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January 17, 2017

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The Commission for the Revision of the Rules of Professional Conduct has circulated a second round of proposed revisions to the Rules of Professional Conduct after having incorporated some changes since the initial promulgation. These are our comments on the various rules:

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

As written, the Rule (with the exception of subdivision (c)) does not require that an attorney actually *know* of the existence of a conflict in order to be in violation of the rule. We suggest adding the word "knowingly" to establish a requisite mens rea. Similarly, there is a comment that indicates that where a witness and a party are both represented by an attorney's office, and that cross-examination of the witness by the attorney's office is likely to cause the witness "embarrassment," that this would be a conflict requiring written waiver by the clients. The word embarrassment is insufficiently defined and could cause difficulty (e.g., if the witness is embarrassed just to be called to testify – does that qualify as a conflict?).

We would not oppose this Rule *if*: a) the comment section were clarified to remove the word "embarrassment," and b) the word "knowingly" was added to establish a required mens rea as indicated below in red.

- (a) A lawyer shall not **knowingly**, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.
- (b) A lawyer shall not **knowingly**, 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.

**Rule 1.16 [Current Rule 3-700]
Declining or Terminating Representation**

We previously objected to this Rule because, as initially written, it appeared to mandate withdrawal for criminal defense attorneys who held the state to its burden of proof in cases where the attorney lacked probable cause to believe that the client was innocent. We also objected to provisions that required our attorneys to send criminal files to clients in jail or state prison, when portions of those files (such as CDs or DVDs) might violate jail or prison rules.

Both of these objections appear to have been addressed by the commission in the new revision of the Rule. Consequently, we have no objection to the Rule as currently formulated.

**Rule 1.2.1 [Current Rule 3-210]
Advising or Assisting the Violation of Law**

The changes to this Rule appear largely non-substantive, with the exception of the comment in section (6) which clarifies the role of defense counsel in regard to conflicting state and federal law. We support the proposed changes to the Rule.

**Rule 3.3 [Current Rule 5-200 (A)-(D)]
Candor Toward the Tribunal**

Rules of Professional Conduct, Rule 5-200, currently prohibits members of the Bar from making false or misleading statements to the court and from citing cases which have been overruled. The proposed Rule 3.3, subdivision (a), provides, "A lawyer shall not knowingly ... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

We strongly urge the Commission to reject this major shift in the Rules of Professional Conduct. Loyalty to our clients is so strongly ingrained in the criminal defense community; it is ethically untenable to consider arguing against their interests, and the courts have supported this. A criminal defense lawyer "must not argue the case against his client." (*People v. Feggans* (1967) 67 Cal.2d 444, 447.) "We have recently set forth in detail the obligations of appellate counsel, including the duty to prepare a legal brief containing citations to the transcript and appropriate authority, and setting forth all arguable issues, and the further duty not to argue the case against his client." (*People v. Lang* (1974) 11 Cal.3d 134, 139; citations omitted.) The requirement that counsel not argue the case against his client is echoed in *People v. Harris* (1993) 19 Cal.App.4th 709, 714, and *People v. Barton* (1978) 21 Cal.3d 513, 519. The Sixth Amendment right to counsel clearly creates special duties applicable to lawyers representing criminal defendants.

If the Commission were to adopt a rule requiring criminal defense lawyers to cite authority contrary to the defense position, this would unquestionably damage the attorney-client relationship. Having one's own attorney provide the court with authority which would undermine the defense position and possibly compel the court to rule against the client would certainly be viewed by the client as a hostile act. Indigent criminal defendants – the only clients our offices represent – are often reluctant to place their faith in appointed counsel not of their choice. The harm to the attorney-client relationship resulting from counsel informing the court of authority against the client would injure that relationship, perhaps irrevocably.

The prior Commission, in the 2010 California Proposed Rules of Professional Conduct, noted in a Comment to the previously proposed Rule 3.3, that "whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules." (California Proposed Rules of Professional Conduct 2010, p. 65.) This recognition does not appear in the current version of the Proposed Rule or the Comment. In fact, the Comment to this Proposed Rule specifically states that this Rule does apply to criminal defense lawyers: "The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases."

At the very end of this Comment, after a discussion of counsel's duties when the client announces his or her intent to testify falsely, the Comment concludes: "The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions." This apparent exception may be read as applicable solely to the preceding discussion related to clients who announce that they intend to testify falsely. If the intent of the drafters of the Comment is to create an exception to the duty to volunteer contrary authority, as we propose here, that exception must be more clearly articulated.

We urge the Commission to reject any ethical duty which would require criminal defense attorneys to cite authority contrary to their clients' interests. We urge the Commission to write an explicit exception for criminal defense lawyers. A vague reference to "constitutional provisions" fails to give sufficiently clear direction. We urge the Commission to include in the Comment the following statement: "The obligation to disclose to the tribunal legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel does not apply to criminal defense counsel."

**Rule 1.8.10 [Current Rule 3-120]
Sexual Relations with Client**

California's current Rule 3-120 is nuanced and balanced, with an understanding of the nature of human relations. The new Rule prohibits sexual relations with a current client who is not the spouse or domestic partner of the attorney unless the consensual sexual relationship

existed at the time that the lawyer-client relationship commenced. The new Rule might be easier to enforce, but is unrealistic in the real world.

California's present Rule bans sexual relations between an attorney and a client when the relations are 1) required as a condition of representation; 2) obtained by coercion, intimidation or undue influence; or 3) cause the lawyer to perform legal services incompetently.

It can be recognized that sexual relations between an attorney and a client are not to be encouraged or even should be discouraged, yet in reality they do happen. Should a lawyer be punished for having sexual relations with a client when there has been no harm to the client? Or when the sexual relationship was consensual, was not the result of any coercion, intimidation, or undue influence, and was not required as a condition of representation? Or even when the lawyer performed all legal services competently, perhaps even in an outstanding manner? The new Rule prohibits any non-pre-existing sexual relationship, regardless of harm, unless the participants are married or are domestic partners.

The existing Rule correctly recognizes that sex does occur, and the Rule prohibits sex that is non-consensual, is coerced, is a condition of representation, or results in incompetent representation. The Commission's real complaint is not that lawyers and clients are engaging in sexual relations, it is that the current Rule is too difficult to enforce without proof of harm or misconduct. (See executive summary of Rule 1.8.10.) The only evidence the Commission can muster that the current Rule is ineffective in the executive summary is anecdotal. We oppose this revision.

RULE 4.2 [Current Rule 2-100]
Communication with Represented Person

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rule 2-100(A).)

The Proposed Rule 4.2 states, "In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rule 4.2, subd. (a).) We oppose the change from the term "party" to the term "person." Moreover, we have concerns with the Comments to this Proposed Rule.

There is a California State Bar Court opinion specifically recognizing and adopting the difference between "party" and "person." (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798.) The State Bar Court examined this precise issue in considerable detail, citing many cases and secondary authorities: "We find scant authority in the drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party." The State Bar Court stated, "Discipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party." The State Bar Court concluded, "Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented 'party.'" The State Bar Court then found Dale culpable for his contact with a *person* who was represented by counsel, but who was not a party to the action, where that contact was without counsel's permission. Comment [9] in proposed Rule 4.2 mentions *Dale* in support of the statement that an attorney who communicates with a represented person is "subject to other restrictions in communicating with the person."

A defense lawyer in a criminal case sometimes finds it necessary, on behalf of a client, to seek an interview with a person represented by counsel, where that person is not a party. Many situations arise where this becomes an issue. One is the "Amber Frey" situation. In the Scott Peterson murder trial, witness Amber Frey was represented by counsel, Gloria Allred. That representation was not unrelated to the murder trial; the representation was solely with respect to that trial. Obviously, both the prosecution and the defense wanted to interview Ms. Frey, a key witness. Under the Rule as it is currently written, there would be no impediment to such an interview by either side, even in the absence of permission from Ms. Frey's counsel.

It has been our experience that victims of crimes increasingly appear in criminal cases with counsel to protect their rights and advance their interests. This has been approved by the Court of Appeal in light of the enactment of Proposition 9, the Victims' Bill of Rights Act of 2008: Marsy's Law. (*People v. Smith* (2011) 198 Cal.App.4th 415.) Clearly the victim of a crime appearing with counsel is a "person" known to be represented by another lawyer in the matter, and any attempt to interview the victim about the crime or subsequent damages resulting from the crime would be a communication "about the subject of the representation." On its face the Proposed Rule certainly applies. This would bar both the defense and the prosecution from seeking to interview a crime victim known to be represented by counsel, without permission of that counsel. This would cause a substantial change in the handling of criminal cases.

Another situation which arises with some frequency is when a defendant tells his lawyer that the person who really committed the offense is now in jail. When the lawyer checks on this other person, the lawyer finds that the other person is in jail for his own unrelated case. It is certain that the other person's lawyer will never agree to permit the first lawyer to interview

his or her client, given that the point of the interview is to obtain a confession to another crime. Yet this is often the only way in which the first lawyer can vigorously defend his own client and seek the truth that his client is in fact innocent. Under the Rule as it is currently written, there is no impediment to such an interview. This is in fact commonly done under the current Rule.

We believe that it is essential that prosecutors and defense lawyers be permitted to investigate and present their cases as completely as possible, to further the goal of "facilitating the ascertainment of truth in connection with legal proceedings." (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 857.) We believe that adoption of the Proposed Rule will inject uncertainty into an area where no uncertainty currently exists. If adoption of the Proposed Rule actually does change the scope of the Rule, the consequences will be damaging to both sides in criminal cases, and ultimately damaging to the goal of the ascertainment of truth. If changing "party" to "person" in fact makes no change, then the term should not be changed.

Moreover, the Comment to one of the exceptions raises a substantial concern. The Proposed Rule has exceptions:

- (c) This Rule shall not prohibit:
 - (1) communications with a public official, board, committee, or body; or
 - (2) communications otherwise authorized by law or a court order.

The exception to the Comment is:

[8] The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

Our concern is that the Comment authorizes (by not precluding) "communications with represented persons in the course of such legitimate investigative activities as authorized by law." The two cases cited in the Comment, and the only Attorney General Opinion of which we

are aware, all depend on the distinction between investigation and the filing of criminal charges. The Attorney General Opinion States:

During the investigative phase of a criminal or civil law enforcement proceeding, Rule 2-100 of the California Rules of Professional Conduct does not prohibit a public prosecutor, or an investigator under the direction of a public prosecutor, from communicating with a person known to be represented by counsel, concerning the subject of the representation, without the consent of such counsel.

In connection with the Sixth Amendment right to counsel, an accused may not be interrogated without counsel when a criminal charge has been filed and the accused has retained counsel. (*Massiah v. United States* (1964) 377 U.S. 201; *People v. Duck Wong* (1976) 18 Cal.3d 178, 185.) However, the right attaches only when adversarial judicial proceedings have been initiated (*People v. Mattson* (1990) 50 Cal.3d 826, 868), "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment" (*Kirby v. Illinois* (1972) 406 U.S. 682, 688-689).

The right to counsel does not attach before the government's role shifts from investigation to accusation...

It is, instead, sufficient to note that criminal and civil investigations by public prosecutors are both authorized and limited by law. However, they are not limited by either the Fifth or Sixth Amendment prior to the initiation of the accusatory stage. In our view, then, investigatory interrogations are "communications otherwise authorized by law" within the meaning of subparagraph (C)(3) of Rule 2-100.

(75 Ops. Cal. Atty. Gen. 223, fn. Omitted.)

Our concern is with use of the term "investigative activities" in the Comment. It can easily be imagined that a prosecutor might understand "investigative activities" as permitting direct contact with a represented defendant, without consent of counsel, even after the filing of a criminal charge, so long as the contact is viewed as part of the "investigative activities." Investigation of criminal cases often persists even after the filing of charges.

We urge the Commission to cite to the Attorney General Opinion as well as the federal cases, and clarify that the permission to conduct interviews is limited to pre-filing time periods. This could be accomplished by adding a sentence in the Comment:

The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law, prior to the filing of criminal charges.

Although we oppose adoption of this Rule with the term "person" in lieu of "party," if this Rule is adopted, the exception in the Comment for criminal defense lawyers conducting investigative activities authorized by law is essential. (See, e.g., *Grievance Comm. for S. Dist. of N.Y. v. Simels* (2d Cir. 1995) 48 F.3d 640.) We therefore propose the following additional language to paragraph (b):

(b) A lawyer for the defendant in a criminal proceeding or other proceeding that may result in an individual's liberty being restrained, or the respondent in a proceeding that could result in incarceration, may nevertheless defend the proceeding by requiring that every element of the case be established.

In order to afford the full measure of constitutional protections to a client who faces a potential restraint of liberty, we advocate for the addition of the above language to protect and uphold the rights of the clients we represent.

Sincerely,

A handwritten signature in black ink, appearing to read "Janice Y Fukai". The signature is fluid and cursive, with the first name "Janice" being more prominent than the last name "Fukai".

JANICE Y FUKAI
Alternate Public Defender
County of Los Angeles



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January 17, 2017

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Conflict of Interest: Current Clients**

As written, the Rule (with the exception of subdivision (c)) does not require that an attorney actually *know* of the existence of a conflict in order to violate the provision. We suggest adding the word "knowingly" to establish a requisite mens rea.

There is also a comment which indicates that where a witness and a party are both represented by an attorney's office, and when cross-examination of the witness by the attorney's office is likely to cause the witness "embarrassment," a conflict would exist requiring written waiver by the clients. The word embarrassment is insufficiently defined.

We propose deleting "embarrassment," from the comment, and including "knowingly" as described above.

**Rule 3.3 [Current Rule 5-200 (A)-(D)]
Candor Toward the Tribunal**

Proposed Rule 3.3, subdivision (a), provides, "[a] lawyer shall not knowingly...fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." We strongly urge the Commission to reject the proposed rule.

"To Enrich Lives Through Effective and Caring Service"

Loyalty to the client is the cornerstone of criminal defense practice, thus it is ethically untenable to require attorneys to argue against a client's interests. The courts have supported this position. A criminal defense lawyer "must not argue the case against his client." (*People v. Feggans* (1967) 67 Cal.2d 444, 447.) "We have recently set forth in detail the obligations of appellate counsel, including the duty to prepare a legal brief containing citations to the transcript and appropriate authority, and setting forth all arguable issues, and the further duty not to argue the case against his client." (*People v. Lang* (1974) 11 Cal.3d 134, 139; citations omitted.) The requirement that counsel not argue the case against his client is repeated in *People v. Harris* (1993) 19 Cal.App.4th 709, 714, and *People v. Barton* (1978) 21 Cal.3d 513, 519. Additionally, the Sixth Amendment right to counsel clearly creates special duties applicable to attorneys representing criminal defendants.

The prior Commission, in the 2010 California Proposed Rules of Professional Conduct, noted in a Comment to the previously proposed Rule 3.3, that "whether a criminal defense lawyer is required to disclose directly adverse legal authority in the controlling jurisdiction involves constitutional principles that are beyond the scope of these Rules." (California Proposed Rules of Professional Conduct 2010, p. 65.) Recognition of applicable constitutional principles does not appear in the current version of the proposed Rule or the Comment. We assert that a client's constitutional right to zealous representation is unfairly infringed upon by the proposed Rule, thus we urge the Commission to reject imposing an ethical duty requiring criminal defense attorneys to cite authority contrary to their client's interests.

RULE 4.2 [Current Rule 2-100] Communication with Represented Person

Currently, Rule 2-100 of the Rules of Professional Conduct bars lawyers from communicating directly with a represented "party": "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." (Current Rule 2-100(A).)

Proposed Rule 4.2 states, "[i]n representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." (Proposed Rule 4.2, subd. (a).) We oppose the change of "party" to "person." We also have specific concerns with the Comments to the proposed Rule.

1. Proposed rule changes "party" to "person"

The California State Bar Court opinion of *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 recognizes and adopts the distinction between "party" and "person." In *Dale* the State Bar Court examined this precise issue in considerable detail, citing many cases and

secondary authorities and finding “...scant authority in the drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party.” The opinion stated, “[d]iscipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party.” The State Bar Court noted, “[f]inding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented ‘party.’” The State Bar Court ruled that Dale was not culpable for his contact with a *person* who was represented by counsel, but who was not a party to the action, even where that contact was without counsel’s permission.

Our experience tells us that victims of crime increasingly appear in criminal cases with counsel to protect their rights and advance their interests. This has been approved by the Court of Appeal in light of the enactment of Proposition 9, the Victims’ Bill of Rights Act of 2008: Marsy’s Law. (*People v. Smith* (2011) 198 Cal. App. 4th 415.) A crime victim appearing in court with counsel is a “person” known to be represented by another lawyer in the matter, and any attempt to interview the individual about the crime or subsequent damages resulting from the crime would be a communication “about the subject of the representation” under the proposed revision. The proposed revision would bar both the defense and the prosecution from seeking to interview a victim known to be represented by counsel, without permission of that counsel. As a consequence substantial changes in the handling of criminal cases would be caused.

We believe it is essential that prosecutors and defense attorneys be permitted to investigate and present their cases as completely as possible. Adoption of the proposed Rule will inject uncertainty into an area where no uncertainty currently exists.

2. Concerns with the Comments to the proposed Rule

Exception to the Comment:

[8] The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

We express concern with use of the term “investigative activities” in the Comment. It can easily be imagined that a prosecutor might understand “investigative activities” as permitting direct contact with a represented defendant, without consent of counsel, even after the filing of a criminal charge, so long as the contact is viewed as part of “investigative activities.” Investigation of criminal cases often continues after the filing of charges.

We urge the Commission to rely on the federal and California cases in this area. Specifically, in connection with the right to counsel an accused may not be interrogated without counsel when a criminal charge has been filed and the accused has retained counsel. (*Massiah v. United States* (1964) 377 U.S. 201; *People v. Duck Wong* (1976) 18 Cal.3d 178.) We also urge the Commission to adopt the position that permission to conduct interviews is limited to pre-filing time periods. We suggest adding the following sentence in the Comment:

The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law, prior to the filing of criminal charges.

Although we oppose adoption of this Rule with the term “person” in lieu of “party,” if this Rule is adopted an exception in the Comment for criminal defense attorneys conducting investigative activities authority by law must be included as well. (See, e.g., *Grievance Comm. for S. Dist. of N.Y. v. Simels* (2d Cir. 1995) 48 F.3d 640.)

Date: 1/17/2017

Signature: Kelly G. Emiling
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Chief Deputy Public Defender

January 20, 2017

VIA EMAIL TO: audrey.hollins@calbar.ca.gov

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Re: Proposed Rule of Professional Conduct 3.5 – Comments from California Special Districts Association

Dear Ms. Hollins:

The California Special Districts Association (CSDA) appreciates the opportunity to comment on the proposed revisions to the Rules of Professional Conduct, specifically on proposed revisions to Rule 3.5, concerning contacts with administrative law judges, members of an administrative body acting in an adjudicative capacity, other adjudicatory officers, and staff members who are assisting judges and officers in making their decisions. CSDA is concerned that the proposed revision of Rule 3.5 would create uncertainties and challenges for attorneys who represent CSDA's members in quasi-adjudicatory proceedings, such as proceedings before the Commission on State Mandates, State Water Resources Control Board (SWRCB), Air Resources Board, and local agencies. Accordingly, this letter includes an attachment, prepared by the Association of California Water Agencies (ACWA), with proposed edits to the revisions of Rule 3.5 that are agreeable to CSDA and would address these concerns.

Background

CSDA is a not-for-profit statewide association whose members include over 1,000 special districts and affiliate organizations throughout the state. CSDA represents all types of special districts, which provide millions of Californians with essential local services such as fire protection, water, health care, sanitation, and parks and recreation, just to name a few.

CSDA was formed in 1969 to promote good governance and improved core local services through professional development, advocacy, and other services for all types of independent special districts. In fulfilling this mission, CSDA identifies issues of concern to its member districts and the communities 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. Additionally, CSDA advocates for its members' interests with policymakers, including work on legislation with the California Legislature and executive officers and departments, as well as work with state regulatory agencies.

CSDA has considered the proposed revision to Rule of Professional Conduct 3.5 and is submitting this comment letter, including an attachment with proposed edits, to address specific concerns on the effect of revised Rule 3.5 in two particular areas: state and local proceedings.

Effect of Proposed Rule 3.5 on State Proceedings

At the state level, CSDA is primarily concerned about the potential impact of proposed Rule 3.5 on attorneys' ability to participate in proceedings before the adjudicatory bodies. An example of the immediate impact of the proposed revisions to Rule 3.5 can be illustrated through matters pending before the SWRCB. The SWRCB is currently conducting an adjudicatory hearing involving hundreds of parties, including special districts, that concerns the Governor's proposal to build tunnels under the Bay-Delta to enable more efficient exports of water from the Sacramento River ("California WaterFix").

The relationship between the California WaterFix hearing and another SWRCB proceeding demonstrates the problems that proposed Rule 3.5 would cause for attorneys practicing before the SWRCB. The SWRCB also has a proceeding pending before it regarding a proposed update to the Bay-Delta Water Quality Control Plan. Although the 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. Should the State Bar 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 CSDA’s members – in intertwined water proceedings. For example, presentations in the quasi-legislative Bay-Delta proceeding potentially 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, and therefore a violation of Rule 3.5 as proposed.

Fortunately, there is a solution to this problem. Agencies operating under the state Administrative Procedure Act currently 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. The attached 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 would be in compliance with the Rules of Professional Conduct’s requirements concerning contacts with administrative decision-makers.

Effect of Proposed Rule 3.5 on Local Proceedings

CSDA’s concerns with the effect of proposed Rule 3.5 on local proceedings mirror our concerns of the 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 CSDA members. Adopting a Rule of Professional Conduct that would apply unique restrictions to attorneys having contact with local decision-makers in such proceedings would 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. However, just as the Administrative Procedure Act establishes rules about contacts with state-agency decision-makers in quasi-adjudicatory proceedings, a substantial body of law exists 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).)

CSDA recommends that the State Bar revise proposed Rule 3.5 to state that local 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 statutes and common law governing all parties’ *ex parte* contacts in such situations, CSDA recommends that the State Bar rely on that law to govern attorneys’ interactions with those decision-makers.

Conclusion

CSDA appreciates the opportunity to comment on the proposed Rule of Professional Conduct 3.5. The proposed edits to Rule 3.5 attached to this letter would address the uncertainty and issues likely to arise in state and local quasi-adjudicatory proceedings if the proposed revisions are adopted without further amendment.

Sincerely,



Mustafa Hessabi
Legislative Analyst

State Bar No. 302972

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.

11728 Wilshire Boulevard, #610
Los Angeles, California 90025
January 22, 2017

Honorable Lee Smalley Edmon
Justice, Second District Court of Appeal
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Gregory Dresser, Esq.
Office of Trial Counsel
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Dear Justice Edmon and Mr, Dresser:

I have not heard back regarding the proposal that attorneys have similar reporting requirements for discrimination as they have for malpractice. I would suggest a rule containing the following or similar language:

"Every attorney and law firm shall be required to report to the State Bar, any of the following regarding allegations of discrimination in employment regarding hiring, termination, promotion, demotion, retention, assignment or any other actions or inactions:

- a. the filing of three claims, complaints, applications or other documents seeking to initiate any proceeding, or requesting a right to sue letter, whether filed in a single or combination of one or more judicial tribunals or administrative agencies within a twelve month period, and
- b. any judgement, settlement, award, decision or other adjudication whether or not a formal action has been initiated before any tribunal, agency or other entity."

Yours truly,



Paul Eisner

Hollins, Audrey

From: Alison Leary [mailto:aleary@cacities.org]
Sent: Thursday, January 19, 2017 3:30 PM
To: Hollins, Audrey
Cc: Patrick Whitnell; Corrie Manning
Subject: Comment to Proposed Rule 3.5
Attachments: State_Bar_Letter - 09Jan17.pdf; ACWA proposed changes rule 3.5.pdf

Dear Ms. Hollins:

Although the comment period has ended for the comprehensive proposed amendments to the Rules of Professional Conduct of the State Bar of California, I am writing on behalf of the League of California Cities (League) to note that the League joins in the comments to proposed rule 3.5 submitted by the Association of California Water Agencies (attached).

Thank you,

Alison Leary
Deputy General Counsel
League of California Cities®
1400 K Street, Ste 400
Sacramento, CA 95814
(916) 658-8266 (office)

www.cacities.org

Go Green. Please consider the environment before printing this email. The League of California Cities is a nonpartisan education and advocacy organization serving local government.

Disclaimer: This communication may contain the League of California Cities' confidential and proprietary data. This message is intended only for the personal and confidential use of the designated recipients named above. If you are not the intended recipient of this message you are hereby notified that any review, dissemination, distribution or copying of this message is strictly prohibited. In addition, if you have received this message in error, please advise the sender by reply email and delete the message. The League of California Cities does not provide legal advice and nothing in this email should be construed as legal advice. Please contact your legal counsel if you have a legal question regarding any information in this email.

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.



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January 31, 2017

Members of the RAD Committee
State Bar Board of Trustees
State Bar of California
180 Howard Street
San Francisco, CA 94105
BY EMAIL c/o Lauren.McCurdy@calbar.ca.gov
Submitted in Word for ADA purposes

Re: Comment on proposed Rule of Professional Conduct 1.8.1

Dear members of the RAD Board committee:

I have just reviewed the "RAD" agenda, and noted that in the lengthy attachment you sent, the materials on Rule 1.8.1, at pages 343-364, *make no mention of the ethics professors' comment on this rule*, which was the subject of our ongoing letters, including our final complete letter of September 21, 2016. This letter, co-signed by 55 California ethics professors, maintained, as we have throughout this rules-making process, including our communications to the first Rules Revision Commission, that Rule 1.8.1 *must*, in order to be effective, state that *the rule applies to modifications of fee contracts*.

As I have testified before the Rules Revision Commission, the application of MR 1.8.1 to fee modifications is perhaps the most important issue that remained for RRC2 near the end of its work. We have written the commission as follows, in pertinent part:

1. **Model Rule 1.8.1:**

Perhaps the most lawyer-protective and anti-client rule in the current work product of this commission is the unjustifiable language of MR 1.8.1....

A. **Modification of fee contracts:**

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

The first ethics professors' letter evaluated this rule extensively, as follows below....

Any subsequent modification of a fee agreement with a client is done under circumstances where the lawyer has already taken on ongoing fiduciary duties to

Thank you for the opportunity to address this comment to the commission.

Respectfully submitted,



Richard Zitrin



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January 28, 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:

Given time constraints, I write this letter on my own behalf, but reference the current positions that have been taken by teachers of Legal Ethics or Professional Responsibility at a law school in California. I am writing the commission rather than the "RAD" Committee of the Board simply because I'm not sure where the comment should go. I will provide it to both Lauren McCurdy and Randy Difuntorum, whom I'm sure will get it to the appropriate places.

The ethics professors' most recent letter argued for a return to the itemized list set forth in an earlier version of Rule 1.7(b). The commission has declined to make that change, but has added an introductory phrase to Rule 1.7(d) that explains that compliance with (a), (b), and (c) is necessary in addition to compliance with (d).

In our most recent letter, the ethics professors noted the following as to (d):

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.

While the commission disagrees with us that the test is subjective, the additional language added to the beginning of (d) allays some of our concerns because it incorporates the "tests" embodied in (a), (b), and (c). The commission noted our letter as being among the reasons for this change. I agree.

Speaking now entirely for myself, I also strongly agree with the other changes the commission has made, most significantly to correct its omissions in comment paragraphs 1 and 2. The additional language of paragraph 1 is necessary and appropriate. The language in paragraph 2 correctly accepts the argument made by COPRAC to broaden the definition of "matter."

the client. Thus, a modification of a fee agreement is a business transaction with a client, [whether or not it involves] acquiring a pecuniary interest adverse to the client as well....

The current draft of Rule 1.8.1 simply eliminates these requirements, and excludes modifications of fee contracts from the rule, under proposed Comment 5. This proposed language adds the italicized language to the existing comment: "This Rule is not intended to apply to an agreement by which a lawyer is retained by a client or to the modification of such an agreement."

The only possible justification for this language is lawyers' own self-interest – to modify fee contracts in the middle of representation without the existing protections afforded those clients....

As can readily be seen by the bolded portion of the language from our September 21, 2016 letter, we believe that it is necessary to state that while the initial contract does not equate to "doing business" with a client, any modification of a fee contract must invoke MR 1.8.1. In this respect, we agreed completely with the Office of Chief Trial Counsel, and we copy Mr. Gregory Dresser here. However, OCTC's comment is noted, and ours is not.

The RRC2 declined to make the modification we 55 professors and OCTC sought. The commission's stated reasons in replying to the OCTC comment were as follows:

After extensive discussion about the possible application of this Rule to fee modifications, the Commission decided to retain the language from the current rule 3-300 Discussion, with nonsubstantive wording changes, and to leave to case development the question of when, if at all, the Rule would be applied to fee modifications.

I am glad to say that for the most part, this second Commission has been courageous in dealing with matters of public protection in a forthright and concerned way. I am also glad that the commission removed fee modifications from being specifically excluded from the rule.

However, the failure to require that fee modifications are included in the rule, and passing the buck to the courts, is an unfortunate abrogation of responsibility. As most ethicists in California know, in the last 30 years there has been only confusing and confounding case law on the subject, and that is unlikely to change. Most significant is the case of *Ramirez v. Sturdevant* 21 Cal.App.4th 904 (1994), idiosyncratic on its face, in that attorney Sturdevant was hired, relieved of his representation, and then re-engaged *ab initio*. This has led to an ongoing debate in the legal ethics world about whether a modification applies or not. The State Bar can and should answer that question, and do so in a way that protects clients.

To give this board committee an idea, here is what one purported ethics expert wrote for the San Diego County Bar Association's "Ethics in Brief" column a few years ago:

Usually, rule 3-300 does not apply to an initial fee agreement ... because that contract is entered into as an arm's length transaction. That dynamic changes once the attorney-client relationship is formed and the attorney undertakes fiduciary duties to the client. Because of the development of trust that

presumably a client invests in the attorney, there may be an increased vulnerability for an abuse of that relationship. Accordingly, more care should be taken to ensure that a modification of the fee agreement does not result from such an abuse.

But that does not mean that modifying fee agreements is presumptively unethical. Indeed, they may greatly benefit the client. And it also does not mean that there is an ethical violation if rule 3-300 is not strictly followed.¹

With all respect due to the author trying to grapple with this issue, the inherent contradictions in his brief article are not surprising. While the “arms’ length dynamic changes” after the attorney-client relationship begins, modifying fee agreements may not be “presumptively unethical.” On the other hand, “more care” should be taken about fee modifications lest they play into “increased vulnerability for abuse” that can happen when a lawyer is already a fiduciary. And then, bizarrely, there is the statement that not following this rule (with its current numbering) doesn’t mean there’s necessarily an ethical violation. That is, a violation of an ethics rule is not an ethics violation. Puzzling.

This is the kind of convoluted reasoning that the failure of the RRC2 to explicitly include fee modifications in the rule will result in. These confusions will be the unintended consequences.

May I remind this board committee, as we did the RRC2, that requiring compliance with Rule 1.8.1 does not mean that lawyers may not modify fee contracts. It only means that they must get their client’s informed consent – including to the right to independent counsel if none is yet engaged – to do so. In my wide experience with this rule in my own practice and those of lawyers I advise, good client relations will mean that the vast majority of clients, once notified, will readily agree to reasonable fee modifications. Those that are troublesome or problematic, however, are the ones the rules should be designed to protect against.

Respectfully submitted,

/s/

Richard Zitrin²

cc: Gregory Dresser, OCTC

¹ David Majchrzak, Ethics in Brief, “a service of the legal ethics committee of the SDCBA,” SDCBA on line journal. This is specifically limited as the author’s views and not those of the committee. Emphasis mine. Majchrzak cites only one case – *Ramirez*.

² For identification purposes, the signatories of the September 21, 2016 letter are set forth below.

SIGNATORIES OF THE ETHICS PROFESSORS' LETTERS TO RRC2

Drafters:

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Thomas E. Miller Distinguished Professor of Law

University of California, Hastings College of the Law

Executive Director (1984-1999) of the American Law Institute

Reporter for the American Bar Association Model Rules of Professional Conduct (1983)

Deborah L. Rhode

Director, Center on the Legal Profession and E.W. McFarland Professor of Law

Stanford Law School

Former President of the Association of American Law Schools

Former President of the International Legal Ethics Conference

Author of over 20 books on the legal profession

Richard Zitrin

Lecturer in Law

University of California, Hastings College of the Law

Founding Director (2000-2004), Center for Applied Legal Ethics, University of San Francisco

Lead Author, Legal Ethics: Rules, Statutes and Comparisons (2016) and other legal ethics books

Co-signers:

Mark N. Aaronson

Hon. Raymond L. Sullivan Professor of Law

University of California, Hastings College of the Law

Susan Smith Bakhshian

Director of Bar Programs and Clinical Professor of Law

Loyola Law School

William M. Balin

Adjunct Professor of Law, Ret.

University of California, Hastings College of the Law and

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