Comment [6] is a mistake and should be eliminated or revised.

Borrowing from Rule 5.2, the Comment states that a lawyer will not be in violation of paragraph (c) (1) of the rule if the “lawyer’s decision to ratify a course of conduct is a reasonable resolution of an arguable question of professional duty.”

This Comment is inconsistent with Supreme Court’s direction to avoid law making by Comment. The parallel language in Rule 5.2 is part of the Rule. If it is to be adopted as part of Rule 5.1, it should also adopted as part of the Rule. It is also inconsistent with national practice, since as I understand it, no other state has limited the concept of ratification in this way.

Most important, the Comment is bad policy. In this context, ratification is the adoption of the past or ongoing act of an agent (for example, a partner or associate) as one’s own. Since paragraph (c) (1) only applies if ratification occurs with “knowledge of the relevant facts and specific conduct,” the Comment necessarily implies that there are circumstances where a lawyer who makes a fully informed decision to adopt as her own (rather than overrule or correct) her agent’s violation of the rule has not herself violated the rule.

The transplantation of the unique safe harbor provision of Rule 5.2 into the context of ratification by a principal is a mistake. The former provision reflects the pragmatic realities of practice in a hierarchical organization, including the need for a final decision and the junior lawyer’s lesser



experience and limited power. At the same time, it is a basic assumption of Rule 5.2 that the supervising lawyer *is* in violation of the Rule, regardless of whether his conclusion that he is not in violation is reasonable.

A supervising lawyer who ratifies an agent's violation of an ethical rule with "knowledge of the relevant facts and specific conduct" is much more like the superior who gives an unethical order than the subordinate who follows it. She does not need to defer to the agent on the basis that she does not know all the facts, because the rule's concept of ratification assumes she knows the facts. She does not need to defer because of the agent's presumed superior experience and judgment—instead, the presumption is in favor of her (correct) decision that the conduct is unethical. Finally, she does not run any professional risk by substituting her decision for that of her agent. For all these reasons, the rules should not provide the superior with an excuse for adopting or continuing the agent's violation, but should encourage the lawyer to reject or correct it. The proposed Comment thus grants a safe harbor where none of the reasons for allowing it in Rule 5.2 are present, while creating the wrong incentive effect.

I have heard Comment [6] defended on the ground that it simply reflects the reality that the disciplinary authorities will never proceed against a lawyer whose violation of an ethical rule reflects a reasonable resolution of an arguable question of professional duty. If true, however, this argument proves too much, since it would justify creating an explicit safe harbor under every rule for reasonable resolutions of arguable questions. That in turn lays bare the obvious dangers of confusion and of disincentives for full compliance to which such safe harbors give rise. Further, if the defenders are right, there is no need for the Comment, because prosecutorial discretion can be relied upon to prevent enforcement in the cases to which the Comment is directed.

I understand that the Comment was adopted because of a concern that it might lead to the discipline of lawyers giving ethical advice. This concern is unfounded. It is a basic principle of legal ethics that giving another lawyer ethical advice about past or proposed conduct is not the same as adopting that conduct as one's own. If there is some concern that the concept of ratification will be extended to giving legal advice, it would be more effectively addressed with a comment stating that advising whether another lawyer's conduct complies with professional rules, standing alone, does not constitute ratification of that conduct within the meaning of section (c)(1) of the Rule. This would eliminate any unfair risk to ethics advisors, while ensuring that managerial and supervisory lawyers who make a fully informed decision to ratify their agent's conduct in violation of the rules remain fully responsible for their conduct in doing so.

Thank you for your consideration of these comments.

Very truly yours,

s/Stephen Bundy

Stephen McG. Bundy
Professor of Law, Emeritus

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	California Advocates for Nursing Home Reform (CANHR)
Commenting on behalf of an organization	Yes
Name	Anthony Chicotel
City	San Francisco
State	California
Email address	tony@canhr.org
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.14 Client with Diminished Capacity
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

California Advocates for Nursing Home Reform (CANHR) continues to oppose the adoption of proposed rule 1.14.

A client's contemporaneous consent to the revelation of otherwise confidential information in an effort to assist or protect the client IS ALREADY PERMITTED UNDER THE CURRENT ETHICAL RULES. Only mischief can come from re-stating the obvious: clients can consent to waive the confidentiality of their information. Restating this in an ethical rule regarding clients with "diminished capacity" invites attorneys to treat clients with cognitive disabilities differently regarding the confidentiality of their information than clients without such a disability.

The RRC response to our initial comments on this issue indicates a misunderstanding of our comments. We are not suggesting that attorneys ever "walk away from" a client with a cognitive disability who refuses to consent to the revelation of confidential information. There are myriad ways to represent or help clients who disagree with their attorney's advice.

Regarding the proposed rule permitting advance consent to take protective action, we disagree that the RRC-cited client protections (revocability, attorney ethical prohibitions, and requiring a separate writing) are enough to ensure that clients are giving truly informed consent to advance confidentiality waivers.

Attorneys who obtain advance consent are not required to tell the client when confidential information is actually going to be revealed, thus giving the client no opportunity to make a relevant revocation. Additionally, if an attorney has determined the client has lost capacity to act in the client's own interest, the attorney seems free to ignore a revocation of advance consent for lack of capacity to do so. If the client has been determined to lack capacity to give consent to protective action, they could also be determined to lack capacity to revoke an advance consent.

Therefore, we STRONGLY RECOMMEND the advance consent provisions include a requirement that clients be told of the attorney's intent to reveal confidential information IN ADVANCE of the revelation - to give the client a meaningful opportunity to revoke the consent. Additionally, the rule should be made clear that clients maintain the power to revoke an advance consent at any time, regardless of the attorney's opinion of their capacity, unless the client has been court-adjudicated incompetent to make such a revocation.

Without these important changes, a client's right to revoke an advance waiver is meaningless. We doubt any clients, after having given advance consent, would ever consider the matter again or contemplate a revocation unless they learned the advance consent was going to be used at some point.

We also disagree that requiring the advance

	<p>consent to be on a separate writing will do anything to ensure clients are more "informed" before they sign. For years, nursing homes (one of CANHR's substantive area of expertise) have been required to present pre-dispute arbitration agreements to residents in a separate writing and for years, that requirement has not made one whit of difference in making residents think twice about signing them despite the fact they don't offer a single benefit to the resident. The reason the residents sign these agreements, despite dozens of reasons not to, is because they think they are supposed to. We are certain that, as with nursing home residents, clients seeking legal services will blindly sign esoteric advance consents whether they are contained in the middle of a page or on a separate page.</p> <p>We urge the Board to drop Rule 1.14 and allow clients with cognitive impairments to enjoy the same protections of their confidential information as any other client.</p> <p>Sincerely,</p> <p>Anthony Chicotel Staff Attorney</p>
Attachment	
Attachment	
Attachment	
Date	
File :	
Submitted via:	

September 27, 2016

**Comment on Proposed Rule # 1.14
Client with Diminished Capacity**

**We need a rule on dealing with clients who have diminished capacity.
The proposed rule creates more problems than it solves. Existing ABA
Rule 1.14 is a much better rule.**

Proposed Rule 1.14(b)(1) leaves unclear, what an attorney is supposed to do in a criminal case; and is contrary to long standing case law on an attorney's duties in dependency cases.

Penal Code 1368(b) recites, "If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369...." It is unclear if proposed Rule 1.14 intends that the Penal Code supersedes the proposed rule, or if the proposed rule attempts to circumvent the Penal Code.

In *In Re Sara D* (2001) 87 Cal App 4th 661, 667, the court stated that an attorney should first seek consent from the adult parent to appoint a guardian ad litem for that parent. But the parent does not give consent, the attorney should inform the court that the client lacks legal mental capacity, and the court should appoint a guardian ad litem. *Sara D* was cited with approval in *In Re Jessica G* (2001) 93 Cal App 4th 1180. Thus, the proposed rule would purport to overrule case law.

Proposed Rule 1.14(b)(2) recites a false premise: "Information relating to the client's diminished capacity is protected by Business and Professions Code §6068(e)(1) and Rule 1.6." The primary vice in this statement is that often the information is already known to people attempting to take advantage of the client. If the attorney cannot refer to the information, the fraudfeasor has the upper hand. This section creates a conclusive presumption and should be deleted.

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September 27, 2016

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Proposed Rule 1.14(c)(ii) creates a standard that requires the attorney to obtain consent from a client who is legally incapable of providing consent. The crux of the problem is, what does an attorney do in such a situation?

Proposed Rule 1.14(e) assumes that in all cases, a conservatorship is adverse to the client. In fact, in many cases the conservatorship is the precise legal method to protect the client, since the conservatee lacks legal capacity to make a contract. Prob C. 1872(b).

There is no present statute, rule, or case that gives guidance on what an attorney can do when the client appears to be lacking in legal mental capacity. Most existing ethics opinions summarily conclude that any mention of the problem to anyone other than the client violates confidentiality. They assume that protective action is adverse to the client. Both assumptions are false and leave the attorney with no option other than to withdraw and leave the client defenseless.

The power to take protective action is subject to abuse, as are many other attorney actions. In this field, the abuse is tempered when court intervention is required.

The problem is real. The sort of problems that my attorney clients have brought to me include such issues as

- (1) Children are dividing up parent's estate while parent is living with one of the children
- (2) Fraudfeasor seeks investment in risky venture from a person who is addicted to drugs
- (3) Friend of nursing home patient has rented out her home below market, and is permitting her car to be driven without insurance.
- (4) Bedridden client has asked attorney to manage her finances
- (5) Out of state relative seeks to impose conservatorship on grandparent, who prefers next door neighbor
- (6) Son has obtained conservatorship of parent, then takes over parent's residence while moving parent to nursing home

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(7) Son sues father and stepmother for fraud after father makes stepmother a beneficiary of father's trust

(8) Elderly person makes radical change in estate plan: Consider these scenarios

(a) Testator asks attorney of many decades to make the changes; or

(b) Testator comes to new attorney's office by appointment; or

(c) Testator shows up in new attorney's office with a new "friend."

The point of the foregoing list is to show that there are a myriad of difficult factual and legal issues that can arise. The ABA Rule leaves flexibility, while the proposed new rule is unworkable.

In the Third Edition of "Guide to the California Rules of Professional Conduct for Estate Planning, Trust, and Probate Counsel," §7.5, the Section asks for legislation that would not permit a petition for conservatorship but would permit the attorney to contact "individuals or entities that have the ability to take action to protect the client." That could be a spouse or other relative, the Public Administrator – somebody, rather than abandoning the client. The earlier editions of the Guide have similar asked for legislation.

The Restatement of the Law - The Law Governing Attorneys (3rd ed), the American Law Institute recites at §24(4) that an attorney may take protective action that "will advance the client's objectives" when the client has diminished capacity.

I propose that the Board recommend the existing ABA Rule in lieu of this proposed rule. Otherwise, I propose that that this proposed Rule be withdrawn.

I have been an attorney for 45 years. For the past 25 years, I have specialized in advising attorneys on professional responsibility matters. Attorneys who have clients with diminished capacity – or appear to be totally without legal mental capacity – consult me on a regular basis. I have come to believe that some sort of flexibility is needed. I am not aware of widespread problems in ABA states that would indicate a need to use a different version of current ABA Rule 1.14.

Jerome Fishkin

From: Lamport, Stanley W. [mailto:slamport@coxcastle.com]
Sent: Monday, January 09, 2017 4:55 PM
To: Hollins, Audrey
Cc: McCurdy, Lauren; Difuntorum, Randall
Subject: Comment on Proposed Rule 1.7

Dear Audrey:

I could not seem to get the formatting right on the web page, so I am directing my comments to you. This is the first of three comments that I am submitting on my own behalf. This comment concerns proposed Rule 1.7

A. Paragraph (c) Should Be Removed from Proposed Rule 1.7

Paragraph (c) should not be in a conflicts of interest rule. Proposed Paragraph (c) requires written disclosure of a relationship with or responsibility to a party, a witness or with another party's lawyer, even when a significant risk that would require disclosure and consent under paragraph (b) is not present. In other words, this proposed Rule would require written disclosure in circumstances that do not present a conflict of interest.

Generally speaking, a conflict of interest is a situation that interferes with a lawyer's ability to perform the basic duties in a lawyer-client relationship. In the words of paragraph (b), a conflict of interest exists if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another.

Paragraph (c) applies in circumstances where there is no such risk. It is not a conflict of interest rule. It is a duty to inform issue, which should be subject to rules governing the duty to inform – a duty to reasonably inform a client about significant developments related to the representation.

There is no reason for the State Bar to discipline a lawyer for failing to disclose a relationship that does not affect the representation, unless the existence of the relationship is a significant development. This is true with respect to both subparts (1) and (2).

The conflict issue with respect to subpart (1) is already addressed in paragraph (b). The conflict issue with respect to a relationship with another party's lawyer in subpart (2) should also be addressed in the context of paragraph (b), to the extent it is not already encompassed within the concept of a lawyer's own interests in paragraph (b).

B. The Last Sentence in Comment [4] Should Be Limited to Paragraph (a)

Comment [4] attempts to carry over the Discussion in current rule 3-310, which makes Rule 3-310(C)(3) inapplicable when a lawyer represents an insurer in connection with defending an insured and accepts a representation that is adverse to another insured defended by the same insurer. Rule 3-310(C)(3) is wholly encompassed by proposed Rule 1.7(a), which applies to representations that are directly adverse to another client in the same or a separate matter.

The import of the Discussion in the current rule is that the prohibition on accepting a representation that is directly adverse to an existing client does not apply when the client is an insurer that the lawyer only represents in connection with defending an insured and the adversity is based on a claim against another insured defended by the same insurer. The Discussion was added in response to the holding in *State Farm*, which only concerns the conflict addressed in paragraph (a).

The Discussion in current Rule 3-310 does not apply to paragraph (b). Paragraph (b) applies if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another or by the lawyer's own interests. Paragraph (b) has nothing to do with the Comment. Furthermore, paragraph (b) involves conflicts that affect a lawyer's competence in representing the insured and insurer, which is beyond the scope of the issue that was addressed in the Discussion in the current rule. There is no justification for exempting lawyers from conflicts that affect the competent representation of insurer and insured.

STAN

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From: Lamport, Stanley W. [mailto:slamport@coxcastle.com]
Sent: Monday, January 09, 2017 5:31 PM
To: Marlaud, Angela; Hollins, Audrey
Cc: McCurdy, Lauren; Difuntorum, Randall
Subject: Comment on Proposed Rule 1.9

Dear Audrey:

The following is my comment on proposed Rule 1.9, which I submit on my own behalf.

A. Paragraph (a) Should Be Revised to State the Language in Rule 3-310(E)

The version of this Rule that was previously circulated for public comment retained the language in current Rule 3-310(E) in paragraph (c)(1). Following public comment, the language from current Rule 3-310(E) was removed from paragraph (c)(1), and paragraph (a)(1) was retained. The language in current Rule 3-310(E) should be retained and should replace the language in paragraph (a).

Rule 3-310(E) eloquently and correctly states the duty. It focuses on whether the employment is adverse, which concerns whether the use of confidential information is contrary to the former client's interests. (See *David Welch Co. v. Erskine & Tulley* (1988)203 Cal.App.3d 884, 891, disapproved on other grounds in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.) It also focuses on the materiality of the information, which concerns whether the former client's confidential information potentially could be used in the new matter. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.)

In practical terms, current rule 3-310(E) means that a lawyer cannot accept a representation in circumstances where the lawyer could potentially use or disclose the former client's confidential information in a manner that would be *contrary to the former client's interests*.

Proposed paragraph (a) ties adversity to the interests of the lawyer's current client, not the former client. The language reflects the ABA perspective, which is less protective of client confidential information than is expressed in Business & Professions Code §6068(e)(1) and Rule 3-100. ***Under the Model Rule language, which the Commission is proposing in paragraph (a), if the current client's interests are not "materially adverse" to the former client, there is no requirement to obtain the former client's consent under (a) in the Proposed Rule even if the two matters are "substantially related."***

A former client, who does not want confidential information used or disclosed in the lawyer's representation of the former client's foe, may be just as reluctant to have that information used or disclosed in the lawyer's representation of the former client's friend. The interests that matter under this rule are the former client's interests in confidentiality, not the interests of the lawyer's new client. The rule should be instructing the profession to view protection of a former client's interests in confidentiality from the former client's perspective, and not from the perspective of the lawyer's new client.

This is a rule that is frequently litigated, particularly in disqualification motions. No California court has ever considered the difference between the emphasis in Rule 3-310(E) on a

representation's adversity to a former client and the emphasis in Model Rule 1.9(a) on the interests of a new client being materially adverse to the former client. Limiting the inquiry in paragraph (a) in the Proposed Rule to circumstances where the new client's interests are materially adverse to the former client invites litigation over whether a lawyer does not have to obtain a former client's consent where the new client's interests are not "materially adverse" (as well as litigation over the meaning of "materially adverse interests"). It sends the wrong message about the duty of confidentiality.

Replacing the language in paragraph (a) with the language in Rule 3-310(E) resolves the foregoing concerns. If the Commission is not going to retain the current Rule 3-310(E) language, then there should be a Comment which makes clear that the difference in the language between the current rule and the proposed rule is not a substantive change.

In this regard, Comment [3] could be revised to state:

For purposes of this Rule, the representation of another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client occurs when there is a substantial risk of a violation of one of the two duties to a former client described above in Comment [1]. Two matters are "the same or substantially related" for purposes of this Rule if: (i) the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code §6068(e) and Rule 1.6. The person's interests are materially adverse to the interest of the former client if the lawyer's representation of the person creates a substantial risk that the lawyer either (i) would do anything in the representation of the person that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) use or reveal information protected by Rule 1.6 and Business and Professions Code section 6068(e) in the representation of the person.

However, the fact that it is necessary to include such a comment underscores that the language in Rule 3-310(E) is a superior formulation and should be retained. Comment [3] is only necessary to assure that Model Rule 1.9(a) does not conflict with the well developed body of California law based on Rule 3-310(E).

B. Paragraph (c)(1) & (2) Should Be Revised.

Rule 1.9(c) should be revised to clarify that a lawyer is required to comply with Rule 1.9(c) with respect to information acquired by the lawyer's former law firm when the lawyer acquired the information when associated with that former law firm. This concept is in paragraph (b), which relates specifically to representational conflicts governed by paragraph (a). The language in paragraph (b) does not relate to the language in paragraph (c); but it should.

As currently drafted paragraph (c) states:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code §6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former

client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known.;

(2) reveal information protected by Business and Professions Code §6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client. (Emphasis added.)

Paragraph (c) refers to three representations of a former client: (i) the lawyer's representation, (ii) the lawyer's present firm's representation, and (iii) the lawyer's former firm's representation. The reference to "acquired by virtue of the representation" in subparts (1) and (2) refers to all three representations.

While paragraph (c) makes sense with respect to the first two categories of representation, it does not make sense with respect to the third category. Under paragraph (c), a lawyer would be prohibited from using or revealing confidential information acquired by the lawyer's former firm, even if the lawyer did not acquire the confidential information while practicing in the former firm. The result is inconsistent with paragraph (b) and California law, which recognizes that a lawyer only has duties with respect to information the lawyer acquired in the lawyer's former firm.

Accordingly, the concept in paragraph (b) needs to also be in paragraph (c). This is important because, as revised, paragraph (c) now exclusively addresses a lawyer's use and revelation of confidential information in non-representational circumstances. Paragraphs (a) and (b) both concern representational conflicts of interest (where a lawyer accepts a representation of a person in the same or substantially related matter).

However, paragraph (c) extends to non-representational use and revelation of confidential information. California courts have held that current Rule 3-310(E) extends to non-representational "employment" adverse to a former client, where the lawyer uses or reveals confidential information of a former client in circumstances where the lawyer is not representing another client. (See *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884 [lawyer's use of confidential information in setting up competing debt collection business]; *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139 [law firm's use of confidential information to acquire property].)

Paragraph (b) does not cover these non-representational situations. There needs to be language in paragraph (c) stating that with respect to information acquired by a lawyer's former firm, paragraph (c) applies only when the lawyer acquired such information while employed at that firm.

Regards,

STAN

Stanley W. Lamport



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From: Lamport, Stanley W. [mailto:slamport@coxcastle.com]
Sent: Monday, January 09, 2017 4:58 PM
To: Hollins, Audrey; Marlaud, Angela
Cc: McCurdy, Lauren; Difuntorum, Randall
Subject: Comment on Proposed Rule 1.18

Dear Audrey:

The following is my comment on proposed Rule 1.18, which I submit on my own behalf.

The screening provisions in Proposed Rule 1.18(d)(2) should be removed from the rule. Proposed Rule 1.18(d)(2) would allow a firm which possesses a prospective client's confidential information to nevertheless represent a client in a matter where that information is material when there is a unconsented screen. While the Commission has attempted to limit unconsented screening to situations where the tainted lawyer took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client, unconsented screening is still problematic in those circumstances.

The proposed rule still allows a law firm in possession of a prospective client's confidential information to represent a person in a matter in which that information would be material. If the terminology means that the lawyer in question did not receive material confidential information, there would be no reason for a screen. A screen is used to rebut the presumption that confidential information within the firm is being shared. If the lawyer did not acquire material confidential information, there would be nothing to rebut. For the rule to have any effect the limiting language would need to encompass circumstances where the lawyer in question was privy to the prospective client's confidential information.

The fact that the lawyer attempted to limit the amount of confidential information obtained from a prospective client is not going to matter to the prospective client if the lawyer still obtained material confidential information in determining whether to accept the engagement. The information is still in the firm's hands and the prospective client must still accept an unconsented screen over which the prospective client has no effective means of oversight.

There is no compelling need for unconsented screening in this proposed Rule. California courts have been able to discern when communications with a prospective client do not warrant disqualification because no material confidential information was transmitted. (*See e.g. In re Marriage of Zimmerman* (1993) 16 Cal.App.4th 556.) California courts have also recognized that disqualification is warranted when a law firm has obtained material confidential information from a prospective client. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135.) There is no reason, through the use of an unconsented screen, to undermine the protection of a prospective client's ability to communicate with a lawyer without fear of consequence.

The fundamental problem with unconsented screening is that the prospective client cannot object to the screen and has no way to verify that the prospective client's confidential information is not available to the lawyers representing the prospective client's current adversary.

The duty of confidentiality exists to assure that anyone can discuss with a lawyer how the law applies to the client's most intimate problem without fear of consequence. This duty also exists because effective representation depends on open communication between lawyer and client. (*City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 235 ["Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading."].)

California law presumes that confidential information possessed by one lawyer in a law firm is shared by all other lawyers in the firm. This presumption exists because a prospective client has no means to assure that information in the possession of a firm representing the prospective client's adversary will not be shared and used or disclosed against the prospective client's interests. As the Court of Appeal stated in *Adams v. Aerojet General* (2001) 86 Cal.App.4th 1324 in adopting Cal. State Bar Formal Opn. 1998-152:

The vicarious disqualification rule has been established as a prophylactic device to protect the sanctity of former client confidences where a law firm with a member attorney who has acquired knowledge of confidential information material to the current controversy would otherwise be permitted to represent the former client's adversary. ***"No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. . . . No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent."*** (*Cho v. Superior Court* (1995) 39 Cal. App. 4th 113, 125 [45 Cal. Rptr. 2d 863], fn. omitted.) As the State Bar Committee observes: "the absence of an effective means of oversight combined with the law firm's interest as an advocate for the current client in the adverse representation are factors that tend to undermine a former client's trust, and in turn the public's trust, in a legal system that would permit such a situation to exist without the former client's consent." (Formal Opn. No. 1998-152, supra, at p. IIA-418.) (Emphasis added.)

Screening without client consent does not protect clients or prospective clients because it cannot be verified by a client. A prospective client who has not expressed confidence in a screen by consenting to it should not be forced to accept screening by fiat. A prospective client, who has shared confidential information with a lawyer, would justifiably feel a sense of betrayal to learn that information, the prospective client expected would be held in confidence, is in the possession of a law firm representing the prospective client's adversary in a situation where that information could benefit that adversary.

Limiting the rule to circumstances where the tainted lawyer took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client does not solve the problem.

Regards,

STAN

Stanley W. Lamport



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January 2, 2017

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 EMAIL c/o Lauren.McCurdy@calbar.ca.gov

Re: Comment on proposed Rule of Professional Conduct 1.7(b)

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 54 of the 55 ethics professors who signed the September 21, 2016 letter that, among other things, addressed Rule 1.7, and specifically Rule 1.7(b). (A single signatory of that letter did not agree with this position, and he is thus not part of this letter.)

When we submitted our letter in September, our approval and support of Rule 1.7 was predicated on the then-existing draft, which included a list of items under subsection (b) – similar to the list currently in Rule 3-310(B) – that required informed written consent. That draft proposal was subsequently changed to eliminate the list that we approved of in our letter. This list, extremely valuable, has been replaced by vaguer language as to what matters require informed written mistake.

We adhere to our last comment, supporting approval of the prior draft that set forth Rule 1.7(b) (1)-(5) with specificity. To review this in more detail, the text of subsection (b) we approved read as follows:

- (b) A lawyer shall not, without informed written consent* from each affected client, represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or the lawyer's own interests, including when:
 - (1) the lawyer has, or knows* that another lawyer in the lawyer's firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or
 - (2) the lawyer:
 - (i) knows* the lawyer previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

- (ii) knows* or reasonably should know* the previous relationship will materially limit the lawyer's representation; or
- (3) the lawyer has or had a legal, business, financial, professional, or personal relationship with another person* or entity the lawyer knows* or reasonably should know* will be affected substantially by resolution of the matter; or
- (4) the lawyer has or had, or knows* that another lawyer in the lawyer's firm* has or had, a legal, business, financial, or personal interest in the subject matter of the representation that the lawyer knows* or reasonably should know* will materially limit the lawyer's representation; or
- (5) the lawyer knows* or reasonably should know* that there is a reasonable* likelihood that the interests of clients being represented by the lawyer in the same matter will conflict.

In commenting on this rule draft, we applauded 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...." We noted that "[t]hese changes are a major and important step in the protection of client rights. In particular, ... subsection (b) now requires informed written consent."

We also had in mind the specific subsections of Rule 1.7(b). For instance, we commented specifically on a suggested revision to section 1.7(b)(3):

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.

Thus, in our support, we were both cognizant and evaluative of the specific subsections of Rule 1.7(b).

In October that draft was retrenched, and now contains only a general statement:

- b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer's own interests.

This language is far less protective of the rights of clients than the previous draft. On first glance, the revised language more closely tracks ABA Model Rule 1.7(a)(2). However, upon closer scrutiny this revised language adversely affects client loyalty in two ways. First, the ABA comments make clear that the "material limitation" test is objective. That is no longer true in the California draft.

Paragraph (b) now references "compliance with paragraph (d)," and paragraph (d) uses a subjective test (representation permitted if "the lawyer reasonably believes that the lawyer will be

able to provide competent and diligent representation” – our emphasis). That language would vitiate the objective standard required in ABA MR 1.7(a)(2), and in the former draft we approved.

Second and perhaps more significant, the most important specific language of subsection (b) has now been removed from the rule and relegated to a comment, paragraph 5. This language – “materially limited [by] the lawyer’s other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal” – thus again merely requires disclosure and not consent under Comment paragraph 5. This vitiates the thrust of the informed consent requirement in section (b) and is a serious retrenchment as to client protection. (We also note that it also appears to legislate in a comment, something the Supreme Court has asked not to occur.)

The subsection (b) list has a long history in California rule-making. When the 1989 rules were approved, creating the current rule format, subsection (b), with its list of situations, required informed written consent. Then in 1992, a less client-protective modification was passed requiring only disclosure. After considerable discussion, this Commission moved back, properly so, to requiring consent. But this most recent revision essentially returns to the ill-advised 1992 version of the rules that this Commission had previously taken pains to modify.

We approved of proposed rule 1.7(b) – except as to our note regarding use of the word “resolution,” as noted above – with the protections offered under the then-current draft containing the specifics in a list of five subparagraphs, each requiring informed written consent. We urge the Commission to return to that draft for its final proposal.

Thank you for the opportunity to comment on this rule.

Respectfully submitted,

Geoffrey C. Hazard

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Executive Director (1984-1999) of the American Law Institute
Reporter for the American Bar Association Model Rules of Professional Conduct (1983)*

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RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	League of California Cities
Commenting on behalf of an organization	Yes
Name	Alison Leary
City	Sacramento
State	California
Email address	aleary@cacities.org
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>To Whom It May Concern:</p> <p>The League wishes to reiterate the sentiments expressed in its comment letter dated September 27, 2016, which the League submitted during the first public comment period. Please find the letter attached.</p> <p>Please do not hesitate to contact me with any questions or to discuss this matter further.</p> <p>Sincerely,</p> <p>Alison Leary Deputy General Counsel League of California Cities® 1400 K Street, Ste 400 Sacramento, CA 95814 (916) 658-8266 (office)</p>
Attachment	Comments_Re_Rev_of_Rule_1.11.pdf (202k)
Attachment	
Attachment	
Date	12/15/2016
File :	League of California Cities (Leary) Y-2016-4-[1.11]-FS
Submitted via:	Online



1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
www.cacities.org

September 27, 2016

VIA ONLINE PUBLIC COMMENT FORM

Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Re: Proposed Rule 1.11: Special Conflicts of Interest for Former and Current Government Officials and Employees

To Whom It May Concern:

I write in support of Proposed Rule 1.11 on behalf of the City Attorneys' Department of the League of California Cities ("League"), an association of 475 California cities united in promoting the general welfare of California cities and their citizens. Proposed Rule 1.11 establishes specific conflict of interest rules for former and current government attorneys. Because this rule provides clear and necessary guidance to both former and current government lawyers regarding their professional duties, the League fully supports its adoption by the California State Bar's Board of Trustees ("Board"). However, the League urges the Board to modify Proposed Rule 1.11 by substituting "public officer" for "public official." This modification would clarify the scope of the rule, by utilizing terminology that is already well defined in California public agency law, as explained at length in the League's comments to Proposed Rule 4.2.

Thank you for the opportunity to comment on Proposed Rule 1.11. Please do not hesitate to contact the League with any questions or to discuss this matter further.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alison Leary".

Alison Leary
Deputy General Counsel
League of California Cities

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	League of California Cities
Commenting on behalf of an organization	Yes
Name	Alison Leary
City	Sacramento
State	California
Email address	aleary@cacities.org
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 4.2 [2-100] Communication with a Represented Person
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>To Whom It May Concern:</p> <p>The League wishes to reiterate the sentiments expressed in its comment letter dated September 27, 2016, which the League submitted during the first public comment period. Please find the letter attached.</p> <p>Please do not hesitate to contact me with any questions or to discuss this matter further.</p> <p>Sincerely,</p> <p>Alison Leary Deputy General Counsel League of California Cities® 1400 K Street, Ste 400 Sacramento, CA 95814 (916) 658-8266 (office)</p>
Attachment	League_Comments_Re_Rev_of_Rule_4.2.pdf (284k)
Attachment	
Attachment	
Date	12/15/2016
File :	League of California Cities (Leary) Y-2016-3-[1.15]-FS
Submitted via:	Online



1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
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September 27, 2016

VIA ONLINE PUBLIC COMMENT FORM

Office of Professional Competence, Planning, and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Re: Proposed Rule 4.2: Communication with a Represented Person

To Whom It May Concern:

I write on behalf of the City Attorneys' Department of the League of California Cities ("League"), an association of 475 California cities united in promoting the general welfare of cities and their citizens, regarding Proposed Rule 4.2. The League urges the California State Bar's Board of Trustees ("Board") to modify Proposed Rule 4.2 by substituting "Public Officer" for "Public Official" and adopting the ABA's approach to an opposing counsel's contacts with Public Officers.

I. The League Urges the Board to Substitute "Public Officer" for "Public Official" in Proposed Rule 4.2, because "Public Officer" is Well Defined in California Public Agency Law and Its Use Will Clarify the Scope of Proposed Rule 4.2's Application.

While Proposed Rule 4.2 rightly attempts to define "public official," its reliance on an analogy to positions typically found in a private corporation, partnership, or association is inapt. Governmental organizations are unique in structure and, given the complexity and diversity of their hierarchies, identifying the public analog to a private "officer," "director," "partner," or "managing agent" is not an easy task. As such, the definition of "public official," as drafted, offers little guidance as to whom it applies. In order to enhance compliance, facilitate enforcement, and prevent needless litigation, the League urges the Board to use terminology that is already well defined in public agency law: "public officer."

Over many years, California courts and the California Attorney General's Office have issued opinions clarifying that a public officer is an individual who holds "(1) a position in government, (2) which is created or authorized by...law, (3) the tenure of which is continuing and permanent, not occasional or temporary, [and] (4) in which the [individual] performs a public function for public benefit and exercises some of the sovereign powers of the state." (74 Ops.Cal.Atty.Gen. 82, 83.) These opinions have analyzed a myriad of factual scenarios and outlined the scope of the term "public officer," as distinguished from "public employee," in great detail. (*Dibb v. County of San Diego* (1994) 8 Cal. 4th 1200 [holding that members of a County's Citizens Law Enforcement Review Board is a public officer]; *Neigel v. Superior Court* (1977) 72 Cal.App.3d 373 [finding that a city police officer is not a public officer]; *People ex re. Chapman v. Rapsey*

(1940) 16 Cal.2d 636, 640 [finding that a city attorney is a public officer]; *Patton v. Board of Health of City and County of San Francisco* (1899) 127 Cal. 388, 393-395 [finding that a health inspector of the city and county of San Francisco is a public officer]; *Bennett v. Superior Court of Placer County* (3d Dist. 1955) 131 Cal. App. 2d 841 [finding that a clerk of a judicial district court is a public officer]; 74 Ops.Cal.Atty.Gen. 142 (2004) [finding that a fire division chief is not a public officer]; 82 Ops.Cal.Atty.Gen. 83, 84 (1999) [finding a community development director is not a public officer]; 78 Ops.Cal.Atty.Gen. 362 (1995) [finding that a sheriff's deputy chief is not a public officer]; 68 Ops.Cal.Atty.Gen. 337 (1985) [finding that a fire captain is not a public officer].)

Given their breadth and resulting clarity, the above cited opinions should constitute persuasive authority in determining whether a given person is a Public Officer under Proposed Rule 4.2. Thus, the League urges the board to substitute the term “public officer” for “public official,” and to either define “public officer” as “an individual who holds a position in government, that is created or authorized by law, the tenure of which is continuing and permanent, and in which the individual performs a public function for public benefit and exercises some of the sovereign powers of the state,” or to reference the well-developed body of law in a comment to the rule.

II. The League Urges the Board to Adopt the American Bar Association’s (“ABA”) Approach to an Opposing Counsel’s Contacts with Public Officers, as Outlined in ABA Formal Ethics Opinion 97-408, in Lieu of Proposed Rule 4.2’s Wholesale Exception.

The rationale behind the no-contact rule, as set forth in Proposed Rule 4.2, is that “the legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.” (ABA Formal Opinion 95-396.) Thus, the no-contact rule “provides protection of the represented person against overreaching by adverse counsel, safeguards the client-lawyer relationship from interference by adverse counsel, and reduces the likelihood that clients will disclose privileged or other information that might harm their interests.” (*Id.*)

Of course, these interests must not supersede the constitutional right to petition the government for redress of grievances and the related public interest in open access to government. (U.S. Const., 1st Amend.; Cal. Const. Art. 1, § 3.) “Government lawyers should not be able to block all access to government officials to the point of interfering with the right to petition for redress.” (City of N.Y., Comm. on Professional Ethics Op. 1991-4 (1991).) However, a wholesale exception to the no-contact rule for opposing counsel’s contacts with public officers—as currently provided for in Proposed Rule 4.2(c)—is problematic for several reasons:

1. The exception is overly broad, such that a lawyer for a private party may abuse the exception by conducting a factual inquiry for use against the government in litigation—communication not protected by the constitutional right to petition the government or the derivative public policy of open access to government;
2. “Public officers may not know exactly what cases are pending against them, the status of those cases, the consequences of those cases, or the consequences their statements

may have in those cases” (City of N.Y., Comm. on Professional Ethics Op. 1991-4 (1991)); and

3. Unregulated communications with certain public officers might subject those public officers to liability under the Brown Act, which provides that “[a] majority of members of a legislative body shall not, outside a meeting...use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.” (Cal. Gov. Code § 54952.2(b)(1).)

In order to “accommodat[e] the tension between a citizen’s right of access and the government’s right to be protected from uncounseled communications by an opposing party’s lawyer,” the ABA subjects all unconsented contacts with government officials to three important conditions: (1) “the government official to be contacted must have authority to take or recommend action in the controversy;” (2) “the sole purpose of the communication must be to address a policy issue, including settling the controversy;” and (3) “the lawyer of the private party must give government counsel notice that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entering into the communication.” (ABA Formal Opinion 97-408). Thus, notwithstanding ABA Model Rule 4.2’s exception for communications with government officers, “in situations where the right to petition has no apparent applicability, either because it is not the sole purpose of the contact to address a policy issue or because the government officials with whom the lawyer wishes to communicate are not authorized to take or recommend action in the matter, Rule 4.2 [is] considered fully applicable.” (*Id.*)

This approach appropriately balances the constitutional right to petition government, while protecting public entities from the substantial disadvantage that may follow when opposing counsel have free rein to communicate with public officers. Therefore, the League urges the Board to amend Rule 4.2(c) to reflect these caveats to the exception for opposing counsel’s communications with public clients.

Conclusion

Proposed Rule 4.2’s wholesale exception to opposing counsel’s contacts with public officers is overly broad and its application vague. The League urges the Board to:

1. Substitute the term “public officer” for “public official”;
2. Either define “public officer” as “an individual who holds a position in government that is created or authorized by law, the tenure of which is continuing and permanent, not occasional or temporary, and in which the individual performs a public function for the public benefit and exercises some of the sovereign powers of the government,” or reference the existing body of law distinguishing between public officers and public employees in a comment to Rule 4.2; and
3. Modify Rule 4.2’s exception to communications with public clients such that it conforms to the ABA approach, under which: (1) opposing counsel must provide the government attorney with reasonable advance notice of any attempt to communicate with a public client; (2) the communication must be directed to an individual who has

authority to take or recommend action in the matter; and (3) the sole purpose of such communication must be to address a policy issue, including potential settlement.

Thank you for the opportunity to comment on Proposed Rule 4.2. Please do not hesitate to contact the League with any questions or to discuss this matter further.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alison Leary".

Alison Leary
Deputy General Counsel
League of California Cities

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Los Angeles County Bar Association
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Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.8.1 [3-300] Business Transactions with a Client and Pecuniary Interests Adverse to the Client
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Current Rule 3-300(A) states that: "The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client." Model Rule 1.8(a)(1) similarly states that "the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client."

Proposed Rule 1.8.1(a) departs from both rules by requiring the lawyer, who is subject to the rule, to make the disclosure and transmit the terms of the transaction to the client. The Committee believes that the current wording of Rule 3-300(A) should be retained, by making the following changes to paragraph (a) of Proposed Rule 1.8.1:

"The transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client." The disclosure obligation under the current rule is not limited to merely providing the terms to the client in writing. It includes providing the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. (*Beery v. State Bar* (1987) 43 Cal.3d 802.)

Not every transaction or acquisition is proposed by the lawyer. There are many situations where the client proposes the terms and transmits those terms to the lawyer. In those scenarios the lawyer is not always in the best position to make the disclosure and is not always the person in the best position to transmit the terms. In scenarios where the client is proposing the terms, the client already may be represented by separate legal counsel who has prepared and discussed those terms with the client. In those circumstances, the client proposing the transaction may know more about the terms and may have received advice from separate counsel about the terms, that the lawyer, who is a party to the transaction, is no position to advise the client about. In such circumstances, it both impractical and unreasonable to expect the lawyer to advise the client as the rule contemplates.

The focus of both the current California rule and the Model Rule is whether the terms have been disclosed and transmitted to the client in writing. If that has occurred, it should not matter whether the lawyer fulfilled that function or independent counsel performed that function. The purpose is to assure that the client is fully informed, not to impose a burden on a lawyer no matter the circumstances. Where the lawyer proposes the terms, it inevitably will be that lawyer's responsibility to fully disclose those terms and transmit those terms to the client. But there are other scenarios where departing from both the California and Model Rule formulations will produce unreasonable results.

This rule is not just a disciplinary rule. It is frequently litigated, particularly in lawsuits where

	<p>a client seeks to void a transaction based on whether a lawyer has complied with the rule. As a result, lawyers and clients pay for this rule in court. Changing the standard as now proposed will inevitably result in litigation over the consequences of the change.</p> <p>Neither the current California Rule nor the ABA Model Rule formulation is broken. There is no reason to revise the rule to address only part of the range of scenarios where the rule will apply.</p>
Attachment	LACBA_1.8.1_Final_12-14-16.docx (55k)
Attachment	
Attachment	
Date	12/20/2016
File :	Los Angeles County Bar Association (Schmid) Y-2016-6a-[1.8.1]-FS
Submitted via:	Online

December 14, 2016

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Re: Proposed Rule of Professional Conduct 1.8.1 [3-300]
Business Transactions with a Client and Acquiring Interests
Adverse to the Client

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association ("PREC") appreciates the opportunity to comment on the draft rules of conduct (the "Proposed Rules") proposed by the State Bar's Commission for the Revision of the Rules of Professional Conduct (the "Rules Revision Commission").¹ We continue to be impressed by the tremendous efforts and accomplishments of the Rules Revision Commission, and we commend the Commission for its work product to date.

Current Rule 3-300(A) states that: "The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client." Model Rule 1.8(a)(1) similarly states that "the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client."

Proposed Rule 1.8.1(a) departs from both rules by requiring the lawyer, who is subject to the rule, to make the disclosure and transmit the terms of the transaction to the client. The Committee believes that the current wording of Rule 3-300(A) should be retained, by making the following changes to paragraph (a) of Proposed Rule 1.8.1:

¹ Please note that, as a matter of policy, the members of PREC who are also members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting on any comments to the Proposed Rules.

“The transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer’s role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client.”

The disclosure obligation under the current rule is not limited to merely providing the terms to the client in writing. It includes providing the client with the same advice regarding the transaction or acquisition that the lawyer would provide to the client in a transaction with a third party. (*Beery v. State Bar* (1987) 43 Cal.3d 802.)

Not every transaction or acquisition is proposed by the lawyer. There are many situations where the client proposes the terms and transmits those terms to the lawyer. In those scenarios the lawyer is not always in the best position to make the disclosure and is not always the person in the best position to transmit the terms. In scenarios where the client is proposing the terms, the client already may be represented by separate legal counsel who has prepared and discussed those terms with the client. In those circumstances, the client proposing the transaction may know more about the terms and may have received advice from separate counsel about the terms, that the lawyer, who is a party to the transaction, is no position to advise the client about. In such circumstances, it both impractical and unreasonable to expect the lawyer to advise the client as the rule contemplates.

The focus of both the current California rule and the Model Rule is whether the terms have been disclosed and transmitted to the client in writing. If that has occurred, it should not matter whether the lawyer fulfilled that function or independent counsel performed that function. The purpose is to assure that the client is fully informed, not to impose a burden on a lawyer no matter the circumstances. Where the lawyer proposes the terms, it inevitably will be that lawyer’s responsibility to fully disclose those terms and transmit those terms to the client. But there are other scenarios where departing from both the California and Model Rule formulations will produce unreasonable results.

This rule is not just a disciplinary rule. It is frequently litigated, particularly in lawsuits where a client seeks to void a transaction based on whether a lawyer has complied with the rule. As a result, lawyers and clients pay for this rule in court. Changing the standard as now proposed will inevitably result in litigation over the consequences of the change.

Neither the current California Rule nor the ABA Model Rule formulation is broken. There is no reason to revise the rule to address only part of the range of scenarios where the rule will apply.

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,

A handwritten signature in dark ink, appearing to read "Teresa J. Schmid", with a stylized flourish at the end.

Teresa J. Schmid
Chair, LACBA Professional Responsibility and
Ethics Committee

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Los Angeles County Bar Association
Commenting on behalf of an organization	Yes
Name	Teresa J. Schmid
City	Los Angeles
State	California
Email address	n7jxz@pacbell.net
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.8.10 [3-120] Sexual Relations with Current Client
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule

<p>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</p>	<p>For the reasons stated in our prior comment letter dated September 21, 2016, PREC continues to oppose the adoption of Proposed Rule 1.8.10 [Sexual Relations With Client] in its current revised form. While the proposed rule is consistent with the ABA Model Rule, it is much more restrictive than our current rule on sexual relations (Rule 3-120), and prohibits ALL sexual relations with clients, except for those that existed at the time the attorney-client relationship commenced (contrasted with our current rule, which essentially prohibits coercion, intimidation and undue influence in entering into sexual relations with a client).</p> <p>We appreciate the changes introduced in the latest revision of the proposed rule, which seeks to address concerns raised in public comments about the potential invasion of constitutional rights of privacy and freedom of association. New language in paragraph (a) applies the rule only to a “current” client “who is not the lawyer’s spouse or registered domestic partner.”</p> <p>We also note that new paragraph (c) was added to Proposed Rule 1.8.10 (to the effect that, if the complainant is someone other than the client, the State Bar must consider whether the client would be unduly burdened by a charge against the attorney). If the elements of coercion, intimidation, or undue influence were present in the relationship, then the client could be pressured to resist the filing of charges, thereby impairing disciplinary proceedings and frustrating public protection. Under current rule 3-120, there is no such constraint on investigation and prosecution; the issues presented by third-party complaints are addressed in Business and Professions Code 6106.9(3)(e), which requires that a complaint by any person alleging improper sexual relations between a lawyer and client be verified under oath.</p> <p>While the newly proposed language would narrow the scope of the rule’s applicability, it does not cure the constitutional defects that an absolute ban would raise as to the rights of both lawyers and clients. PREC believes that the rule should retain the language of current rule 3-120, which prohibits sexual relations based on coercion, undue influence or intimidation, not merely on just whether an attorney engages in sexual relations with a client with whom he or she was not already involved sexually at the time the representation commenced.</p>
Attachment	LACBA_1.8.10_Final_12-14-16.docx (57k)
Attachment	
Attachment	
Date	12/20/2016
File :	Los Angeles County Bar Association (Schmid) Y-2016-6b-[1.8.10]-FS
Submitted via:	Online

December 14, 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule of Professional Conduct 1.8.10 [3-120]
Sexual Relations With Client

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) appreciates the opportunity to comment on the draft rules of conduct (the “Proposed Rules”) proposed by the State Bar’s Commission for the Revision of the Rules of Professional Conduct (the “Rules Revision Commission”).¹ We continue to be impressed by the tremendous efforts and accomplishments of the Rules Revision Commission, and we commend the Commission for its work product to date.

For the reasons stated in our prior comment letter dated September 21, 2016, PREC continues to oppose the adoption of Proposed Rule 1.8.10 [Sexual Relations With Client] in its current revised form. While the proposed rule is consistent with the ABA Model Rule, it is much more restrictive than our current rule on sexual relations (Rule 3-120), and prohibits ALL sexual relations with clients, except for those that existed at the time the attorney-client relationship commenced (contrasted with our current rule, which essentially prohibits coercion, intimation and undue influence in entering into sexual relations with a client).

We appreciate the changes introduced in the latest revision of the proposed rule, which seeks to address concerns raised in public comments about the potential invasion of constitutional rights of privacy and freedom of association. New language in paragraph (a) applies the rule only to a “current” client “who is not the lawyer’s spouse or registered domestic partner.”

¹

Please note that, as a matter of policy, the members of PREC who are also members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting on any comments to the Proposed Rules.

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We also note that new paragraph (c) was added to Proposed Rule 1.8.10 (to the effect that, if the complainant is someone other than the client, the State Bar must consider whether the client would be unduly burdened by a charge against the attorney). If the elements of coercion, intimidation, or undue influence were present in the relationship, then the client could be pressured to resist the filing of charges, thereby impairing disciplinary proceedings and frustrating public protection. Under current rule 3-120, there is no such constraint on investigation and prosecution; the issues presented by third-party complaints are addressed in Business and Professions Code 6106.9(3)(e), which requires that a complaint by any person alleging improper sexual relations between a lawyer and client be verified under oath.

While the newly proposed language would narrow the scope of the rule's applicability, it does not cure the constitutional defects that an absolute ban would raise as to the rights of both lawyers and clients. PREC believes that the rule should retain the language of current rule 3-120, which prohibits sexual relations based on coercion, undue influence or intimidation, not merely on just whether an attorney engages in sexual relations with a client with whom he or she was not already involved sexually at the time the representation commenced.

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,

A handwritten signature in cursive script, appearing to read "Teresa J. Schmid". The signature is written in dark ink on a light-colored background.

Teresa J. Schmid
Chair, LACBA Professional Responsibility and
Ethics Committee

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Los Angeles County Bar Association
Commenting on behalf of an organization	Yes
Name	Teresa J. Schmid
City	Los Angeles
State	California
Email address	n7jxz@pacbell.net
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule

<p>ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.</p>	<p>For the reasons stated in our prior comment letter dated September 21, 2016, PREC continues to oppose the adoption of paragraph (a) of Proposed Rule 1.15 [Safe Keeping Funds and Property of Clients and Other Persons (current Rule 4-100)] in its current revised form. The inclusion of the word “fees” in paragraph (a) would mandate that all routine fee retainers (which are customarily required as advance deposits on fees for a new client engagement) be deposited into a trust account.</p> <p>Because this new requirement is not included in our current Rule 4-100, the insertion of this one single word could potentially have a dramatic impact on the day-to-day practices of many attorneys throughout the state. To be clear, our concern is less about the substance of the proposed change in the rule, but rather about the transition: This rule as so modified would profoundly impact the current business models of many legal practices, including those serving clients of low income and modest means. Implementation of the proposed changes would require sufficient time, training, and development of supporting materials (such as the state bar’s online model fee agreements) to ensure that the public is protected, not only by the proper handling of client funds, but also by the uninterrupted availability of legal services as lawyers adapt their practices to conform.</p> <p>Alternatively, as we noted in our prior comment letter, the Proposed Rule fails to address whether or not fees that have already been advanced prior to the effective date of the rule will need to be moved from a general account or other source to a trust account. In order to avoid further disruption, we strongly urge that, if the Proposed Rule is adopted in its current form, fees so advanced prior to the effective date of the change be excluded from the application of the rule. We note that the Rules Revision Commission, in its response in the Synopsis of Public Comments, stated its belief that this issue is one of several “easily resolvable implementation issues if the Supreme Court decides to adopt the rule.” PREC proposes that, instead of addressing this concern as an implement issue, paragraph (a) of the Proposed Rule should be modified to delete the words “or held,” to make more clear that the Proposed Rule only applies to “funds received” (i.e., after the effective date of the rule), rather than extending to “funds held” (i.e., as of the effective date of the rule).</p>
Attachment	LACBA_1.15_Final_12-14-16.docx (57k)
Attachment	
Attachment	
Date	12/20/2016
File :	Los Angeles County Bar Association (Schmid) Y-2016-6c-[1.15]-FS
Submitted via:	Online

December 14, 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rules of Professional Conduct 1.15 [4-100]
Safe Keeping Funds and Property of Clients and Other Persons

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) appreciates the opportunity to comment on the draft rules of conduct (the “Proposed Rules”) proposed by the State Bar’s Commission for the Revision of the Rules of Professional Conduct (the “Rules Revision Commission”).¹ We continue to be impressed by the tremendous efforts and accomplishments of the Rules Revision Commission, and we commend the Commission for its work product to date.

For the reasons stated in our prior comment letter dated September 21, 2016, PREC continues to oppose the adoption of paragraph (a) of Proposed Rule 1.15 [Safe Keeping Funds and Property of Clients and Other Persons (current Rule 4-100)] in its current revised form. The inclusion of the word “fees” in paragraph (a) would mandate that all routine fee retainers (which are customarily required as advance deposits on fees for a new client engagement) be deposited into a trust account.

Because this new requirement is not included in our current Rule 4-100, the insertion of this one single word could potentially have a dramatic impact on the day-to-day practices of many attorneys throughout the state. To be clear, our concern is less about the substance of the proposed change in the rule, but rather about the transition: This rule as so modified would profoundly impact the current business models of many legal practices, including those serving clients of low income and modest means. Implementation of the proposed changes would require sufficient time, training, and development of supporting materials (such as the state bar’s online model fee agreements) to ensure that the public is protected, not only by

¹ Please note that, as a matter of policy, the members of PREC who are also members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting on any comments to the Proposed Rules.

the proper handling of client funds, but also by the uninterrupted availability of legal services as lawyers adapt their practices to conform.

Alternatively, as we noted in our prior comment letter, the Proposed Rule fails to address whether or not fees that have already been advanced prior to the effective date of the rule will need to be moved from a general account or other source to a trust account. In order to avoid further disruption, we strongly urge that, if the Proposed Rule is adopted in its current form, fees so advanced prior to the effective date of the change be excluded from the application of the rule. We note that the Rules Revision Commission, in its response in the Synopsis of Public Comments, stated its belief that this issue is one of several “easily resolvable implementation issues if the Supreme Court decides to adopt the rule.” PREC proposes that, instead of addressing this concern as an implement issue, paragraph (a) of the Proposed Rule should be modified to delete the words “or held,” to make more clear that the Proposed Rule only applies to “funds received” (i.e., after the effective date of the rule), rather than extending to “funds held” (i.e., as of the effective date of the rule).

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Teresa J. Schmid".

Teresa J. Schmid
Chair, LACBA Professional Responsibility and
Ethics Committee

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Los Angeles County Bar Association
Commenting on behalf of an organization	Yes
Name	Teresa J. Schmid
City	Los Angeles
State	California
Email address	n7jxz@pacbell.net
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 2.1 Advisor
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

Proposed Rule 2.1 is not a disciplinary standard. It is an aspirational rule that would be extremely difficult, if not impossible to enforce. It includes aspirational comments, which do not elucidate the rule. As such, the proposed Rule is inconsistent with the Supreme Court's direction to the Second Commission.

There is no question that independent professional judgment is a core element of a lawyer's duty of loyalty to a client. The duty is already addressed in a number of rules which focus on circumstances that can affect a lawyer's independent judgment. For example, under proposed Rule 1.7(b) a lawyer's independent judgment is one of the considerations involved when there is a significant risk that the lawyer's representation of a client will be materially limited by the lawyer's responsibilities and relationships with present and former clients and other persons or by the lawyer's own interests.

While it is possible to discipline a lawyer for representing a client in circumstances that would tend to interfere with a lawyer's exercise of independent professional judgment, it would be extremely difficult, if not impossible, to identify and prosecute a true lack of independent judgment in a disciplinary proceeding. Whether a lawyer is exercising independent judgment in a given circumstance is speculative at best. One would have to know what the lawyer was actually thinking.

Part of the problem with the proposed rule is that it does not define independent judgment. The First Commission attempted a definition of independent judgment. The Second Commission has declined to adopt any definition. As a result, it is not clear what "independent judgment" means in this rule. Does "independent judgment" mean judgment that is not influenced by duties or interests that are outside the lawyer-client relationship (which is along the lines of the first Commission definition) or is "independent judgment" judgment that is independent of the client's interest so as to include social and political norms, as some suggest. It is problematic to enforce a rule based on a concept of independent judgment when there is no consensus regarding its meaning.

The proposed rule appears to be more of a vehicle for the practice advice in the Comments. The two Comments present a non-disciplinary permissive discussion regarding (i) advice a lawyer may initiate when doing so may be in the client's interest and (ii) permitting advice regarding moral, economic, social and political factors. While the Comments may be good advice to the profession, they are merely aspirational commentary. They do nothing to explain how the rule would apply as a disciplinary standard.

The Supreme Court's direction to the Second Commission stressed that the proposed rules should adhere to the historical purpose of the CPRC to regulate the professional conduct of member of the Bar and thus should remain a set of minimum discipline standards. The Supreme Court also stated that while the Second Commission may be guided by the ABA Model

	<p>Rules where appropriate, it should avoid incorporating the purely aspirational or ethical considerations that are present in the Model Rules and Comments. The Court also stressed that the CPRC should stand on their own and that comments should be used sparingly and only to elucidate and not expand up the rules themselves.</p> <p>Proposed Rule 2.1 and the proposed comments are inconsistent with all of these directions from the Supreme Court. As such, the Rule should not be adopted.</p>
Attachment	LACBA_2.1_Final_12-14-16.docx (56k)
Attachment	
Attachment	
Date	12/20/2016
File :	Los Angeles County Bar Association (Schmid) Y-2016-6d-[2.1]-FS
Submitted via:	Online

December 14, 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Tel:
213.627.2727

Fax:
213.833.6717

www.lacba.org

Re: Proposed Rule of Professional Conduct 2.1
Advisor

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) appreciates the opportunity to comment on the draft rules of conduct (the “Proposed Rules”) proposed by the State Bar’s Commission for the Revision of the Rules of Professional Conduct (the “Rules Revision Commission”).¹ We continue to be impressed by the tremendous efforts and accomplishments of the Rules Revision Commission, and we commend the Commission for its work product to date.

Proposed Rule 2.1 is not a disciplinary standard. It is an aspirational rule that would be extremely difficult, if not impossible to enforce. It includes aspirational comments, which do not elucidate the rule. As such, the proposed Rule is inconsistent with the Supreme Court’s direction to the Second Commission.

There is no question that independent professional judgment is a core element of a lawyer’s duty of loyalty to a client. The duty is already addressed in a number of rules which focus on circumstances that can affect a lawyer’s independent judgment. For example, under proposed Rule 1.7(b) a lawyer’s independent judgment is one of the considerations involved when there a signification risk that the lawyer’s representation of a client will be materially limited by the lawyer’s responsibilities and relationships with present and former clients and other persons or by the lawyer’s own interests.

¹ Please note that, as a matter of policy, the members of PREC who are also members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting on any comments to the Proposed Rules.

While it is possible to discipline a lawyer for representing a client in circumstances that would tend to interfere with a lawyer's exercise of independent professional judgment, it would be extremely difficult, if not impossible, to identify and prosecute a true lack of independent judgment in a disciplinary proceeding. Whether a lawyer is exercising independent judgment in a given circumstance is speculative at best. One would have to know what the lawyer was actually thinking.

Part of the problem with the proposed rule is that it does not define independent judgment. The First Commission attempted a definition of independent judgment. The Second Commission has declined to adopt any definition. As a result, it is not clear what "independent judgment" means in this rule. Does "independent judgment" mean judgment that is not influenced by duties or interests that are outside the lawyer-client relationship (which is along the lines of the first Commission definition) or is "independent judgment" judgment that is independent of the client's interest so as to include social and political norms, as some suggest. It is problematic to enforce a rule based on a concept of independent judgment when there is no consensus regarding its meaning.

The proposed rule appears to be more of a vehicle for the practice advice in the Comments. The two Comments present a non-disciplinary permissive discussion regarding (i) advice a lawyer may initiate when doing so may be in the client's interest and (ii) permitting advice regarding moral, economic, social and political factors. While the Comments may be good advice to the profession, they are merely aspirational commentary. They do nothing to explain how the rule would apply as a disciplinary standard.

The Supreme Court's direction to the Second Commission stressed that the proposed rules should adhere to the historical purpose of the CPRC to regulate the professional conduct of member of the Bar and thus should remain a set of minimum discipline standards. The Supreme Court also stated that while the Second Commission may be guided by the ABA Model Rules where appropriate, it should avoid incorporating the purely aspirational or ethical considerations that are present in the Model Rules and Comments. The Court also stressed that the CPRC should stand on their own and that comments should be used sparingly and only to elucidate and not expand up the rules themselves.

Proposed Rule 2.1 and the proposed comments are inconsistent with all of these directions from the Supreme Court. As such, the Rule should not be adopted.

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,

A handwritten signature in purple ink, appearing to read "Teresa J. Schmid".

Teresa J. Schmid
Chair, LACBA Professional Responsibility and
Ethics Committee

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Los Angeles County Bar Association
Commenting on behalf of an organization	Yes
Name	Teresa J. Schmid
City	Los Angeles
State	California
Email address	n7jxz@pacbell.net
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 8.4.1 [2-400] Prohibited Discrimination, Harassment and Retaliation
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE with this proposed Rule

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

PREC supports the Commission's revision of Proposed Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation (current Rule 2-400), which incorporates the Commission's ALT1 version of the Rule. PREC continues its support for the elimination of subpart (C) of current Rule 2-400, which requires that a non-disciplinary tribunal must have first fully adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred before a disciplinary investigation or proceeding may be initiated. PREC also fully approves the revised language that clarifies the applicability of the rule to retaliatory behavior and reinforces the scope of the Rule being limited to unlawful discrimination and harassment.

In light of the written comments and testimony made pursuant to the Commission's initial release of alternative versions of this Proposed Rule 8.4.1 for public comment, PREC offers the following discussion to summarize the reasons for its support of the Proposed Rule as revised and to address the most commonly raised objections to it:

Current Rule 2-400, Prohibited Discriminatory Conduct in a Law Practice, has been in effect since 1994. It represents the Supreme Court's policy that discrimination and harassment by lawyers conducted in the course of representing clients or in operating a law firm constitute ethical misconduct that is subject to discipline. The prior adjudication requirement contained in current Rule 2-400 would so delay disciplinary proceedings as to threaten the availability of witnesses and documentary evidence, so that the current rule is virtually unenforceable. As a result, the Supreme Court's public policy objectives are frustrated. The Proposed Rule would cure that defect.

Proposed Rule 8.4.1 poses no risk that lawyers would be prosecuted on the basis of meritless claims of discrimination or harassment. The Proposed Rule expressly requires that, in order to be subject a lawyer to discipline, the alleged misconduct must be unlawful, as determined by reference to applicable state and federal statutes and decisions in employment and in offering good and services to the public. In disciplinary proceedings, the state bar would have the burden of establishing unlawfulness of the conduct as part of its case in chief. In addition, in all proceedings before the State Bar Court the state bar must meet a clear and convincing burden of proof.

Protection of the public mandates the adoption of Proposed Rule 8.4.1. Discrimination and harassment frequently occur as a continuing course of conduct which requires intervention. Current Rule 2-400 prevents the state bar from taking action which would interrupt ongoing lawful behavior. Again, Proposed Rule 8.4.1 would cure that defect.

At the time of this writing, major demonstrations against discrimination and harassment are being held in California and throughout the United

	States in the aftermath of the recent presidential election. As PREC has previously argued, any action taken, or not taken, by the state bar to prevent a known risk to the public from discrimination and harassment has implications beyond the technical revision of Rule 2-400. As a matter of public policy, as well as public protection, by adopting Proposed Rule 8.4.1 the state bar has an opportunity to take immediate action to address that risk.
Attachment	LACBA_8.4.1_Final_12-14-16.docx (56k)
Attachment	
Attachment	
Date	12/20/2016
File :	Los Angeles County Bar Association (Schmid) Y-2016-6e-[8.4.1]-FS
Submitted via:	Online

December 14, 2016

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Rule of Professional Conduct 8.4.1 [2-400]
Prohibited Discrimination, Harassment and Retaliation

Dear Ms. Hollins:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) appreciates the opportunity to comment on the draft rules of conduct (the “Proposed Rules”) proposed by the State Bar’s Commission for the Revision of the Rules of Professional Conduct (the “Rules Revision Commission”).¹ We continue to be impressed by the tremendous efforts and accomplishments of the Rules Revision Commission, and we commend the Commission for its work product to date.

PREC supports the Commission’s revision of Proposed Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation (current Rule 2-400), which incorporates the Commission’s ALT1 version of the Rule. PREC continues its support for the elimination of subpart (C) of current Rule 2-400, which requires that a non-disciplinary tribunal must have first fully adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred before a disciplinary investigation or proceeding may be initiated. PREC also fully approves the revised language that clarifies the applicability of the rule to retaliatory behavior and reinforces the scope of the Rule being limited to unlawful discrimination and harassment.

In light of the written comments and testimony made pursuant to the Commission’s initial release of alternative versions of this Proposed Rule 8.4.1 for public comment, PREC offers the following discussion to summarize the reasons for its support of the Proposed Rule as revised and to address the most commonly raised objections to it:

¹ Please note that, as a matter of policy, the members of PREC who are also members of the Rules Revision Commission have abstained in their capacity as members of PREC from voting on any comments to the Proposed Rules.

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Current Rule 2-400, Prohibited Discriminatory Conduct in a Law Practice, has been in effect since 1994. It represents the Supreme Court's policy that discrimination and harassment by lawyers conducted in the course of representing clients or in operating a law firm constitute ethical misconduct that is subject to discipline. The prior adjudication requirement contained in current Rule 2-400 would so delay disciplinary proceedings as to threaten the availability of witnesses and documentary evidence, so that the current rule is virtually unenforceable. As a result, the Supreme Court's public policy objectives are frustrated. The Proposed Rule would cure that defect.

Proposed Rule 8.4.1 poses no risk that lawyers would be prosecuted on the basis of meritless claims of discrimination or harassment. The Proposed Rule expressly requires that, in order to be subject a lawyer to discipline, the alleged misconduct must be unlawful, as determined by reference to applicable state and federal statutes and decisions in employment and in offering good and services to the public. In disciplinary proceedings, the state bar would have the burden of establishing unlawfulness of the conduct as part of its case in chief. In addition, in all proceedings before the State Bar Court the state bar must meet a clear and convincing burden of proof.

Protection of the public mandates the adoption of Proposed Rule 8.4.1. Discrimination and harassment frequently occur as a continuing course of conduct which requires intervention. Current Rule 2-400 prevents the state bar from taking action which would interrupt ongoing lawful behavior. Again, Proposed Rule 8.4.1 would cure that defect.

At the time of this writing, major demonstrations against discrimination and harassment are being held in California and throughout the United States in the aftermath of the recent presidential election. As PREC has previously argued, any action taken, or not taken, by the state bar to prevent a known risk to the public from discrimination and harassment has implications beyond the technical revision of Rule 2-400. As a matter of public policy, as well as public protection, by adopting Proposed Rule 8.4.1 the state bar has an opportunity to take immediate action to address that risk.

Thank you again for the opportunity to comment on the Proposed Rules.

Very Truly Yours,

A handwritten signature in blue ink, appearing to read "Teresa J. Schmid".

Teresa J. Schmid
Chair, LACBA Professional Responsibility and
Ethics Committee

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Attorney--Certified Specialist ETP
Commenting on behalf of an organization	No
Name	Merwyn J. Miller
City	Encinitas
State	California
Email address	merv@aboutlivingtrusts.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.5 [4-200] Fees for Legal Services
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	Please see 4 page attachment in pdf
Attachment	State_Bar_Comment.pdf (133k)
Attachment	
Attachment	
Date	
File :	
Submitted via:	

This comment relates to Proposed Rule 1.5(e) but also to 1.15(b).

You have proposed that all advance fees be placed in the Trust Account rather than the operating account except for what are often referred to as absolute flat fees (as defined in 1.15(b)) under certain conditions. Minimum flat fees (it won't be any less than this but could be more depending on number of hours expended or some other type of contingency) which are paid in advance are not included in the definition of 1.15(b) and, therefore, under the proposal, must be placed in the trust account without exception. There have been at least three attempts to make this change (in various iterations) since 1998. Each approach was shot down due to the extensive negative comment. This approach will cause more disputes between client, attorney, and others, provide less protection to specified parties, restrict the freedom with which attorneys render advice, and increase fees to the client, all as set forth below. I am an attorney of more than 40 years and a certified specialist in estate planning, trust, and probate law. The above prediction is based on my experience as explained below.

More Disputes

I generally take a large advance on fees (as a minimum fee) in estate settlement cases (I am referring here to Non-Probate, out of court, settlements). Many of my colleagues do likewise. Fees paid for estate settlement are typically tax deductible to the estate or the beneficiary. Many of the estates I handle do not have a professional fiduciary or bank as the trustee in charge. Rather, many have one of the surviving children or the surviving spouse as the Trustee. These individuals often are not sophisticated in the tax or estate field. At the end of the year, clients are going to tell their tax accountant preparing their income tax returns that the fees given to the attorney have been paid, because in their mind, they have. They will do this despite the fact that a portion of the fees may still be held in the trust account and, therefore, not paid yet (still the client's money). They will do this despite the fact that the attorney has told them (even many times) that only the amount withdrawn is "paid" and, thereby, deductible. Usually the client will do this not because he is trying to cheat on his taxes but simply because he has too many issues and tasks on his mind in taking care of the estate settlement as well as his own personal life and this issue will just get lost in the shuffle.

If the estate or client is later audited by the IRS, there will be a deficiency owed due to this reporting error. That well could result in the client suing the attorney for allegedly not informing the client. Further, if the deduction was taken by the estate, that deduction often flows out to all of the beneficiaries by way of a tax form K-1. Each beneficiary then takes his percentage share of that deduction. If any, or all, of the beneficiaries is audited, each will have a tax deficiency assessed. They will each then likely seek recourse from the individual acting as trustee who will then seek recovery from his attorney.

Less Protection to Specified Parties

Some of the advice/recommendations that we need to give to the client are not always welcome. For example, where there are beneficiaries of an estate other than the one serving as the trustee the trustee is required to render an accounting as defined by the California Probate Code. Many, if not most of my clients, will often argue that they will just give the other beneficiaries a copy of the bank statement and that should do. That way they don't have to hire and pay yet another person to provide the accounting service (and from the client's perspective, further bleed the estate funds). This state of affairs means that many beneficiaries will never receive a full accounting. It is only with the accounting that the beneficiary has a full disclosure of the financial transactions that have occurred in the estate/trust. Without the accounting, theft and mismanagement are far more probable.

Further, under the Probate Code, just supplying the bank statements does not meet the requirement. Until a proper accounting is rendered, the statute of limitations never runs on a claim by the beneficiary against the person serving as trustee. Thus, years later, lawsuits are going to be brought by the beneficiaries against the individual trustee and, of course, counterclaims against the attorney.

Fees will Increase

In the estate settlement field, cases can take a year or longer to settle and close. The client has to make a decision as to whether to hire an attorney at the outset. The decision is not an easy one for most individual clients (as stated above, they are not typically professional fiduciaries or banks but, rather, surviving family members). It is a lot of money, often times 1% (sometimes more) of the net worth of the estate. Ultimately, this money is coming out of their pocket as they are the beneficiaries of the estate. They are unfamiliar with attorneys, often never having hired one before. So they make the decision to hire the attorney and obtain the necessary money. Under the proposed rule, the funds will be placed in the trust account since it is an advance fee and, as a minimum flat fee cannot be placed in the operating account (Rule 1.5(e) and 1.15). Therefore, fees will have to be withdrawn each month when certain defined benchmarks are reached. And, of course, the attorney will need to obtain the client's consent to make the withdrawal. That means that the client will again have to make the same decision about the attorney each month thereafter, i.e. in this case whether to continue with the attorney or fire him. Obviously, some will decide to fire the attorney. Given that fact, fees will increase as the attorney is taking more risk that he will get his complete fee.

Let's compare the likelihood of payment to the attorney between receiving the fees in advance and into the operating account early in the proceeding (minimum flat fee) vs. paid, piece meal, in arrears, perhaps in arrears each month as benchmarks are met (the proposed method). It is a simple matter of financial logic that a vendor (the attorney) will charge more for the latter. First, with the latter proposed method, he is taking more risk (of not being paid—see discussion above re clients terminating attorneys and demanding refund of the remaining money in the trust account) and, second, he is getting paid later in time (money has a "time value").

With estate settlements we could be talking about 1-2 years so the time value of the money is real.

And this opinion is not conjecture; we have actual data on this. Settlements done through the Probate Court are subject to a statutory fee. It is just slightly more than 2% of the GROSS value of the estate up to \$1,000,000. Trust settlements (done outside the court) generally are done for approximately 1% or less of the NET value of the estate. Probate statutory fees are paid at the end of the case after the court has approved them. Trust settlements, as stated above, are typically paid at the front end. With Probate, there is a risk to the attorney that the client (the executor) will take the estate money and take off (yes, that has happened to me) without paying the attorney and without court approval. So with Probate, the attorney has more risk and gets paid later in time than with Trust settlements.

Although younger, less experienced attorneys will tell you the difference in fees is because trust settlements are so much simpler than Probate settlements, that really is not true. All of the attorney's (and trustee's or executor's) duties are the same whether in Probate or not except that the attorney need not deal with the court. But the court involvement on a Probate is really minimal—2 hearings, uncontested, typically pre-approved by phone. If any hearing is contested it would be compensated by extraordinary fees. So the lack of the two court hearings is nowhere near enough to justify a discount to the fees of 50% or more.

Further, it simply takes more resources and effort to obtain the client's consent to withdraw money from the trust account each month as benchmarks are met. Even if the parties agree that unless the client disputes the charges within a certain number of days after the monthly statement is issued the attorney may withdraw the designated amount from the trust account, this requires the attorney or staff to go back into the billing regimen a second time each month. Another truth: more effort, more fees!

Lastly, it is not feasible for the attorney to make the advance on fees an absolute flat fee (with client permission to deposit the fee in his operating account) as opposed to a minimum flat fee. In estate settlement cases the attorney cannot charge an absolute flat fee since there is no guarantee on the time or effort that will be involved. Our cases usually are completed for less than the minimum—but not always. If I convert to absolute flat fees, then I must increase the fee to make absolutely sure that the fee (based on my hourly rate) will not exceed the fee quoted. Anytime there is a guarantee, the economic system tells us that the fee increases.

Bottom line, clients will wind up paying more with the proposed rules.

Advice of Attorney Will be Less Robust and Complete

In my younger days I charged hourly in arrears on estate settlement cases. As

stated above, some of the advice/recommendations that we need to give to the client are not always welcome (see discussion of accountings above). Sometimes, certainly more than I would have liked, the client terminated my services due to not liking the recommendation. In order to not lose clients, I believe I became less fervent in my advice to clients to render accountings (or taking certain other actions), obtaining waivers and releases from my clients to protect myself. With the switch to minimum flat fees paid in advance, this concern on my part tended to disappear. The client had already paid, the money was in my operating account, and the benchmark for earning the fee, in large part, had already passed. I was free to give the best advice I could without fear of being terminated. This was good for the client (yes, it was good for me, too) and all of the beneficiaries because the client was far more likely to do what I recommended. The proposed rules threaten this freedom and threaten the protection of the beneficiaries.

Recommendation

Include minimum flat fees in your definition of flat fees at 1.5(e) and make clear that an attorney will not violate the rules for charging more if the client requires the attorney to deposit the fee in his trust account.

Rule 1.15(b) (2) is not clear

I believe you are attempting to make absolute flat fees paid in advance of less than \$1000 exempt from the “writing” requirement of (b)(1). Subparagraph (b)(2) does not say that. Either remove the term “writing” from (b)(1) leaving (b) (2) to require all flat fees in excess of \$1000 to be in writing or rewrite (b)(2) to make clear that if the flat fee does not exceed \$1000 there is no requirement of a writing.

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Member, State Bar of California
Commenting on behalf of an organization	No
Name	Robert W. Mills
City	Kentfield
State	California
Email address	rwm@millslawfirm.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.8.10 [3-120] Sexual Relations with Current Client
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I am deeply opposed to this proposed Rule. I believe it is unwarranted, demeaning to both attorneys and their clients, and is so overboard and indiscriminate that it is likely to result in all sorts of unintended and inequitable consequences, including among other things, blackmail and extortion.</p> <p>This prudish, big-brother-knows-best intrusion into the attorney client relationship infantilizes the client and presumes that clients are not consenting adults, but instead are like children, inherently incapable of either giving informed consent to sex or otherwise making adult decisions consistent with they own desires and interest. To justify such a new rule, one must further believe that clients, and the public, want and need to State Bar to act as clients' guardian ad litem in sexual matters. Alternatively, to justify such a rule, one must presume that an attorney enjoys by reason of an attorney-client relationship, an inherently coercive or controlling position of power or control over his or her client and that the attorney will likely, absent an explicit RPC, use that power and control to sexually abuse the client.</p> <p>I have seen no evidence in my 42 years of law practice that any of these presumptions are either true or warranted. I have seen more attorneys I have known sexually exploited by their clients than the other way around. Nor does it appear to me that the inevitable but rare instances of sexual misconduct by members of the Bar involving clients cannot be far better addressed by the other abundant, already existing remedies for such conduct under California law.</p>
Attachment	
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Date	

File :	
Submitted via:	

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Private practice, small law firm
Commenting on behalf of an organization	No
Name	Rory S. Morse
City	San Jose
State	California
Email address	rory@thedaytonlawfirm.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	DISAGREE with this proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I strongly disagree with the proposal to require attorneys to hold flat fees in trust until the completion of work. I understand that there is a concern that money paid in advance that is subject to the requirement (under agreement) of a refund go directly into a business account where it can be spent freely, but in my opinion there are other approaches to address this concern, such as a simple requirement to maintain a minimum balance within business accounts.</p> <p>The increase in administrative work with maintaining flat fees in a trust account, billing hourly time against them, and recordkeeping to live up to a formal audit under this rule would double to triple administrative time required on maintaining billing records for relatively simple flat fee work for clients, and most would not benefit in any way from such increased administrative work.</p>
Attachment	
Attachment	
Attachment	
Date	12/15/2016
File :	Morse Rory Y-2016-2-[1.15]-FS
Submitted via:	Online

From: Edward Poll [mailto:edpoll@lawbiz.com]
Sent: Thursday, January 05, 2017 2:02 PM
To: McCurdy, Lauren
Subject: Public Comment -- Proposed Rule of Professional Conduct - Rule 1.17/ 2-300 ... Comment Period Ends 1/9/17

Lauren, thank you for your assistance in locating the pertinent discussion on the Bar site.

I have reviewed 1.17 proposal and have commented (see attachment) thereon in so far as the language of selling an entire practice vs. a practice area.

Summary:

Bottom line, the modification of the ABA to allow a practice area makes more sense to me, both ethically and economically, both for the protection of clients and the well-being of lawyers.

My Background:

By way of summary of my background, I practiced law as a solo and in a small firm for 25 years; the last 25 years I have consulted with lawyers in both small and large firms, and have written extensively about the economics of law.

Pertinent to this discussion, I am the author of *Selling Your Law Practice: The Profitable Exit Strategy; Life After Law: What Will You Do With The Next 6,000 Days?*

I am also the author of *Attorney & Law Firm Guide to the Business of Law®*, Third Ed., published by the American Bar Association.

I have been a leader in the CalBar's GP Section and LPMT Section and the ABA's GPSSF Section, the LPM Sectionm

Please confirm your receipt of this email and the attached comment. Should you need/want more identification on the comment page itself, let me know. Again, thank you for your guidance.

Ed Poll, J.D., M.B.A., CMC
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January 5, 2017

Comment to RRC2 – 1.17 (2-300)

The practice of law is **both** a Profession and a Business.

A *profession* is defined as “a calling requiring specialized knowledge” and often long-term studies. A *business* involves the “buying and selling of ... services.” In this case, it is the selling of specialized knowledge to persons in need. More than 50 years ago, Senator Adlai E. Stevenson said “*Law is not a profession at all, but rather a business service and repair shop.*” The fact that we act as a guild does not remove its economic realities. Without the exchange of money, clients would have no one to service their needs.

The commentary suggests that a rule change to allow the sale of an area of practice will “... add to the commercialization of the practice of law.” On the contrary, it will recognize today’s economic reality. *BigLaw* finds myriad ways around this rule. This system is “rigged” against the sole and small firm lawyer. The ABA approach is simple and more in line with economic realities of an aging lawyer population.

Forcing the sale of an *entire practice* rather than an *entire practice area* will not benefit the client; the lawyer, however, will be penalized.

- The disfavored practice area will get little or no service. (One could argue that malpractice insurance will protect the client from poor service. Insurance today does not appear to increase client service. It would be better to have an enthusiastic and skilled lawyer handling such matters in order to further build the practice area just purchased from the selling lawyer.)
 - It should be noted that real success in such transactions comes from the efforts of the buyer, not the seller; to force a selling lawyer to become passive in certain areas hurts the clients.
- The lawyer will merely jettison the disfavored area or not accept new clients/matters in that area. That will not benefit current or future clients. It will hurt the lawyer by either making it more difficult or impossible to sell the entire practice.
- It will encourage “selling” lawyers to adopt “sham” facades to avoid the draconian impact of the rule in its current format.

There is nothing in the ABA 1.17 modification to permit the sale of an *entire practice area* that has caused client harm. On the contrary, the benefits are multiple:

- Clients continue to be served by lawyers wanting to work with them and solve their issues.
- Buying Lawyers see this “practice area” approach as important to their increased revenue.
- “Selling lawyer” (one with the rest of the practice continues to serve clients with his skills).
- “Selling lawyer” is “straight” with the ethical practices of the Bar and his/her clients.
- The “selling lawyer” is able to monetize the practice built over the years.
- The “selling lawyer” is able to continue to be a vibrant part of the legal community

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	
Commenting on behalf of an organization	No
Name	robert reed
City	sherman oaks
State	California
Email address	robertreed@gmail.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.15 [4-100] Safekeeping Funds and Property of Clients and Other Persons
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I do small scale flat-fee work (registering copyrights for musicians) -- it would be cumbersome to deposit these funds in a Clients' Trust Account first as CTA does not have access to ATM/mobile depositing.</p> <p>Perhaps a modification for flat-fees above \$1000 to be required CTA deposit?</p> <p>Thanks!</p>
Attachment	
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Date	
File :	
Submitted via:	

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Sall Spencer Callas & Krueger, ALC
Commenting on behalf of an organization	Yes
Name	Michael A. Sall
City	Laguna Beach
State	California
Email address	msall@sallspencer.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.3 [3-110(B)] Diligence
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE with this proposed Rule
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Comment_to_Proposed_Rule_1_3.pdf (48k)
Attachment	
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Date	
File :	
Submitted via:	



SALL SPENCER
CALLAS & KRUEGER
A LAW CORPORATION

32351 Coast Highway
Laguna Beach, California 92651
Tel: 949-499-2942
Fax: 949-499-7403

January 9, 2017

Via Public Comment Submission Form

Commission for the Revision of the Rules of Professional Conduct
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Re: *Comments to Proposed Rule of Professional Conduct 1.3*

To the Commission for the Revision of the Rules of Professional Conduct and the Board of Trustees of the California State Bar:

I support the revision of proposed rule 1.3 that moved “with gross negligence” to the end of the series of intent elements in subdivision (a). This revision avoids any possible interpretation of “with gross negligence” as a dependant clause modifying “recklessly” rather than a separate item in the series.

However, proposed rule 1.1, as approved by the Board, does not contain this revision, such that the language of the two rules no longer parallel each other. The two rules should parallel each other if for no other reason than to ensure the “intentionally, repeatedly, recklessly or with gross negligence” standard is consistently interpreted across the rules. Under the meaningful-variation canon of statutory construction, a difference between statutes—or here rules—that are otherwise similar is usually interpreted as a purposeful signal that the language should be given different meanings. Accordingly, the inconsistent usage between proposed rules 1.1 and 1.3 creates the possibility that they will be given different meanings by lawyers, the bar, and the courts. Because the revision in proposed rule 1.3 is a beneficial revision that improves the clarity of the rule, the same revision should be made in proposed rule 1.1.

Thank you for your consideration of the foregoing comments.

Sincerely,

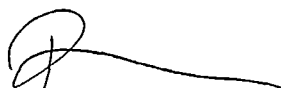
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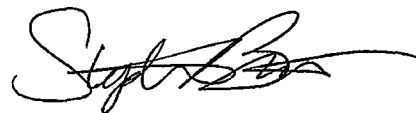
Robert K. Sall




Suzanne Burke Spencer



Brandon N. Krueger



Stephanie Brault



Michael A. Sall

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Sall Spencer Callas & Krueger, ALC
Commenting on behalf of an organization	Yes
Name	Michael A. Sall
City	Laguna Beach
State	California
Email address	msall@sallspencer.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.9 [3-310(E)] Duties To Former Clients
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Comment_to_Proposed_Rule_1_9.pdf (287k)
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January 9, 2017

Via Public Comment Submission Form

Commission for the Revision of the Rules of Professional Conduct
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Re: *Comments to Proposed Rule of Professional Conduct 1.9*

To the Commission for the Revision of the Rules of Professional Conduct and the Board of Trustees of the California State Bar:

This comment addresses itself to the following four components of the current version of proposed Rule 1.9: (i) the elimination of subdivision (c)(3) by the Commission, (ii) the addition of Comment 3, (iii) Comment 4, and (iv) the addition of a new exception to an attorney's duty to preserve client secrets included in section (c)(1).

I. The Elimination of Subdivision (c)(3) Leaves a Gap in the Coverage of the Rule

The elimination of subdivision (c)(3) leaves a gap in the Rule in comparison to existing Rule 3-310 in that proposed Rule 1.9 fails to prohibit the representation of a client adverse to a former client, without informed written consent from the former client, where the attorney actually received confidential information material to the representation but where the prior and current representation are not substantially related. Existing Rule 3-310(E) prohibits such representations. In contrast, while proposed Rule 1.9 (c)(1) and (c)(2) would prohibit an attorney who actually receives confidential information material to a subsequent representation from using or revealing it, the attorney would *not* be required to get his or her former client's informed written consent to the adverse representation. There does not seem to be a good reason for taking away from a client the existing right to be informed and to consent to subsequent adverse representation based solely on whether the former and subsequent matters are substantially related. Rather, if an attorney actually receives material confidential information, the client's informed written consent to subsequent adverse representation should be required, as it is under existing law.

In *Costello v. Buckley*, 245 Cal. App. 4th 748 (2016), for example, the court found improper an attorney's representation adverse to a former client where the attorney had actually received material confidential information, even though the two matters were not substantially related.

Neither subdivision (a) nor subdivision (b) meet the facts set forth in *Costello* because both subdivisions apply only to "the same or a substantially related matter." In *Costello*, the former client had actually disclosed confidential information pertaining to her romantic relationship with her boyfriend to her attorney in the course of a representation regarding litigation over an easement. *Costello*, 245 Cal. App. 4th at 751. The attorney subsequently sought to represent the boyfriend in litigation against the former client in a matter in which the romantic relationship was at issue. *Id.* at 751-52. Although the matters had no apparent legal or factual similarity, the attorney had nevertheless obtained confidential information material to the second representation. *Id.* at 755-56.

Under the facts presented in *Costello*, it does not appear that this scenario would fit into either alternative set forth in Comment 3's definition of "the same or substantially related" insofar as the two representations (i) did not involve the same transaction or legal dispute or other work performed by the lawyer and (ii) the lawyer would not necessarily have "normally" obtained information about the former client's romantic relationship in the context of an easement dispute.

Similarly, neither subdivisions (c)(1) and (c)(2) adequately fill this gap. These subdivisions prohibit the *use* or *revelation* of confidential information, but do not prohibit the subsequent adverse representation, without informed written consent, itself. This leaves a former client in the unenviable—and unjustified—position of having to trust his or her former attorney not to disclose his or her confidences even as that attorney works against the former client's interests. There is no justification for imposing this burden on former clients and it would be a meaningful deviation from the existing Rule which requires the former client's informed written consent in such a situation.

Accordingly, proposed Rule 1.9 as written and interpreted in light of Comment 3 does not clearly govern the circumstances involving the actual receipt of material confidential information by an attorney—the factual scenario presented in *Costello*. It does not appear that the Commission intends to change the scope of existing Rule 3-310(E) in adopting proposed Rule 1.9, insofar as the deletion of subdivision (c)(3) was premised on the Commission's belief that subdivision (c)(3) was adequately encompassed by subdivisions (a) and (c)(1) and (2). As set forth above, we respectfully disagree and accordingly urge the Commission to retain subdivision (c)(3) and expressly maintain continuity with the scope of existing Rule 3-310(E).

II. Comment 3 Is Ambiguous and Is Contrary to the Commission's Charter Not to Legislate Through Comment

Comment 3 attempts to distill and fix in time the judicially created and evolving concept of substantial relationship. We believe that the interpretation of the phrase "the same or substantially related" for purposes of the Rule should be left to the courts and legislature, should it choose to wade into these waters. Comment 3 appears to us to be an attempt to interpret the Rule, not state a minimum disciplinary Rule, as the Commission's charter requires.

Moreover, the attempt to encapsulate the current state of the law on substantial relationship as reflected in Comment 3 is not entirely accurate and is ambiguous. Comment 3 defines the term “the same or substantially related” in two inconsistent manners. First, it defines the term to mean that the matters “involve a substantial risk of a violation of one of the two duties to a former client described above in Comment [1].” Second, it purports to restate this definition by defining when “[t]his will occur.” However, the two alternative methods in which “[t]his will occur” are not the exclusive methods by which a substantial risk of a violation of an attorney’s duties under *Oasis West Realty* and *Wutchumna Water Co.* may occur. The ambiguity arises from the phrase “[t]his will occur” because it is unclear whether that phrase is intended to be an exclusive statement of when a substantial risk of a violation of an attorney’s *Wutchumna* duties arises or not.

If the phrase is not intended to suggest that the two stated methods are the exclusive means of creating such a substantial risk, then the comment should say so directly. For example, the sentence could be rephrased to read “This may occur” rather than “This will occur.” Alternatively, the sentence could read “This will occur (i) . . . or (ii) . . . , but may occur under other circumstances as well.”

Alternatively, if the phrase is intended to be an exclusive statement, then it is too narrow and is inconsistent with the duties imposed by *Wutchumna*. In particular, those duties extend to the use of any confidential information acquired by virtue of the previous relationship. This includes confidential information *actually acquired* in the prior representation even if that information would not “*normally*” have been obtained in the prior representation—i.e., the factual scenario presented in *Costello v. Buckley*. The narrowness of this interpretation is of particular concern given the elimination of subdivision (c)(3) discussed above.

Moreover, the phrase “substantially related” in the context of successive representation of adverse parties by an attorney has been well-developed by substantial Supreme Court and appellate court precedent in the context of attorney disqualification. See, e.g., *Flatt v. Superior Court*, 9 Cal. 4th 275 (1994); *Jessen v. Hartford Cas. Ins. Co.*, 111 Cal. App. 4th 698 (2003). The “substantial relationship” test is routinely applied by the courts and has an established meaning. The definition of substantially related provided in the proposed Rule is inconsistent with the application of the substantial relationship test by the courts.

Although the Commission’s stated intent is “that the attorney conduct standards set by the rules are not intended to be standards of law firm disqualification in non-disciplinary proceedings,” (Executive Summary for Proposed Rule of Professional Conduct 1.9 at p. 4), the use of the same term of art—“substantially related”—in both the Rule and in the body of existing disqualification case law creates an appearance, apparently not intended by the Commission, that the test is or ought to be the same. Thus, the comments of proposed Rule 1.9 and Comment 3 should include a disclaimer that the Rule does not modify the existing standards for attorney disqualification in the case of successive representations.

Alternatively, if the term “substantially related” as used in the proposed Rule is intended to reflect the substantial relationship test in existing body of disqualification case law, then Comment 3 should be revised to expressly incorporate that case law rather than to articulate a new definition.

III. Comment 4 Is Likewise Contrary to the Commission’s Charter Not to Legislate Through Comment and Is Inconsistent with Existing Law

As with Comment 3, Comment 4 appears to be an attempt to interpret the Rule, not state a minimum disciplinary Rule, as the Commission’s charter requires. In particular, the comment states that “the lawyer has a conflict of interest *only* when the lawyer involved has actual knowledge of information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c).” (Emphasis added.) This is an interpretation of the rule, not a statement of the minimum standard of discipline.

Moreover, the statement is not an accurate statement of existing law. In determining whether an attorney has a conflict of interest precluding subsequent adverse representation that is substantially related to prior representation, the proper inquiry is whether the attorney was personally, directly involved in the prior representation, not whether the attorney actually possesses material confidential information. This principle is reflected in substantial case law presuming the receipt of confidential information by an attorney who was directly involved in the representation. *See Global Van Lines, Inc. v. Superior Court*, 144 Cal. App. 3d 483, 489 (1983); *accord H.F. Ahmanson & Co. v. Salomon Brothers, Inc.*, 229 Cal. App. 3d 1445, 1457 (1991). The presumption that applies to a personally involved attorney is irrebutable and neither the Court nor the State Bar may properly inquire into the extent of an attorney’s “actual knowledge” of confidential information. Nor should a client be put in the position of have to reveal confidential or privileged information in order to establish that his former attorney actually possesses it. The very purpose of the presumption is to protect client confidentiality and privilege and to avoid the necessity of these types of disclosures. A rule dependent on the actual knowledge of the attorney is thus counter to well-established California law and the reason courts presume receipt of confidential information by an attorney personally involved in the former client’s representation. This concept is also reflected in the first of the two *Wutchumna* duties identified in Comment 1: not to “do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client.”

The comment should accordingly be removed in its entirety, leaving to the courts and authorities responsible for interpreting and enforcing the Rules with the task of doing so. At a minimum, Comment 4 should be revised to comport to existing law by stating that an attorney actually involved in the prior representation has a conflict of interest regardless of whether he or she has actual knowledge of confidential information.

IV. The Phrase “Or When the Information Has Become Generally Known” in Subsection (c)(1) Is Inconsistent With The State Bar Act and California Law

Subsection (c)(1) introduces into the Rule a new concept in California: specifically, that an attorney may use a client’s information that is otherwise confidential under Business and Professions Code § 6068(e) and Rule 1.6 if the “information has become generally known.” There is no such

“generally known” exception to an attorney’s obligation to preserve her client’s secrets in either Business and Professions Code § 6068(e) or Rule 1.6 (current Rule 3-100). Thus, the exception for “generally known” information is one being created by the Commission, which we believe is an unjustified expansion into legislative functions and is not warranted by existing California law.

We are aware that the Commission’s attention was drawn to this anomaly in the first round of public comment letters (*see, e.g.*, comment letter from the Orange County Bar Association Committee on Professionalism and Ethics). The Commission’s response to that comment was that no anomaly existed because subsection (c)(1) applies only to the ability to “use,” not “reveal,” client confidential information and presumably, only the latter is prohibited by Business and Professions Code § 6068(e) and Rule 1.6. We respectfully disagree. Case law is clear that an attorney is prohibited not only from disclosing, i.e. revealing, information protected by § 6068(e) and current Rule 3-100, but is also prohibited from using such information. *See, e.g., Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 573-74 (1932) (an attorney may not “at any time *use* against his former client knowledge or information acquired by virtue of the previous relationship” (emphasis added)); *Elan Transdermal Ltd. v. Cygnus Therapeutic Sys.*, 809 F. Supp. 1383, 1387 (N.D. Cal. 1992) (attorneys may not “*use* against his former client knowledge or information acquired by virtue of the previous relationship” (emphasis added)); *Oasis West Realty LLC v. Goldman*, 51 Cal. 4th 811, 823 (2011) (duties of loyalty and confidentiality bar an attorney “from *both* disclosing *or* using the former client’s confidential information against the former client” (emphasis in original)); *Styles v. Mumbert*, 164 Cal. App. 4th 1163, 1168 (2008) (“In addition to not being able to directly reveal *or use* confidences after the termination of the relationship, an attorney may not *act* in a way which would undermine his continuing duty to protect the confidential relationship.” (first emphasis added; second emphasis in original)).

Thus, permitting an attorney to use a former client’s confidential information that has become “generally known” is inconsistent with California law. We are aware such an exception is included in Model Rule 1.9(c)(1) and, in fact, we may even believe that “generally known” information should not be included in the prohibition of (c)(1), however, given present California law and the obligation in § 6068(e) of a lawyer “at every peril to himself or herself to preserve the secrets, of his or her client,” we simply cannot harmonize a Rule that allows a lawyer to use such information if it has become generally known. If the legislature wanted to allow use of a client’s confidential information and to prohibit only disclosure, it could have easily said so. But the statute obligates an attorney to “preserve” client secrets, a verb that, in our view and as interpreted by California cases, encompasses more than just non-disclosure. Accordingly, we respectfully suggest that the phrase “or when the information has become generally known” should be removed from subsection (c)(1).

Thank you for your consideration of the foregoing comment.

Sincerely,

SALL SPENCER CALLAS & KRUEGER
A Law Corporation



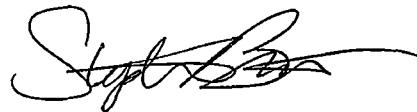
Robert K. Sall



Suzanne Burke Spencer



Brandon N. Krueger



Stephanie Brault



Michael A. Sall

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Sall Spencer Callas & Krueger, ALC
Commenting on behalf of an organization	Yes
Name	Michael A. Sall
City	Laguna Beach
State	California
Email address	msall@sallspencer.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.13 [3-600] Organization as Client
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Comment_to_Proposed_Rule_1_13.pdf (49k)
Attachment	
Attachment	
Date	
File :	
Submitted via:	



SALL SPENCER
CALLAS & KRUEGER
A LAW CORPORATION

32351 Coast Highway
Laguna Beach, California 92651
Tel: 949-499-2942
Fax: 949-499-7403

January 9, 2017

Via Public Comment Submission Form

Commission for the Revision of the Rules of Professional Conduct
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Re: *Comments to Proposed Rule of Professional Conduct 1.13*

To the Commission for the Revision of the Rules of Professional Conduct and the Board of Trustees of the California State Bar:

This comment addresses the revision made to subdivision (c). As revised, subdivision (c) reads as a categorical prohibition on the revelation of information protected by § 6068(e) to anyone, including higher authorities within the organization. Subdivision (c) would apparently then prohibit the exact course of conduct prescribed by subdivision (b)—internally reporting to a higher authority.

The prior language for subdivision (c) did not read this way, insofar as the revelation of confidential client information to higher authorities within the client organization is not a violation of an attorney's duty under § 6068(e). The new language does not incorporate the scope of the *duty* under § 6068(e), but rather only incorporates the scope of the information protected by that section. Accordingly, the duty created by subdivision (c) must be cast slightly more narrowly to allow the attorney to make a report within the organization.

We propose the following language as a revision addressing these concerns: "In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code § 6068(e) except to those authorities within the organization authorized to receive such information."

Thank you for your consideration of the foregoing comments.

Sincerely,

SALL SPENCER CALLAS & KRUEGER
A Law Corporation



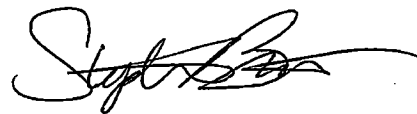
Robert K. Sall



Suzanne Burke Spencer



Brandon N. Krueger



Stephanie Brault



Michael A. Sall

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	Sall Spencer Callas & Krueger, ALC
Commenting on behalf of an organization	Yes
Name	Michael A. Sall
City	Laguna Beach
State	California
Email address	msall@sallspencer.com
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.18 Duties To Prospective Client
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Comment_to_Proposed_Rule_1_18.pdf (152k)
Attachment	
Attachment	
Date	
File :	
Submitted via:	



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January 9, 2017

Via Public Comment Submission Form

Commission for the Revision of the Rules of Professional Conduct
Office of Professional Competence, Planning and Development
State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Re: *Comments to Proposed Rule of Professional Conduct 1.18*

To the Commission for the Revision of the Rules of Professional Conduct and the Board of Trustees of the California State Bar:

We oppose adoption of proposed rule 1.18 in its current form. The provisions governing screening are inappropriate and should be removed or, at the very least, substantially limited.

I. No Screening of Potential Clients Is Appropriate Except Where Screening Would Be Permitted by Proposed Rule 1.10

It is well-established California law that ethical screening is not appropriate where an attorney side-switches in the same matter. *Kirk v. First American*, in authorizing ethical screening in limited circumstances did so “tempered by the *Henricksen* rule that various disqualification should be automatic in cases of a tainted attorney possessing actual confidential information from a representation, who switches sides in the same case.” 183 Cal. App. 4th 776, 800 (2010). In the prospective client situation, the rule should be the same. An attorney who actually receives confidential information from a prospective client cannot be screened if the attorney’s firm later seeks to represent an adverse party in the same matter. The potential for abuse of that confidential information is substantial, and the limitation on the definition of prospective client contained in Comment 2 adequately protects attorneys from persons who would seek to deliberately conflict the firm out of a representation by providing unsolicited confidential information to that firm.¹ A firm that receives and reviews—through one or more of its

¹ Indeed, the importance of Comment 2 in that regard is such that it should be moved above the line and integrated into subdivision (a).

attorneys—confidential information in evaluating whether to undertake a representation, and then instead undertakes to represent an adverse party in that matter essentially switches sides.

The same prohibition on screening should also apply to substantially related matters. Proposed Rule 1.10 authorizes screening only where the tainted attorney has changed law firms and where that attorney did not “substantially participate” in the former representation.² Proposed Rule 1.18 would authorize screening in the absence of any firm switching by the tainted attorney. A prospective client consults a *firm* about a potential representation, just as a client is represented by a firm, and not just by an attorney or attorneys at that firm. See *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP*, 150 Cal. App. 4th 384, 392 (2007). The prospective client discloses information *to the firm* in the expectation that it will be maintained in confidence. The adoption of this rule would work a radical change in how prospective clients must treat their exchanges with potential counsel, the burden of which will fall primarily on unsophisticated individuals. Organizations and sophisticated repeat clients will be able to—and be aware of the need to—negotiate around the screening provisions in this rule by weight of their bargaining power. Individual clients, by contrast, are unlikely to be aware of this rule revision and are likely to believe, incorrectly, that the firms to which they disclose confidential information will not turn against them by representing adverse parties. This betrayal of public expectations will work to undermine the public’s faith in the integrity of the bar and the fairness of the administration of justice.

II. Even if Screening Is Permitted, the Scope of Subdivision (d)(2) Is Overbroad

Even if some form of screening in the potential client context is permitted, subdivision (d)(2) is overbroad. As written, subdivision (d)(2) permits screening wherever the lawyer “took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client.” This standard is vague and entirely divorced from existing California case law on screening, which has been authorized only where the actual degree of a lawyer’s involvement in the representation of the former client was exceedingly limited. See *Kirk*, 183 Cal. App. 4th at 786 (attorney’s participation was limited to a 17-minute telephone conversation). Any standard that is adopted should comport with the limited circumstances under which screening is currently permitted under California case law.

The standard in the proposed rule is also substantially overbroad as a matter of policy. The amount of confidential information reviewed in deciding to undertake a matter may be substantial,

² We note that there is no support in existing case law for the concept that screening is appropriate to avoid a conflict of interest where an attorney did not “substantially participate” in the former, substantially related matter—an amount of involvement that well beyond the *de minimus*, 17-minute telephone call involved in *Kirk*, which is the only California case that has permitted ethical screening. There is also no support in existing case law to allow an attorney to switch sides in the same case, as long as he or she did not “substantially participate” in the prior matter. Thus, the screening permitted in Proposed 1.10 goes further than existing case law as it is and for that reason should not be adopted as drafted. We do not see how it is in the public’s or Bar’s interests to expand the scope of permissible ethical screening even further for prospective clients, as proposed in Rule 1.18.

especially in connection with contingency representations on complex matters. Attorneys deciding whether to undertake a contingency representation often form opinions as to the potential merits of the matter before agreeing to a contingency agreement so as to assess their likelihood of collecting a fee and the size of that fee. Such a review is “reasonably necessary” in the contingency context, but involves substantial substantive analysis such that any representation by the attorney’s firm of an adverse party in the same matter is tantamount to side-switching: having used one party’s confidential information to form an opinion of the merits of the case, the firm would then represent the opposing party. Such a circumstance can do nothing but undermine the public’s trust in the legal profession and the fairness of the judicial process.

Moreover, even a limited review of the information necessary to decide to undertake a representation, the information provided is likely to be the most critical documents in a matter, such as key communications, contracts, or reports. For prospective organizational or sophisticated clients, a limited review may involve existing work product from in-house or outside counsel who are referring the matter out. Such materials include factual summaries, timelines of key events, witness interviews, or memoranda discussing potential claims. No screening can be justified once a potential client entrusts such confidential information to an attorney. An attorney reviewing such materials for an actual—rather than prospective—client could not be permissibly screened under existing California case law or under proposed rule 1.10. See Kirk, 183 Cal. App. 4th at 786; Proposed Rule of Professional Conduct 1.10, Comment 1 (considering “the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter” in determining whether the lawyer substantially participated in the previous representation by his or her prior firm). For similar reasons, no screening should be allowed in the context of a prospective client either.

Thank you for your consideration of the foregoing comment.

Sincerely,

SALL SPENCER CALLAS & KRUEGER
A Law Corporation



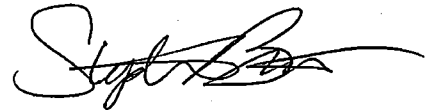
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**THE STATE BAR OF
CALIFORNIA**

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January 9, 2017

Audrey Hollins, Director
Office of Professional Competence, Planning &
Development
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Comments of the Office of Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Ms. Hollins:

The Board of Trustees requested additional public comment on several of the proposed new or amended Rules of Professional Conduct developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct.

Preliminarily, the Office of Chief Trial Counsel (OCTC) would again like to thank Justice Lee Edmon, Chair, Jeffrey L. Beich and Dean J. Zipser Co-Vice-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct for the opportunity to submit additional comments about the proposed Rules of Professional Conduct. OCTC appreciates the Commission's considerable and important task and is here to assist the Commission.

OCTC views many of the proposed rules as a positive step in formulating an updated set of new Rules of Professional Conduct and appreciates the Commission's significant work.

OCTC, however, notes the following significant concerns with the proposed rules.¹ Many of the comments within the proposed rules, and some of the proposed rules themselves, are inconsistent with the Supreme Court's direction that the Commission begin with California's current Rules of Professional Conduct and "focus on revisions that are necessary to address developments in the law, and that eliminate, where possible, any unnecessary differences between California's rules and those used by a preponderance of the states."

Some of the proposed rules and comments alter the current rules without offering any basis or indication for how California's current rule is inadequate. For example, the Commission proposes that the competence rule be articulated in several rules, addressing competence, diligence, and supervision separately. This division is artificial, confusing, inconsistent with established California law, and will

¹ OCTC also refers the Commission to and incorporates its September 27, 2016 letter commenting on the proposed rules.

make enforcement more difficult. At the very least, it will cause an unnecessary proliferation of the charges filed against attorneys and has the potential for unintended consequences.

Additionally, some of the proposed rules are inconsistent with, and contrary to, the well-established law regarding one's level of intent and knowledge. Proposed rules requiring that an act or omission be committed "knowingly" damage well established law providing that violations can be found based upon recklessness, gross negligence, or willful blindness, as well as "knowingly" or intentionally.² Business and Professions Code section 6077 authorizes discipline for a willful breach of the Rules of Professional Conduct. It does not require actual knowledge or bad faith or evil intent, only that the attorney acted purposely.³ Violations of the Business and Professions Code require a somewhat more specific level of willfulness than that required for a violation of the Rules of Professional Conduct.⁴ Some of the Commission's proposals risk lowering the high standards of conduct currently required of attorneys in this State.

The Use of Comments to the Rules.

OCTC supports some of the comments to the proposed rules, including some instances of multiple comments. In other cases, the proposed rules include comments that are inconsistent with the Supreme

² See e.g. *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 850 and 855-858; *Sanchez v. Bar* (1976) 18 Cal.3d 280, 283-285; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281; *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330; *In the Matter of Parish* (2015) 5 Cal. State Bar Ct. Rptr. 370; *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433. Also, Standard 2.11 of the Standards for Attorney Sanctions for Professional Misconduct states that disbarment or actual suspension is the presumed sanction for even a grossly negligent misrepresentation.

In *Vaughn v. State Bar*, *supra*, 6 Cal.3d at 855-858, the Supreme Court rejected the lack of personal knowledge as a defense to a charge that the attorney intentionally and falsely caused a pleading to be made falsely stating that no part of a court-ordered fee had been paid. The Supreme Court found Vaughn culpable of misconduct even though it did not find the attorney knew his statement was false. This is because he engaged in a course of conduct involving gross negligence and carelessness, tantamount to moral turpitude. California criminal law also has violations that can be committed for "criminal negligence," i.e. aggravated, culpable, gross, or reckless conduct. For instance, Corporation Code section 25401's prohibition on false or misleading statements or omissions made in the sale of a security does not require knowledge of the falsity or misleading nature of the statement. Individuals can be found guilty of violating this section by criminal negligence in failing to investigate and discover the false or misleading statement. (See *People v. Simon* (1995) 9 Cal.4th 493, 522.)

³ See *Gadda v. State Bar* (1990) 50 Cal.3d 344, 355 [as a result of petitioner's carelessness in failing to check a newspaper article, he misled at least 14 people into believing that they might be eligible for United States citizenship, in violation of former rule 2-101]; *Abeles v. State Bar* (1973) 9 Cal.3d 603, 610-611. Former rule 2-101(A) is current rule 1-400 prohibiting misleading communications and solicitations. Negligence is generally not and should not be a basis for discipline. However, gross negligence, recklessness, and willful blindness are disciplinable and should be. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 ["It has been held that 'Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (Citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.' (Citations.)"].

⁴ *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.

Court's direction that the Commission begin with the current Rules of Professional Conduct (CRPC) and "focus on revisions that are necessary to address developments in the law, and that eliminate, where possible, any unnecessary differences between California's rules and those used by a preponderance of the states." The second Commission should be guided in its task by the principle that the CRPC's historical purpose is to regulate the professional conduct of members of the Bar, and that as such, the proposed rules should remain a set of minimum disciplinary standards. While the second Commission may be guided by and refer to the American Bar Association's Model Rules of Professional Conduct when appropriate, it should avoid incorporating the purely aspirational or ethical considerations that are present in the Model Rules and Comments. Comments to the proposed rules should be used sparingly and only to elucidate and not to expand upon the rules themselves. California's Code of Judicial Ethics provides one model for the use of commentary in the adoption of a set of rules." The comments in the latter cases, as discussed below, should be revised or deleted.⁵ Further, there are too many comments and they often overwhelm the rules themselves.

Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.

1. OCTC supports this rule.
2. OCTC supports Comments 2, 3, and 4.
3. Comment 1 is duplicative of subsections (a) and (b) and, thus, unnecessary and inconsistent with the Supreme Court's directive that Comments should be used sparingly and only to elucidate and not to expand upon the rules themselves.
4. Comment 5 is aspirational only, encouraging attorneys to do pro bono activities. The Comment, therefore, is contrary to the Supreme Court's directive that the Commission should avoid incorporating purely aspiration or ethical considerations that are present in the Model Rules and Comments.

Rule 1.2.1 Advising or Assisting the Violation of Law.

1. OCTC is concerned that this proposed rule fails to prohibit an attorney from attempting to violate the rules. Many other jurisdictions prohibit attorney from attempting to violate the rules. (See e.g. Model Rule 8.4(a); *People v. Katz* (Colo. 2002) 58 P.3d 1177, 1192 ["The fortuitous discovery and frustration of his intended misappropriation of those funds does not lessen the seriousness of his actions."].) California also has disciplined attorneys for attempting to violate ethical standards. (*Werner v. State Bar* (1944) 24 Cal.2d 611, 618 [attempted bribe, whether or not there was any intention to carry it out, is an act of moral turpitude]. See also *In re Conflenti* (1981) 29 Cal.3d 120, 124 [moral turpitude found following conviction for attempt to receive stolen property]; *In re Lesansky* (2001) 25 Cal.4th 11, 17 [moral turpitude found following conviction for attempt to commit a lewd or lascivious act on a child].⁶ Further, exempting attempts to violate a rule or a section of the State Bar Act is contrary to the

⁵ Unless stated otherwise, all future references to section are to a section of the Business and Professions Code; all references to rule or CRPC are to the current Rules of Professional Conduct; all references to proposed rule is to the Commission's proposed Rule of Professional Conduct; and all references to the Model Rules are to the ABA's Model Rules of Professional Conduct.

⁶ In *In re Lesansky*, *supra*, 25 Cal.4th at 17, the Supreme Court wrote: "Here, petitioner's conviction was for an attempt rather than for a completed offense, and it does not appear that any child was actually harmed, but neither of these circumstances alters our conclusion that his criminal conduct necessarily involves moral

purposes of attorney discipline: to establish minimal standards of conduct and to inquire into the fitness of the attorney to continue in that capacity for the protection of the courts and profession. (*Bradpiece v. State Bar* (1974) 10 Cal.3d 742, 748. See also *In re Attorney Discipline* (1998) 19 Cal.4th 582, 609 [“The basic purpose [of disciplinary proceedings] is to protect the public and the profession from the objectionable activities of persons unfit to practice law...”].) An attorney who attempts to violate a rule or the State Bar Act by taking direct action but does not complete the violation due to some fortuity still raises concerns about his or her fitness to be an attorney. The Supreme Court should not have to wait until the attorney successfully completes the prohibited act or causes harm to discipline the attorney.

2. OCTC supports Comments 2, 4, and 5.

3. The first sentence of Comment 1 is confusing. It does not address when attorneys provide information in a manner or under circumstances that suggests or implicitly recommends a violation of the law. (See *In the Matter of Fandy* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 776.) OCTC suggests that the Commission strike the first sentence, but retain the second.

4. Comment 3 appears to be incomplete. When an attorney is allowed to challenge a court ruling or order by violating the ruling or order, the attorney must first *openly and unequivocally refuse to comply* with the order. (See *In the Matter of Gilbert* (Utah 2016) 379 P.3d 1247, 1256 [“An attorney must either obey a court order or alert the court that he or she intends to not comply with the order.”]; *In re Igbanugo* (Minn. 2015) 863 N.W.2d 751, 763 [an attorney violated a court order because the attorney’s failure to abide by the court order did not include an open refusal before the court]; *In re Jones* (Wash. 2014) 338 P.3d 842, 853 [rule 3.4(c) of the Washington Rules of Professional Conduct is violated when an attorney takes action contrary to a court’s order unless the attorney openly and unequivocally informs the court in good faith that he will not comply]; *In the Matter of Ford* (Alaska 2006) 128 P.3d 178, 181.) See also *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951-952 [“Petitioner urges, however, that most, if not all, of the orders he is accused of disobeying were technically invalid, relieving him of the duty to comply. Such technical arguments are waived to the extent the orders became final without appropriate challenge. There can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid.”]. Also, requiring an attorney to challenge a court ruling or order openly is consistent with proposed rule 3.4(f).

Rule 1.3 Diligence.

1. As discussed in OCTC’s September 27, 2016 letter, OCTC is concerned with segregating and separating diligence, competence, and supervision into separate rules. There has been no showing that the proposed changes are necessary to address developments in the law or because the current rule is inadequate to protect the public. Further, there is well-established case law concerning the current rule. (See e.g. *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41; *In the Matter of Broadway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944; *In the Matter of Myrdall* (Review

turpitude. ‘An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.’ (Pen. Code, § 21a.) The act ‘must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action.’ (*People v. Kipp* (1998) 18 Cal.4th 349, 376 [75 Cal.Rptr.2d 716, 956 P.2d 1169].) Thus, by his commission of an attempt, petitioner fully demonstrated a readiness to engage in a serious sexual offense likely to result in harm to a child. This is sufficient to warrant discipline.” There is no good reason why an attorney’s attempt to violate the rules should not be disciplinable if the attorney commits a direct but ineffectual act toward its commission.

Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363; *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657; *Layton v. State Bar* (1990) 50 Cal.3d 889; *Gadda v. State Bar* (1990) 50 Cal.3d 344; *Bernstein v. State Bar* (1990) 50 Cal.3d 221; *Van Sloten v. State Bar* (1989) 38 Cal.3d 921; *Franklin v. State Bar* (1986) 41 Cal.3d 700; *McMorris v. State Bar* (1983) 35 Cal.3d 77.) But, under the proposed new rules California will have to develop new law to distinguish among competence, diligence, and failure to supervise. It is also noted that the first Commission did not support distinguishing between competence and diligence.

2. A failure to perform diligently is a failure to perform competently. This is because diligence is an essential part of competence. From the client's perspective, it does not matter why the misconduct occurred but that it occurred. Moreover, distinguishing between competence and diligence is not always easy.⁷ The lines between these concepts are often blurry, unclear, and overlapping. For instance, if an attorney does not know or learn the timelines for filing pleadings in a case and, thus, does not perform them in a timely manner, is that a failure to perform diligently or a failure to perform competently?⁸ At the very least, these proposals will cause OCTC to file more charges against each respondent, i.e. OCTC will have to file three charges for what used to be one charge. The proposed rules will also make enforcement more difficult.

3. OCTC is concerned with Comments 1 and 2, because these Comments are unnecessary, even if those concepts are separated, because each rule explains what it covers.

Rule 1.5 Fees for Legal Services.

1. Unconscionable Fees. OCTC finds the term "unconscionable fee" vague, difficult to understand, confusing, and very difficult to enforce. Moreover, there is no reason for California to use a different term than the rest of the country. The rules should eliminate unnecessary differences with the rest of the country.

2. The term "unconscionable fees" is meant to refer to the common law doctrine of unconscionability of contracts. (See *Cotchett, Pitre & McCarthy v. Paragon Corp* (2010) 187 Cal.App.4th 1405, 1419.) It is often misinterpreted, however, to have a more generalized meaning and to create a much higher burden for the State Bar than is required.⁹ Consequently, OCTC has great difficulty in obtaining culpability under the current language, even in egregious cases.

3. The term "unconscionable fees" comes from a Supreme Court case finding that an attorney could in some situations be disciplined for excessive fees. (See *In re Goldstone* (1931) 214

⁷ Likewise, it is difficult to distinguish between failing to supervise and diligence, or competence. They are part of the same duty to protect the client's interests.

⁸ Former rule 6-101 stated in part: "A member shall not wilfully or habitually ... (2) fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose for which he is employed."

⁹ The State Bar need not establish that the attorney acted knowingly or intentionally to establish a rule 4-200 violation. All that the State Bar must prove is that the attorney acted willfully — that the attorney acted or failed to act purposefully or, stated differently, that the attorney intended to commit the act or intended not to commit the act. (*In the Matter of Silverton* (Review Dept. 2004) 2004 WL 60709, reversed on other grounds, *In re Silverton* (2005) 36 Cal.4th 81.)

Cal. 490, 498-499; *Bushman v. State Bar* (1974) 11 Cal.3d 558.) This was before there was a Rule of Professional Conduct addressing this type of conduct. It appears to be based on a violation of section 6106. But, not every unconscionable fee constitutes an act of moral turpitude. (See *In re Silverton* (2005) 36 Cal.4th 81, 86 [rule 4-200 violation found, but no moral turpitude found].) The ABA's term, which is followed by most other jurisdictions, is that the fee must not be unreasonable, using similar factors that are used in California's rule. The ABA's term is consistent with California law, which provides that "[a]ttorney fee agreements ... must be fair, reasonable and fully explained to the client." (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851. See also *In re Silverton* (2005) 36 Cal.4th 81, 86 ["Although Silverton was 'entitled to contract for, charge, and collect a reasonable fee for providing that service,' he 'did not do so.' He unequivocally contracted for a 100 percent contingency fee of any reduction he was able to negotiate. At least within the context of the present case, that fee is clearly unreasonable, unconscionable, and improper."]; and sections 6147 and 6148. Thus, this change is necessary to address developments in the law, and eliminate, where possible, any unnecessary differences between California's rules and those used by a preponderance of the states.

4. OCTC also urges the Commission to consider adding an additional factor to those listed in subsection (b): whether the services are legal in nature and whether the attorney charges the client for clerical or non-legal services at the same rate as legal services. Other states have disciplined attorneys for charging the same fee for these non-legal services at the legal services rate. (See e.g. *In re Green* (Co. 2000) 11 P.3d 1078 [charging lawyer's rate for faxing documents, etc.]; *Prof'l Ethics & Conduct of Iowa State Bar v. Zimmerman* (Iowa 1991) 465 N.W.2d 288 [lawyer charged full hourly rate for attending ward's birthday party and discussing toiletry needs]; *Cincinnati Bar Ass'n v. Alsfelder* (Ohio 2004) 816 N.E.2d 218 [charging for discussions and advice about boyfriends, vehicles, and restaurants].)

5. OCTC supports proposed subparagraphs (c), (d), and (e). It is well established that only a true retainer to secure an attorney's availability over time is non-refundable. This is because it is considered earned when paid. Advanced fees, however, no matter how the attorney characterizes them, must be refunded if not earned. A failure to do so is disciplinable. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907; *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752; *Matthew v. State Bar* (1989) 49 Cal.3d 984.) Flat fees also must be earned by the performance of services. Any attempt to deal with the issue of creditor rights and government forfeiture rules, as proposed by some of the other commenters, is beyond the scope of the Rules of Professional Conduct.

6. OCTC recommends that the rule be amended to make the failure to have a written fee agreement disciplinable. Other jurisdictions discipline attorneys for failing to have a written fee agreement with the client. (See e.g. *In re Fink* (Vt. 2011) 22 A3d 461, 478-479.) Written fee agreements protect the public and are an integral part of an attorney's duty to communicate significant developments relating to his or her employment. (Rule 3-500; Business and Professions Code section 6068(m).) Disclosure of the terms of the agreement should be in writing, because it protects both the attorney and the client, and the client should not be expected to mentally retain such information throughout the pendency of the client's case. (See *Chambers v. Kay* (2002) 29 Cal.4th 142, 157.) Moreover, California law now requires that most fee agreements be in writing. (*Hawk v. State Bar* (1988) 45 Cal.3d 589, 606; Business and Professions Code sections 6147 and 6148.) In *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 278-280, the Review Department found that failing to have a written agreement as required by sections 6147 and 6148 is not a disciplinable

offense.¹⁰ Most clients will not be aware of their civil remedies when an attorney fails to provide a written fee agreement. (See Business and Professions Code sections 6147 and 6148.) Further, utilizing solely criminal and civil remedies to regulate attorney conduct is inadequate to protect the public from errant attorneys. (See *In Re Attorney Discipline* (1998) 19 Cal.4th 582, 608- 609.) Also, proposed rule 1.5.1 requires that fee sharing agreements between attorneys be in writing and the failure to do so constitutes a basis for discipline. The same should apply to fee agreements between attorneys and clients. There is no principled reason for this difference.

7. OCTC believes that Comment 1 should be in the text of the rule, not a Comment.

8. Comments 2 and 3 seem unnecessary because these Comments are merely duplicative of the rule.

Rule 1.7 Conflict of Interest: Current Clients.

1. OCTC supports this rule.¹¹ However, to avoid confusion, subsection (d) should state: "Even with the client's informed written consent, ..." OCTC recognizes that Comment 8 explains that, but it should be in the text of the rule, not in a Comment.

2. OCTC supports Comments 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11. OCTC has no position on Comment 10 [advanced waivers]. If the Comments discuss advanced waivers, however, they should also discuss the requirements for an adequate advanced waiver. OCTC is concerned that Comment 12 is unnecessary because proposed rules 6.3 and 6.5 are self-explanatory.

3. If subsection (d) is revised as indicated above, the Commission might want to reconsider the first sentence of Comment 9.

Rule 1.8.1. Business Transactions with a Client and Acquiring Interests Adverse to the Client.

1. OCTC believes there should be a comment that fee modifications would and should normally apply to this rule. (See OCTC's written Comment to COPRAC's Proposed Formal Opinion Interim No. 05-0001, already provided in OCTC's August 26, 2008 comments to the rules. See also *In re Silverton* (2005) 36 Cal.4th 81; *In the Matter of Mark Scott* (Review Dept. 2007) Case No. 01-O-05066, Slip Op. p. 19, fn. 22 [contingency fee agreements *renegotiated* at the time of settlement may be governed by rule 3-300, unpublished]; *In re Corcella* (Ind. 2013) 994 N.E.2d 1127; Comment 1 to Rule 1.8 of the Indiana Rules of Professional Conduct.)

2. The rule should be amended to include transactions involving relatives of the attorney when the attorney knows or should know of these transactions or potential transactions. (See *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 776-777 [not applying former rule 5-101 to a transaction between the client and respondent's parents]; *In the Matter of Casey* (Review

¹⁰ Although the Review Department decided in *Harney* that violations of section 6147 and 6148 were not a disciplinable offense, it found that this was a very close question. Moreover, the Review Department used Harney's failure to provide his clients with a written fee agreement as an aggravating circumstance showing harm and required that Harney, as a condition of probation, provide a certain class of his clients with written fee agreements.

¹¹ OCTC, however, is concerned about the proliferation of conflict rules as discussed in its September 27, 2016 letter.

Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 123-124 [not applying rule 3-300 when respondent negotiated a transfer of real property between two of his clients, and as a result of the transfer the attorney's minor son received a 50 percent interest in the property from one of the clients].¹² But see *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [applying former rule 5-101 when attorney persuaded client to loan money to attorney's ex-client and the attorney received most of proceeds of one of the loans as payment of the ex-client's legal fees.] The courts have disciplined real estate brokers for failing to disclose that the purchaser was related to the broker. (*Whitehead v. Gordon* (1969) 2 Cal.App.3d 659 [brother-in-law].) The courts have also applied the presumption of unfair transactions when the purchasers were relatives of the fiduciary. (See *Batson v. Stehlow* (1968) 68 Cal.2d 662, 675; *Adams v. Herman* (1951) 106 Cal.App.2d 92, 99.) Attorneys should be required to comply with rule 3-300 when they *know* or reasonably should know of a transaction or potential transaction between their clients and their relatives. This is necessary for public protection.

3. The rule should also be amended to cover attorney-client transactions for three years after the attorney-client relationship terminated. (Compare *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 370-372 [applying former rule 5-100 to a transaction after the termination of the attorney-client relationship] and *In the Matter of Allen* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 198, 203-205 [not applying rule 3-300 to a transaction after the termination of the attorney-client relationship].) The current law is confusing on this issue, applying the rule to some but not all post-representation transactions. One of the purposes of rule 3-300 is to protect clients from their attorneys' personal use of financial information gained from confidences disclosed during the attorney-client relationship. (*Hunnicutt, supra*, 44 Cal.3d at 370.) Further, "if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [former] rule 5-101 even if the representation has otherwise ended." (*Hunnicutt, supra*, 44 Cal.3d at 370.) Amending the rule to include all transactions within three years of the representation protects clients and clarifies when the rule applies to a transaction and when it does not. Further, such an amendment is consistent with Business & Professions Code section 6175.3 (which requires certain disclosures when an attorney sells financial products to a client or former client within three years of the attorney-client relationship terminating).

4. OCTC supports Comments 1-2 and 4-6.

5. OCTC supports Comment 3. The comment should, however, also make clear that it is the attorney's burden to establish that the transaction is fair and reasonable. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314.)

Rule 1.8.3 Gifts From a Client.

1. OCTC supports this rule and the Comments.

Rule 1.8.5 Payment of Personal or Business Expenses by or for a Client.

1. OCTC generally supports this rule. However, OCTC is concerned that subsection (b)(4) does not define indigent person. The rule exempts an attorney from the requirements of this rule when the attorney pays expenses for an indigent client, but does not define when a person is considered indigent. This lack of precision will make this rule difficult to understand or enforce. This subsection could be used by attorneys to incite or promote unnecessary litigation.

¹² The respondents in these cases were found culpable of either violating rule 3-310 or section 6106 for their conduct.

Rule 1.8.7 Aggregate Settlements.

1. OCTC supports this rule.

Rule 1.8.10 Sexual Relation with Client.

1. OCTC supports this rule and the Comments. The second sentence of Comment 3, however, is unclear as to its meaning because it does not specify what the obligations are.

Rule 1.9 Duties to Former Clients.

1. OCTC generally supports this rule. It is concerned, however, about the use of the term “knowingly” in subsection (b). By using the term “knowingly” in this subsection the Commission is excluding attorneys who commit a conflict violation by recklessness, gross negligence, or willful blindness. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 424-425 [attorney was grossly negligent in failing to investigate and declare conflicts, in violation of the conflict rules and amounting to moral turpitude]. As previously discussed, a rule violation generally only requires that it was done willfully, i.e. purposely, not with bad faith or evil intent. This rule appears to exclude an attorney who either does not have a program to check conflicts or does not actually check whether there is a conflict. That attorney can claim he or she does not have actual knowledge of the conflict. Thus, that attorney would not violate this rule, even though the attorney has engaged in willful blindness or gross negligence. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433 [finding attorney did not have actual knowledge of his suspension, but his willful blindness is tantamount to having actual knowledge that he was ineligible to practice law. That finding was based on statutes that did not require actual knowledge.]) The rules should not permit an attorney to escape culpability by not having a conflict check procedure or by failing to check for conflicts. Although negligence is not a basis for discipline, gross negligence, recklessness, and willful blindness is a basis for discipline. (See *Lowe v. State Bar* (1953) 40 Cal.2d 564, 570 [“It has been held that ‘Gross negligence is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client. (Citations.) It warrants disciplinary action, since it is a violation of his oath to discharge his duties to the best of his knowledge and ability.’ (Citations.)”] Requiring actual knowledge in this rule will lessen the current standards governing conflicts of interest and is contrary to well established standards for when such attorney conduct is disciplinable. OCTC recognizes that conflict procedures may be more difficult when they involve clients from a former law firm, but that should be taken into account in determining if the failure to obtain conflict waivers is the result of excusable negligence or gross negligence, recklessness, or willful blindness. See also OCTC’s comments in the General Discussion section of OCTC September 27, 2016 letter about the proposal to use the term “knowingly” in several of the proposed rules.

2. OCTC is concerned with subparagraphs (a) and (b) of proposed Rule 1.9, because the Commission has added the requirement that the matter be materially adverse while the current rule only requires that it be adverse. This is a significant change in the rule and law, making it far more difficult to enforce the rule and prosecute violations, and far less protective of clients, than the current law. While the term “materially adverse” is in the ABA Model Rules, neither the proposed subparagraph nor proposed rule 1.0 clarifies what that means and why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

3. OCTC supports the Commission's inclusion of Business & Professions Code section 6068(e) in subparagraph (b)(2).

4. OCTC has concerns about Comments 1 and 2. They do not elucidate the rule but, instead, give a philosophical basis for the rule.

5. OCTC supports Comments 3 and 5.

6. OCTC is concerned with Comment 4 for the same reasons it is concerned with the use of "knowingly" in paragraph (b) of the proposed rule. Further, this comment implies it will be the State Bar's burden to prove that the person had actual knowledge of the confidential information, even though the law has long held that, for public protection, knowledge of confidential information is imputed to all the attorneys in a firm. (See *Adams v. Aerojet-General Corp* (2001) 86 Cal.App.4th 1324, ["The imputed knowledge theory holds that knowledge by any member of a law firm is knowledge by all of the attorneys in the firm, partners as well as associates.']; *City and Counsel of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847-848 ["Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale "that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information."]). There are reasons to hold that the normal imputation to a member of the law firm should not strictly apply in discipline matters if the attorney can establish they did not have knowledge of the information, but, given the difficulty of establishing who in a law firm had confidential information, public protection requires that the attorney show that he or she did not have access to the confidential information. Likewise, as discussed, an attorney should not be rewarded for failing to establish adequate conflict procedures or failing to utilize them to determine if there is a potential conflict issue. Whether this constitutes gross negligence should be determined on a case-by-case basis.

7. OCTC has no position on Comment 6's discussion of advanced waivers.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees.

1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments of OCTC's September 27, 2016 letter. This rule appears to exclude an attorney who either does not have a program to check conflicts, or does not actually check to determine whether there is a conflict.

2. OCTC supports Comments 1, 2, 5, 6, 7, 8, 9, and 10. While OCTC generally believes that there are too many unnecessary comments in the rules, the complexity of the conflict rules does require several comments.

3. Comment 3 does not clarify the rule, but, instead, gives a philosophical basis for the rule.

4. Comment 4's use of the word "knowingly" in subsection (b) of the rule is problematic for the reasons already discussed about the use of the word "knowingly."

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.

1. OCTC generally supports this rule, but has the same concerns regarding use of the term "knowingly" in subsection (c) of this rule as it has for proposed Rule 1.9 and the General Comments section of OCTC's September 27, 2016 letter.

2. OCTC supports the Comments.

Rule 1.13 Organization as Client.

1. OCTC generally supports this rule, but has the same concerns regarding use of the term “knowing” in subsection (b) of this rule as it has for proposed Rule 1.9 and the General Comments section of OCTC’s September 27, 2016 letter.
2. OCTC supports Comments 1, 2, 4, and 6, except Comment 2 may need to be rewritten, if the Commission revises its proposals to have a single rule for competence and diligence. OCTC also remains concerned about having separate rules for supervision, as discussed in OCTC’s September 27, 2016 letter.
3. OCTC has the same concerns regarding use of the term “knowing” in Comment 3 for the same reasons it has concerns about subsection (b) of this rule, as well as proposed Rule 1.9 and the General Comments section of this letter.
4. Comment 5 covers the same issues as Comment 2 and, thus, is unnecessary and should be deleted.

Rule 1.14 Client with Diminished Capacity.

1. OCTC supports this rule as a good compromise on this complicated and difficult issue. (See *In the Matter of Karnazes* (Review Dept. 2014) Case No. 10-O-334, 2014 WL 232500; *In re Eugster* (Wa. 2009) 209 P.3d 435.)
2. OCTC supports Comments 3, 4, 5, and 6.
3. Comments 1 and 2 are unnecessary and in the nature of ethics opinions. Comment 7 is unnecessary, as it is already covered by the text of the rule.

Rule 1.15 Handling Funds and Property of Clients and Other Persons.

1. OCTC supports this rule and the Comments to this rule. In particular, OCTC supports the amendments to the current rule to require an attorney to maintain advanced fees in a trust account until the fee is earned and requiring the accounting to be in writing. This enhances public protection. OCTC, however, is concerned with exempting a written agreement to deposit flat fees in the attorney’s operating account for fees of \$1,000 or less. There is no good reason for this \$1,000 exemption.

Rule 1.16 Declining or Terminating Representation.

1. OCTC supports this rule and the Comments to this rule.

Rule 1.17. Purchase and Sale of Law Practice.

1. OCTC supports this rule.
2. OCTC notes that Comment 1 could raise anti-trust or other constitutional issues that would make this rule unenforceable, e.g. the sale of only a field or area of a practice, a practice in a geographical area, or a practice in a particular jurisdiction.
3. OCTC supports Comments 2 and 3.

Rule 1.18 Duties to Prospective Client

1. Neither this proposed rule nor proposed rule 1.0 defines “materially adverse” or why the lawyer, not the client, should decide whether something is material. Further, this addition to the rule creates uncertainty for lawyers and makes it more difficult to prosecute a violation.

2. OCTC is also concerned about the use of the term “knowingly” in paragraph (c) in the other conflict rules and in OCTC’s September 27, 2010 letter.

Rule 2.1 Advisor

1. OCTC takes no position on this rule.

2. Comment 1 could be interpreted as contrary to established law regarding the duty to investigate client matters. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 329 [“While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation.”]; CCP section 128.7.) Also, Comment 1’s statement that an attorney has no duty to give advice that the client has indicated is unwanted is too broad, and may be misleading. “[E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention.” (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687. See also *Janik v. Rudy, Exelrod, & Ziff* (2004) 119 Cal.App.4th 930.) This is because one of the attorney’s basic functions is to advise, and, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client’s legal needs. (*Nichols v. Keller, supra*, 15 Cal.App.4th at 1684.)

Rule 3.1 Meritorious Claims and Contentions.

1. OCTC supports this rule.

Rule 3.3 Candor Toward the Tribunal.

1. OCTC is concerned that this proposed rule requires “knowingly” for the same reasons expressed regarding that term in proposed Rule 1.9, the General Comments section of OCTC’s September 27, 2016 letter, and OCTC’s Comments to proposed rule 3.3 in the September 27, 2016 letter. Moreover, current rule 5-200(A) does not require that a false statement be made knowingly. It can be violated by gross negligence. (See *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281-282 [applying former rule 7-105].)

2. An attorney’s unqualified and unequivocal statements to judges under circumstances that should have caused him or her at least some uncertainty are, at a minimum, deceptive and support a finding of culpability. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 173-174.) California disciplines attorneys for a lack of candor, dishonesty, or moral turpitude, based on gross negligence, recklessness, and willful blindness. (See sections 6068(d) and 6106 and rule 5-200; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857 and 859; *Sanchez v. Bar* (1976) 18 Cal.3d 280, 283–285 [gross negligence amounting to moral turpitude where attorney who knew client’s case was in danger of dismissal inaccurately reported case status to client without first checking client’s file]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281-282; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 [gross negligence in representation to third party]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80; *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117.) In fact, Standard 2.11 of the Standards for Attorney Sanctions for Professional Misconduct states that disbarment or actual suspension is the presumed sanction even for a grossly negligent misrepresentation. Moreover, Section 128.7 of the Code of Civil Procedure requires that all statements in pleadings be made “after an inquiry reasonable under the circumstances.” (See also Federal Rules of Civil Procedure, rule 11; *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].) California should not allow lawyers to make false statements to a court without proper and reasonable inquiry and

a good faith basis for the statement. This proposed rule is also inconsistent with proposed rules 8.2 and 8.4(c). In fact, lack of candor to a court under proposed rule 3.3 requires “knowingly,” but the attorney could be disciplined for the exact same conduct as a result of gross negligence under proposed rule 8.4 and Business and Professions Code sections 6106 and 6068(d).

3. OCTC is also concerned that the proposed rule is far more limited than current rule 5-200, which prohibits an attorney from seeking to mislead a judge, judicial officer, or jury by an artifice or false statement of fact or law. The Commission’s proposed rule would only prohibit a false statement of fact or law. (See *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest, through innuendo, false conclusions; Review Department concluded that on its face the language of Canon 5 only reached factual misrepresentations].)¹³ California has long held that an attorney is required to refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truth, and false statement of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 [“Both express and implied representations of ability to practice are prohibited”]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

4. OCTC is concerned that the proposed rules do not provide for when an attorney (1) states or alludes at trial to evidence that the attorney knows, or reasonably should know, is not relevant or admissible evidence, or has already been ruled inadmissible (see *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 118); (2) states the attorney’s belief in the credibility of a witness (see *Hawk v. Superior Court, supra*, 42 Cal.App.3d at 123); or (3) violates discovery orders of a court. OCTC recognizes that arguably they could be included in proposed rule 3.4, but they are not specifically there, either. They should be included somewhere.

5. OCTC supports the Comments to this rule except Comment 4’s use of “knowingly” for the same reasons previously discussed in this letter as to other rules and comments, and as contained in OCTC’s September 27, 2016 letter.

Rule 3.5 Contact with Judges, Officials, Employees, and Jurors.

1. OCTC supports this rule but recommends that the rule also prohibit communications to a juror or prospective juror that are intended to prevent or encourage the juror from communicating with the other party or the court after their discharge. (*Lind v. Medevac* (1990) 219 Cal.App.3d 516.) While this has been interpreted under what is now subparagraph (g)(4), it would be clearer and more enforceable if it were its own prohibition.

2. OCTC supports the Comments.

¹³ Canon 5B(1)(b) prohibits a judge or candidate for judicial office from making “knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.” There is a proposal to amend this Canon to include not only false statements of fact, but misleading statements as well.

Rule 3.9 Non-adjudicative Proceedings.

1. OCTC supports this rule.
2. OCTC supports the Comment to this rule.

Rule 4.2 Communication with a Person Represented By Counsel.

1. OCTC supports this rule. OCTC is, however, concerned with the use of the term “knows” in subsection (a), as it would appear to allow willful blindness, recklessness, or gross negligence in learning whether the person was represented by counsel. (See prior comments about “knowing” and “knowingly” in this letter and the General Comments sections of OCTC’s September 27, 2016 letter.)
2. OCTC supports Comments 1, 2, 3, 5, 6, 7, 8, and 9.
3. OCTC supports the first sentence of Comment 4. OCTC is, however, concerned with Comment 4’s use of the term “knows” for the same reasons it is concerned with the use of that term in subsection (a) of this proposed rule.

Rule 4.3 Dealing with Unrepresented Person.

1. OCTC supports this rule.
2. Comments 1 and 2 are unnecessary, merely repeat the rule, or provide the philosophical reasons for the rule. Comment 3 is unnecessary, as this subject is covered in Rule 8.4.

Rule 4.4. Duties Concerning Inadvertently Transmitted Writings.

1. OCTC supports this rule and Comments 1 and 2.

Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers.

1. As discussed in OCTC’s September 27, 2016 letter, supervision should remain a part of the rule addressing competence. Supervision by an attorney is an essential part of lawyer competence. (See *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 522, fn. 29 [respondent’s development and maintenance of adequate office management and accounting procedures are fundamental to his fulfilling multiple other duties, including his duties to competently perform legal services (rule 3–110(A)), to adequately communicate with his clients (rule 3–500; § 6068, subd. (m)), to protect his clients’ confidential information (§ 6068, subd. (e)), and to properly handle and account for client funds and other property (rule 4–100).]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *Bernstein v. State Bar* (1990) 50 Cal.3d 221; *Gadda v. State Bar* (1990) 50 Cal.3d 344, 353-354; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403; and the discussion to current rule 3-110.) From the client’s perspective, it does not matter if the misconduct was the result of the attorney’s misconduct or the attorney’s failure to supervise. The attorney was hired to handle the matter. Competence, diligence, and supervision are focused on the same issue, an attorney’s duties to his or her client and the duty to perform the services he or she was hired to perform. Moreover, in California there is well-developed case law about supervision under the competence rule, rule 3-110. Adopting this series of new rules about supervision will require California to develop new law to distinguish among competence, diligence, and the various failures to supervise. At the very least, separating these concepts will cause an unnecessary proliferation of charges and has the potential for unintended consequences. California

has well-established principles and case law about these concepts that could be jeopardized by these changes.

2. Also, distinguishing between competence or diligence and failing to supervise is not easy. The concepts and lines are often blurry and unclear. Choosing the wrong rule to charge could result in a dismissal, even though respondent was on notice as to the basis of the charge. Many attorneys dispute the allegations, but never contend that the misconduct occurred because of a lack of supervision until they are testifying at trial, long after the charges have been brought. If the court determines that the misconduct was the result of a failure to supervise, which was not alleged, the respondent could escape culpability for a failure to perform competently or diligently. This is especially problematic where there is no initial indication from the respondent or others that the misconduct was a result of a lack of supervision, and the State Bar does not have probable cause to allege a failure to supervise.

3. OCTC, however, does not oppose having rules or Comments that clarify the duty of supervision as a part of the duty of competence. This is already the law in California.

4. OCTC is concerned that Comments 5, 8, and 9 are unnecessary and merely repeat the rule. For example, the statement in Comment 5, concerning whether a lawyer has direct supervisory authority over another lawyer in particular circumstances, is a question of fact. This is true of all facts.

5. The first sentence of Comment 7 discusses that the appropriateness of remedial action will depend on the nature and seriousness of the harm. This is understood and does not warrant a Comment. OCTC, however, supports the second sentence, except it has concerns about the use of the term “knowingly” for the same reasons expressed regarding other rules and comments in this letter and in OCTC’s September 27, 2016 letter.

6. Comment 9 discusses that subsections (a) through (c) create independent reasons for discipline. This merely repeats the rule and is unnecessary. Also, OCTC is concerned with the third sentence of Comment 9, which states that paragraph (c) of this proposed rule and proposed rule 8.4 is the only time there is disciplinary liability for the conduct of a partner, associate, or subordinate lawyer. That comment is overly broad, and may encompass a fact pattern or other rule when this comment would not be accurate. (See for example Comment 1 to proposed rule 8.4.1 [duty of all attorneys in law firm to advocate for corrective action for harassment or discriminatory conduct by the firm or any of its other lawyers or non-lawyer personnel]; Section 6106.) OCTC finds the last sentence unnecessary in light of proposed rule 1.0(b)(3).

Rule 7.1 Communications Concerning the Availability of Legal Services.

1. OCTC believes that the current rule is working fine and does not warrant revision. OCTC is concerned with making the current rule into several separate rules for communications, advertising, and solicitation. The line between those concepts is blurry, overlaps, and it is often difficult for attorneys and OCTC to determine whether a communication is a communication, an advertisement, or a solicitation. Moreover, California has well-established law in this area. Adopting this series of new rules regarding communications, advertising, and solicitation will require California to develop new law to distinguish these rules. Further, changing these rules seems inconsistent with the Supreme Court’s direction to begin with California’s rule.

2. Also, proposed rule 7.2 requires that the advertising also be subject to the requirements of 7.1 and 7.3. OCTC believes a unitary rule is clearer, more understandable, and more enforceable. Further, by dividing the current rule into multiple rules, OCTC will have to unnecessarily charge violations of more rules.

3. OCTC is especially concerned with the elimination of all the presumptions in the current rule, including those that are also in the State Bar Act. (See Business and Professions Code sections 6158.1 and 6158.2.) Those presumptions, which are rebuttable, give great guidance and assistance to attorneys, OCTC, and the courts. (See e.g. *In the Matter of Liberty* (2016) Case No. 11-O-18778, Hearing Department Decision.) There is no reason to eliminate all of the presumptions. Further, eliminating them in the rule, while they are required in the State Bar Act, will create great confusion and issues for enforceability.

Rule 8.1 False Statement Regarding Application for Admission to Practice Law.

1. OCTC supports the revision of paragraph (a) of this rule to include that it can be violated by an applicant making a statement in his or her application in reckless disregard for the truth or falsity of a statement, as well as knowingly. This is consistent with *In re Gossage*. In *Gossage*, the Supreme Court stated that “Whether it is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, such an omission is itself strong evidence that the applicant lacks the ‘integrity’ and/or ‘intellectual discernment’ required to be an attorney.” The Court went on to hold: “Contrary to what the majority of the Review Department found, the unusual severity and scope of Gossage's criminal record strengthened — not lessened — his obligation to ensure the accuracy of his Application even if independent research was required To excuse defective preparation of the Application under these circumstances would set a dangerous precedent—encouraging the worst criminal offenders to make the least effort in complying with the disclosure requirements on State Bar applications. In a related vein, we refuse to assume that Gossage or any other applicant in his position cannot reasonably be expected to discover and provide the necessary information. More rigorous intellectual tasks are often performed by attorneys in the practice of law.” (*In re Gossage* (2000) 23 Cal.4th 1080, 1102-1104.)

2. The “reckless disregard” language should be in paragraphs (b) and (c). As previously discussed, gross negligence or recklessness in preparing, responding, or correcting false or misleading statements should be disciplinable.

3. OCTC supports Comment 3. OCTC takes no position as to Comment 2.

4. Comment 1 to this rule would only prohibit a false statement of fact or law, not other misleading statements. (See *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370, 376 [interpreting Canon 5 of the Judicial Code of Ethics to apply only to factual misrepresentations, but not to statements that may be misleading or true statements that might imply or suggest through innuendo false conclusions. The Review Department concluded that on its face the language of Canon 5 only reached factual misrepresentations.].)¹⁴ California has long held that an attorney is required to

¹⁴ Canon 5B(1)(b) prohibits a judge or candidate for judicial office from making “knowing misrepresentations, including false or misleading statements, during an election campaign because doing so would violate Canons 1 and 2A, and may violate other canons.” There is a proposal to amend this Canon to include not only false statements of fact, but misleading statements as well.

refrain from misleading and deceptive acts without qualification. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) No distinction is made among concealment, half-truths, and false statements of fact. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Further, express and implied representations, as well as material omissions, support finding a statement misleading. (See e.g. *In re Naney* (1990) 51 Cal.3d 186 [“Both express and implied representations of ability to practice are prohibited”]; *In the Matter of Kirwin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 636-637]; *Franklin v. State Bar* (1986) 41 Cal.3d 700, 709.)

Rule 8.4 Misconduct.

1. Subsection (a) prohibits only knowingly assisting, soliciting, or inducing another to violate the rules. The word “knowingly” is problematic and inconsistent with California law for the reasons expressed regarding that term in proposed Rules 1.9, 3.3, 4.1, and the General Comments section of OCTC’s September 27, 2016 letter. The rules should not encourage willful blindness, gross negligence, recklessness, or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

2. This rule does not prohibit attempting to violate these rules or the State Bar Act. This proposal is problematic for the same reasons expressed in OCTC’s comment to proposed rule 1.2.1, above. Moreover, by excluding attempts to violate the rules or the State Bar Act, the proposed rule deviates unnecessarily from the ABA Model Rules and the rule in many jurisdictions, which call for discipline for an attorney’s attempt to violate the rules. (See e.g. Model Rule 8.4(a); *People v. Katz* (Colo. 2002) 58 P.3d 1177, 1192 [“The fortuitous discovery and frustration of his intended misappropriation of those funds does not lessen the seriousness of his actions.”].) California law also provides for discipline for attempting to violate an attorney’s ethical standards. (*Werner v. State Bar* (1944) 24 Cal.2d 611, 618 [attempted bribe, whether or not there was any intention to carry it out, is an act of moral turpitude]. See also *In re Conflenti* (1981) 29 Cal.3d 120, 124 [moral turpitude found following conviction for attempt to receive stolen property]; *In re Lesansky* (2001) 25 Cal.4th 11, 17 [moral turpitude found following conviction for attempt to commit a lewd or lascivious act on a child].¹⁵) Exempting attempts to violate the rule and the State Bar Act is contrary to the purposes of attorney discipline: to inquire into the fitness of the attorney to continue in that capacity for the protection of the courts and legal profession. (*Bradpiece v. State Bar* (1974) 10 Cal.3d 742, 748. See also *In re Attorney Discipline* (1998) 19 Cal.4th 582, 609 [“The basic purpose [of disciplinary proceedings] is to protect the public and the profession from the objectionable activities of persons unfit to practice law...”].) An attorney who attempts to violate a rule or the State Bar Act by a direct act, but does not complete the act due to some fortuity, still raises concerns about his fitness to be an attorney. The Supreme Court should not have to wait until the attorney successfully completes the prohibited act

¹⁵ In *In re Lesansky*, *supra*, 25 Cal.4th at 17, the Supreme Court wrote: “Here, petitioner’s conviction was for an attempt rather than for a completed offense, and it does not appear that any child was actually harmed, but neither of these circumstances alters our conclusion that his criminal conduct necessarily involves moral turpitude. ‘An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission.’ (Pen. Code, § 21a.) The act ‘must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action.’ (*People v. Kipp* (1998) 18 Cal.4th 349, 376 [75 Cal.Rptr.2d 716, 956 P.2d 1169].) Thus, by his commission of an attempt, petitioner fully demonstrated a readiness to engage in a serious sexual offense likely to result in harm to a child. This is sufficient to warrant discipline.” There is no principled reason why an attorney’s attempt to violate the rules should not be disciplinable if the attorney commits a direct but ineffectual act toward its commission.

or causes actual harm to discipline the attorney.

3. Paragraph (b) does not include other misconduct warranting discipline. When the Review Department refers convictions to the hearing department, it is to determine if the misconduct constitutes moral turpitude or other misconduct warranting discipline. There is no reason to have a different standard. OCTC recognizes Comment 3 mentions that other misconduct can result in discipline under Business and Professions Code sections 6101 *et seq.*, but that still does not address why the standard should be different under Section 6101 than in the Rules of Professional Conduct.

4. OCTC supports subsections (c), (d), and (e).

5. Subsection (f) prohibits only “‘knowingly’ assisting a judge or judicial officer in conduct that is a violation of the applicable rules of judicial conduct or other law.” This proposal is problematic and inconsistent with California law for the same reasons expressed regarding that term in proposed Rules 1.9, 3.3 and 4.1, and the General Comments section of OCTC’s September 27, 2016 letter.

6. OCTC is also concerned with the use of the word judge or judicial officer in subsection (f) instead of “tribunal” as used elsewhere in the proposed rules. This subsection should also include assisting an administrative law judge or arbitrator in violating their rules of conduct. (See proposed rule 3.4 (f).)

7. OCTC believes that subparagraph (f) should include solicit or induce a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. This would be the same as in subparagraph (a) for violations of these rules or the State Bar Act. While this is not in the Model Rules, there is no reason for the differences between (a) and (f).

8. OCTC supports the Comments to this rule.

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.

1. OCTC supports subsections (a) and (d) of this rule.

2. OCTC supports the general concepts in subsections (b) and (c), but is concerned that subsections (b)(1) and (2) and (c)(2) require “‘knowingly’” for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3 of this letter and the General Comments section of OCTC’s September 27, 2016 letter. The rules should not encourage willful blindness, gross negligence, recklessness, or a failure to investigate. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation].)

3. OCTC supports Comments 2, 7, 8, and 9.

4. Comments 1 and 5 are more appropriate for treatises, law review articles, and ethics opinions. They are merely a philosophical discussion of the reasons for the rule. Further, OCTC is concerned with the use of the term “‘knowingly’” in Comment 5 for the same reasons expressed regarding that term in proposed rules 1.9 and 3.3 in this letter, and the General Comments section of OCTC’s September 27, 2016 letter.

5. Comments 3 and 6 are unnecessary.

OCTC again thanks the Commission for the opportunity to present our views. OCTC also thanks the members of the Commission for the considerable efforts they made in crafting the proposed rules of conduct for California attorneys.

If you have any questions, please feel free to contact us.

Very truly yours,

Gregory Dresser
Interim Chief Trial Counsel



**THE STATE BAR
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180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
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TELEPHONE: (415) 538-2161

December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.3 Diligence

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.3 – Diligence. COPRAC supports the adoption of proposed Rule 1.3 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
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State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.5 Fees for Legal Services

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.5 – Fees for Legal Services. COPRAC supports the adoption of proposed Rule 1.5 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.7 Conflict of Interests: Current Clients

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of the current version of proposed Rule 1.7 Conflict of Interest: Current Clients and offers the following comments.

As an initial matter, COPRAC repeats its strong support for the Commission's decision to adopt the basic framework set out in ABA Model Rule 1.7 for the analysis of concurrent client conflicts. COPRAC also supports most of the changes to the Rule and the Comments approved by the Commission on October 21-22.

COPRAC opposes new Comment [2] defining what constitutes a "matter" for purposes of Rule 1.7 (and, by cross-reference, for Rules 1.9 and 1.11). This definition is clearly too narrow in its application to transactional work, limiting such work to single contracts. It is also confusing in its application to many common situations, such as mediation prior to the filing of a lawsuit or administrative or legislative lobbying. The definition also appears to fall into the category of law-making by Comment that the Supreme Court has disapproved. Finally, this definition appears to be a departure from prior law that is not required for national uniformity, since the ABA Model Rules do not contain such a definition. It appears that other jurisdictions (like California) have been content to treat the question of what counts as a matter (like the question of whether an attorney-client relationship exists) as one to be developed in the case law rather than specified by rule. In light of these considerations, COPRAC suggests that the Comment be dropped or substantially modified.

COPRAC also proposes a small clarifying stylistic revision to new Comment [7] on positional conflicts. We suggest that the Comment's second sentence, beginning with "That advocating..." be rewritten for clarity as follows: "Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by the lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent."

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Suzanee', with a long horizontal flourish extending to the right.

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
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State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.8.1 – Business Transactions with a Client and Pecuniary Interests Adverse to a Client. COPRAC supports the adoption of proposed Rule 1.8.1 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
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State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.3 Gifts from Client

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.8.3 – Gifts from Client. COPRAC supports the adoption of proposed Rule 1.8.3 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a
Client

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC does not support the current revision of proposed Rule 1.8.5 because of the deletion of the phrase "or pro bono client" from subparagraph (b)(4). Prohibiting a lawyer from paying the costs of prosecuting or defending a claim or action, or otherwise protecting or promoting the interests of a pro bono client, could deprive non-indigent clients (including non-profit organizations) of access to justice. In addition, it imposes an unacceptable burden on the First Amendment rights of lawyers to support those causes or persons in which a lawyer may believe.

Thank you for your consideration of our comments.

Very truly yours,

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.8.7 Aggregate Settlements

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.8.7 – Aggregate Settlements. COPRAC supports the adoption of proposed Rule 1.8.7 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.9 Duties to Former Client

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of the revised proposed Rule 1.9 – Duties To Former Clients. COPRAC repeats its support for Rule 1.9 and agrees with all changes reflected in the revised Rule, except for Comment [3], defining “the same or substantially related.” The Committee believes that while the proposed definition is adequate for disciplinary purposes, it may be too narrow for other purposes in which the courts may look to this rule, for example, in a disqualification context. To avoid potential confusion or inconsistency, the Committee recommends that a final sentence should be added to Comment [3] reading as follows: “The definition in this Comment is intended for disciplinary purposes, and may not exhaust all situations in which a court could conclude that two matters are ‘the same or substantially related’ in other contexts.”

Thank you for your consideration of our comments.

Very truly yours,

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.11 Special Conflicts of Interest for Former and Current Government
Officials and Employees

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC generally supports proposed Rule 1.11 as revised, however, we recommend the deletion of Comment [2]. As we stated in our comment letter to proposed Rule 1.7 (dated December 21, 2016), the definition of "matter" is clearly too narrow in its application to transactional work, limiting such work to single contracts. It is also confusing in its application to many common situations, such as mediation prior to the filing of a lawsuit or administrative or legislative lobbying. The definition also appears to fall into the category of law-making by Comment that the Supreme Court has disapproved.

Finally, this definition appears to be a departure from prior law that is not required for national uniformity, since the ABA Model Rules do not contain such a definition. It appears that other jurisdictions (like California) have been content to treat the question of what counts as a matter (like the question of whether an attorney-client relationship exists) as one to be developed in the case law rather than specified by rule. In light of these considerations, COPRAC suggests that the proposed Rule 1.7, Comment [2] be dropped or substantially modified. If deleted, the cross-reference to Rule 1.7, Comment [2] should be deleted in proposed Rule 1.11 as well.

Thank you for your consideration of our comments.

Very truly yours,

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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December 21, 2016

Justice Lee Edmon, Chair
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State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.12 Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.12 – Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral. COPRAC supports the adoption of proposed Rule 1.12 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.13 Organization as Client

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.13 – Organization as Client. COPRAC supports the adoption of proposed Rule 1.13 as revised.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzanne", followed by a long horizontal flourish.

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
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State Bar of California
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San Francisco, CA 94105

RE: Proposed Rule 1.14 Client with Diminished Capacity

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.14 – Client With Diminished Capacity – and has the following comments.

The Committee generally supports the proposed rule as drafted. As we stated in our previous letter dated September 8, 2016, the Committee recognizes that the Commission believes existing confidentiality statutes preclude it from proposing a rule that includes the protections provided by Model Rule of Professional Conduct 1.14. We appreciate the fact that the Commission intends to emphasize the confidentiality constraints in the proposed rule when the Rules are submitted to the Supreme Court.

Thank you for your consideration of our comments.

Very truly yours,

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



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January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
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State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.18 Duties to Prospective Client

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 1.18 – Duties to Prospective Client. COPRAC supports the adoption of proposed Rule 1.18.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Suzanne", followed by a long horizontal flourish.

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 2.1 Advisor

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

The majority of the Committee does not support the adoption of proposed Rule 2.1 because the Rule is aspirational in nature and fails to define disciplinable conduct. Further, the majority believes that the issues are adequately addressed elsewhere in the proposed rules.

However, if proposed Rule 2.1 is adopted, the Committee unanimously believes that proposed Comment [1] is inconsistent with the Rule and the Commission's charter and, therefore, should be deleted. Even though the language from proposed Comment [1] is taken from Model Rule 2.1, Comment [5], it has been taken out of context and, therefore, incorrectly suggests that a lawyer has no duty to investigate a client's affairs even as to matters within the scope of the representation and is never obliged to provide unwanted advice.

A minority of the Committee supports the adoption of Rule 2.1, but suggests that it follow the text of ABA Model Rule 2.1, which has been adopted in nearly every American jurisdiction with no reported ill effects.

The minority also believes that the Commission erred in eliminating the second sentence of ABA Model Rule 2.1 and relegating it to proposed Comment [2]. The original language of the Model Rule states that:

"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."

The minority believes this is a substantive rule intended to prevent clients and disciplinary authorities from later contending that otherwise proper advice should be punished because it embodies controversial discussions of the additional factors that the lawyer viewed as relevant to the client's situation.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Suzanne', with a long horizontal flourish extending to the right.

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

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COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.3 Candor Toward Tribunal

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 3.3 – Candor Toward Tribunal. The Committee respectfully suggests that subparagraph (c) be revised.

Proposed Rule 3.3(c) as originally drafted provided that the duty of candor to the tribunal continues until the conclusion of the proceeding. In the revised rule, the Commission changed paragraph (c) to state that the duty would continue until the end of the proceeding *or the representation, whichever comes first*. The effect of revised paragraph (c) is that a lawyer who is fired or withdraws from a representation would not be subject to Rule 3.3(a). Although in many circumstances, the lawyer whose representation terminates would have no further interaction with the tribunal in the same proceeding, there are circumstances, such as fees or sanctions motions, in which the lawyer would appear before the tribunal. Such a lawyer should continue to be obligated to deal with the tribunal with the same requisite candor. The Committee believes that paragraph (c) should be revised as follows:

- (c) The duties to take reasonable remedial measures stated in paragraphs (a)(3) and (b) continue to the conclusion of the proceeding or the representation, whichever comes first. All other duties continue to the conclusion of the proceeding.

Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Suzanne', with a long horizontal flourish extending to the right.

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 4.2 Communication with a Represented Person

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 4.2 – Communication with a Represented Person. COPRAC supports the adoption of proposed Rule 4.2 as revised.

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
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TELEPHONE: (415) 538-2161

December 21, 2016

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 4.3 Communicating with an Unrepresented Person

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC previously reviewed the provisions of proposed Rule 4.3 – Communicating with an Unrepresented Person and supported the proposed rule. We reiterate our support for proposed Rule 4.3 and the proposed Comments.

We have concluded that none of the public comments cause us to reconsider our support. Your Commission's responses to those comments should dispel the concerns raised, particularly with the addition of Comment [3].

Thank you for your consideration of our comments.

Very truly yours,

Suzanee Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of proposed Rule 4.4 – Duties Concerning Inadvertently Transmitted Writings. The Committee supports the adoption of proposed Rule 4.4 as revised but we respectfully suggest that Comment [2] be deleted for the following reason.

The Comment is confusing, both because the term “inappropriately disclosed” is vague and because it is not clear why the comment is limited only to “sending persons.” If the rule is intended to be limited to inadvertent disclosures, it would be more clear simply to state that. Thank you for your consideration of our comments.

Thank you for your consideration of our comments.

Very truly yours,

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

TELEPHONE: (415) 538-2161

January 6, 2017

Justice Lee Edmon, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 8.1 [1-200] False Statement Regarding Application for Admission,
Readmission, Certification or Registration

Dear Justice Edmon:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California.

COPRAC has reviewed the provisions of revised proposed Rule 8.1 [1-200] – False Statement Regarding Application for Admission, Readmission, Certification or Registration following the initial public comment period.

COPRAC supports the change in scope of proposed Rule 8.1, which addresses the issue of potential inconsistencies between this proposed Rule and proposed Rule 3.3. We find somewhat confusing new paragraph (d), which states as follows:

As used in this Rule, 'admission to practice law' includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar provision relating to admission or certification to practice law in California or elsewhere.

The phrase "any similar provision relating to admission or certification to practice law in California or elsewhere" does not seem to follow in that there is no "provision" earlier identified in the definition and the definition lacks parallel construction, which renders it difficult to comprehend. Thus, it is not clear what type of "provision" is being referred to – a legal provision, such as a Rule or statute, or the State Bar providing something to an attorney? If the intent is to refer simply to reinstatement after disbarment or resignation or applications for a certified legal specialty, then that intention should be clearly stated to eliminate this inherent ambiguity.

Further, on its face, it would not appear that "admission or readmission" or "reinstatement" is a type of "provision." Perhaps changing the word "provision" to "process" or removing the words "provision relating to" would provide the needed clarity. Either way, the sentence as presently constructed does not, in our opinion, clearly convey its meaning and should be clarified.

Thank you for consideration of our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Suzanne', with a long horizontal flourish extending to the right.

Suzanne Burke Spencer, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

From: Jslegal [jslegal@humboldt.net]

Sent: Saturday, January 07, 2017 12:44 AM

To: Hollins, Audrey

Subject: Comprehensive proposed amendments to the Rules of Professional Conduct of the State Bar of California COMMENTS

Changing the numbering of the rules is a very bad idea. I have spent 30+ years memorizing them as currently numbered and I do not see any reason to change the numbering system.

Making a rule that a pro se litigant is not allowed to ex parte a judge seems silly since pro se litigants are not subject to the rules. You can ask the legislature to pass a statute preventing litigants from communicating with judges ex parte, which is a good idea. But I don't see how a State Bar rule can be binding on a person who is not a member of the State Bar. You could alternatively get a Rule of Court adopted, but the Bar cannot just make rules for non-members.

The on line fee statement is mostly illegible, and I like having a plastic bar card and I do use it regularly. Anyone could print a fake paper card so keeping plastic cards deters identity theft.

"Third, in connection with proposed rule 1.2.1 (Advising or Assisting the Violation of Law), the board is requesting comment on whether the rule should include an express exception for a situation where a lawyer believes in good faith that a law, rule or ruling is invalid."

YES there should be an express exception. Judges are not Kings and if a judge makes a void order I can legally tell a client to ignore it, see *In re Berry* (1968) 68 Cal.2d 137, posted at <http://login.findlaw.com/scripts/callaw?dest=ca/cal2d/68/137.html>

Thank you for your consideration.

Yours truly,

112089

RRC2 Proposed Rules Public Comment FormY

Professional Affiliation	U.S. Department of Justice
Commenting on behalf of an organization	Yes
Name	Stacy M. Ludwig
City	Washington, D.C.
State	Washington DC
Email address	Stacy.Ludwig2@usdoj.gov
Select the Proposed Rule that you would like to comment on from the drop down list below.	Rule 1.7 [3-310] Conflict of Interest: Current Clients
From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices. Only comments on the rules circulating for public comment will be considered.	AGREE ONLY IF MODIFIED
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	
Attachment	Letter_to_the_Commission_for_the_Revision_of_the_Rules_of_Professional_Conduct_2017-01-06.pdf (31k)
Attachment	
Attachment	
Date	
File :	
Submitted via:	



U.S. Department of Justice

Professional Responsibility Advisory Office

1425 New York Avenue, N.W.
Suite 12000
Washington, D.C. 20530

January 6, 2017

Commission for the Revision of the Rules of Professional Conduct
State Bar of California
c/o Audrey Hollins
Office of Professional Competence, Planning, and Development
180 Howard Street
San Francisco, CA 94105

Re: Proposed California Rules of Professional Conduct

Dear Commission Members:

On behalf of the U.S. Department of Justice (“the Department”), including the over 400 Department attorneys who practice in California, I write to provide brief comment on three proposed Rules—Rules 1.7 [3-310], 1.18, and 3.3 [5-200]. We are grateful for the opportunity to comment and want to thank the Commission for their important work on the proposed revisions to the Rules of Professional Conduct of the State Bar of California (“the California Rules”).

Proposed Rule 1.7 [3-310] (Conflict of Interest: Current Clients)

In our September 27, 2016, letter to the Commission, we recommended that the Commission provide lawyers with guidance regarding what constitutes a “matter” for purposes of proposed California Rule 1.9. We understand that the Commission has elected to define the term “matter” in Comment [2] to proposed California Rule 1.7 and to apply that definition to all of the conflict of interest rules.¹ In doing so, it appears that the Commission largely relied upon the definition of “matter” previously found in proposed California Rule 1.11(e)(1).²

¹ See Rule 1.7 [3-310] Conflicts of Interest: Current Clients (Commission’s Proposed Rule Adopted on October 21-22, 2016—Clean Version) (hereinafter “Proposed Rule 1.7”), available at [http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.7%20\[3-310\]%20-%20Rule%20-%20XDFT1%20\(10-26-16\)%20-%20ALL.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.7%20[3-310]%20-%20Rule%20-%20XDFT1%20(10-26-16)%20-%20ALL.pdf).

² See Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees (Commission’s Proposed Rule Adopted on October 21-22, 2016—Redline to Public Comment Draft Version) (hereinafter “Proposed Rule 1.11”), available at [http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.11%20-%20Rule%20-%20XDFT1%20\(10-26-16\)%20-%20ALL.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%201.11%20-%20Rule%20-%20XDFT1%20(10-26-16)%20-%20ALL.pdf).

We support the Commission’s decision, but note that, as drafted, the term “matter” does not include “investigation[s], charge[s], accusation[s], [or] arrest[s],” all of which previously were included in proposed Rule 1.11(e).³ We understand that the Commission’s definition is not and cannot be comprehensive—that it merely “includes” those matters described in the proposed Comment.⁴ That said, we think that it is important to define “matter” explicitly to include investigations, charges, accusations, and arrests—which do not readily fall into any of the other types of matters listed—and respectfully request that the Commission include these terms in Comment [2] to proposed Rule 1.7.

Proposed Rule 1.18 (Duties to Prospective Client)

In our September 27, 2016 letter, we wrote to “support the adoption of [a] proposed Rule that addresses a lawyer’s obligations with respect to information communicated in confidence to a lawyer by a prospective client.” We appreciate the Commission’s willingness to reconsider its decision to omit such a rule and support proposed Rule 1.18 as drafted.

Proposed Rule 3.3 [5-200] (Candor Toward the Tribunal)

In our September 27, 2016 letter, we recommended that the Commission incorporate language from the commentary to Model Rule 3.3 into the commentary to proposed California Rule 3.3 to make clear that a lawyer who introduces evidence for the express purpose of establishing its falsity—e.g., a prior, false inconsistent statement during direct examination to “take the sting out” of any impeachment during cross-examination—does not violate proposed Rule 3.3(a)(3). Specifically, we recommended that the Commission include language from Comment [5] to Model Rule 3.3, which states, in pertinent part, that “[a] lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity”⁵.

We understand that the Commission “has not made the suggested change,”⁶ but are concerned that the Commission has misunderstood our request. In summarizing our comments on proposed Rule 3.3, the Commission stated that we had recommended that the “Comment 5 concept that there is no violation for offering evidence to establish its falsity should be in the body of the rule.”⁷ Respectfully, that was not our request. We agree with the Commission that “[t]he comment language explains the scope of the rule’s application, which is an appropriate function of a comment.” That is why we “recommend[ed] that the Commission incorporate this language in the commentary to the proposed Rule” in our original letter. If the Commission is

³ Compare Proposed Rule 1.7, supra n.1, with Proposed Rule 1.11, supra n.2.

⁴ See Proposed Rule 1.7, supra n.1.

⁵ MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. [5].

⁶ Proposed Rule 3.3 [5-200(A)] Candor Toward the Tribunal Synopsis of Public Comments, available at [http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%203.3%20\[5-200\]%20-%20Rule%20-%20XDFT1%20\(10-26-16\)%20-%20ALL.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20Y/PC%20Rules/RRC2%20-%203.3%20[5-200]%20-%20Rule%20-%20XDFT1%20(10-26-16)%20-%20ALL.pdf).

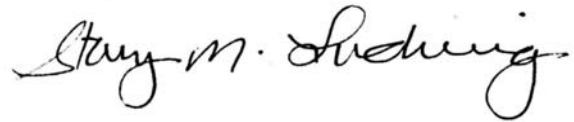
⁷ Id.

amenable to including such a comment, we recommend including it before Comment [4] to the proposed Rule, placing both the new comment and now-Comment [4] under the heading “Offering Evidence,” as in the Model Rules⁸.

Conclusion

We commend the Commission on its work in revising the California Rules and encourage the Commission to adopt the recommendations set forth above. By doing so, we think that the proposed Rules will adhere even more closely to the guiding principles set forth in the Commission’s charter.⁹

Sincerely,

A handwritten signature in black ink that reads "Stacy M. Ludwig". The signature is written in a cursive, flowing style.

Stacy M. Ludwig
Director
Professional Responsibility Advisory Office

⁸ See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmts. [5] & [7].

⁹ See Commission Charter, available at <http://ethics.calbar.ca.gov/Committees/RulesCommission2014.aspx>.