

## **LIST OF PUBLIC COMMENTS RECEIVED ON PROPOSED RULE 1.7**

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## Attachment C: Full Text of the Public Comments

**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).

## Attachment C: Full Text of the Public Comments

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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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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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.<sup>1</sup> 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

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

OCTC'S COMMENTS TO THE PROPOSED RULES OF PROFESSIONAL CONDUCT

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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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>2</sup> 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.)

<sup>3</sup> 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.)"].

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

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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.<sup>5</sup> Further, there are too many comments and they often overwhelm the rules themselves.

[TEXT OMITTED]

OCTC'S COMMENTS TO THE PROPOSED RULES OF PROFESSIONAL CONDUCT

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**Rule 1.7 Conflict of Interest: Current Clients.**

1. OCTC supports this rule.<sup>11</sup> 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.

[TEXT OMITTED]

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



OCTC'S COMMENTS TO THE PROPOSED RULES OF PROFESSIONAL CONDUCT

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

Very truly yours,

A handwritten signature in blue ink that reads "Gregory Dresser". The signature is written in a cursive, flowing style.

Gregory Dresser  
Interim Chief Trial Counsel





**THE STATE BAR  
OF CALIFORNIA**

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**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 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."

Attachment C: Full Text of the Public Comments

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

## 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	<a href="#">Letter_to_the_Commission_for_the_Revision_of_the_Rules_of_Professional_Conduct_2017-01-06.pdf (31k)</a>
Attachment	
Attachment	
Date	
File :	
Submitted via:	



**U.S. Department of Justice**

*Professional Responsibility Advisory Office*

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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.<sup>1</sup> 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).<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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).<sup>3</sup> We understand that the Commission’s definition is not and cannot be comprehensive—that it merely “includes” those matters described in the proposed Comment.<sup>4</sup> 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”<sup>5</sup>.

We understand that the Commission “has not made the suggested change,”<sup>6</sup> 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.”<sup>7</sup> 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

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<sup>3</sup> Compare Proposed Rule 1.7, supra n.1, with Proposed Rule 1.11, supra n.2.

<sup>4</sup> See Proposed Rule 1.7, supra n.1.

<sup>5</sup> MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. [5].

<sup>6</sup> 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).

<sup>7</sup> 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 Rules<sup>8</sup>.

### **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.<sup>9</sup>

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

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

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