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Chief Justice Tani Cantil-Sakauye
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

cc: Beth Jay, Principal Attorney to the Chief Justice

Re: Comment on proposed rules of professional conduct

Dear Chief Justice Cantil-Sakauye and the Associate Justices of the Court:

Please consider this comment on behalf of each of the undersigned, each a teacher of Legal Ethics or Professional Responsibility at a law school in California. We are providing you with identification for each professor, including law school affiliation and other significant identifying information. The information is for identification purposes only.

Preliminarily, we note the following: First, we believe that the ethical rules that govern the conduct of lawyers in California are extraordinarily important to the daily practice of law. Second, we also believe that, taken as a whole, the proposed rules fall short in their charge, first and foremost, to *protect clients and the public*.[1] Any variation from this path that puts the profession's self-interest or self-protection ahead of the needs of clients or the public must fail. Not only would such a course be a disservice to the consumers of legal services, but it would likely result in damaging the integrity of, respect for, and confidence in the profession that the rules are expressly designed to foster.

Third, the black-letter rules must serve not only as rules of discipline for those lawyers accused of offenses, but as *guidance* for the overwhelming majority of responsible and ethical lawyers who look to the rules for benchmarks that govern their behavior. Most of California's lawyers do not have the level of sophistication that members of the Rules Commission or this Board of Governors have developed. Thus, the State Bar must make it clear that these rules shall serve as guideposts to the average practitioner.

Fourth, we note the charge from our state's Supreme Court to bring California rules into closer alignment with the ABA Model Rules. There are some instances in which the California rules are superior, but more instances – particularly in the Commission's *omission* of certain rules – in which California would be wise to adopt an ABA-style rule.

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[1] The laudable language in current proposed rule 1.0(a) says the following: "The purposes of the following Rules are: (1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession."

A few additional preliminary notes:

1. We note that this letter is not all-inclusive. Rather, it is an attempt to articulate some of the most important and more global concerns that we share about the rules draft submitted to the Board. There are a number of issues left unaddressed. In particular, we have generally not commented on specific paragraphs of the Comment sections of the rules, though these sections can be extremely important.

2. Issues not addressed include some that have received a great deal of attention, such as flat fees under Rule 1.5 and lawyers, including prosecutors, contacting represented parties. These issues either have been amply deconstructed elsewhere or are matters on which we did not reach consensus. Still other issues would unduly lengthen and diffuse the points made here.

3. While the signatories have all concurred in the below recommendations, some would have expressed their agreement in somewhat different language than the drafters of this letter have used. Moreover, we refer to but – due to the desire to avoid adding to this letter's already considerable length – have not always cited to the Commission's written reasoning or certain minority reports with which we agree.

4. Lastly, this letter is in no respect intended as criticism of the Rules Commission. Commission members have done laudable work, including, for example, ultimately approving a conflicts of interest rule that more closely approximates the ABA Model Rules, provides more client protection, and gives more guidance for the average attorney.

We note the following specific issues within five general areas of comment:

I. Rules relating to conflicts of interest

1. Rule 1.7 – Basic conflict of interest rule

We commend the Commission for adopting the ABA version of Model Rule 1.7 after much back and forth debate. This revises an earlier decision of the Commission to continue with California Rule of Professional Conduct ("CRPC") 3-310. On June 6, 2008, thirteen California ethics professors signed a letter critical of CRPC 3-310 ("*June 2008 Ethics Profs. Letter*"). The position in this letter is consistent with the *June 2008 letter*, except that the Commission has heeded the concerns expressed in that letter and elsewhere and to its credit adopted MR 1.7 in ABA format and style.

A. Comment 22 on advanced waivers – no position taken in this letter

This letter does not address the issue of whether Comment 22 of Rule 1.7, on advanced waivers, is or is not appropriate. The *June 2008 Ethics Profs. Letter* did address this issue, and opposed the adoption of this Comment paragraph, then enumerated ¶ 33.[2] To the extent that the same dozen signatories objecting to this paragraph are signatories here, their previous positions have been noted. Other signatories take no position on this paragraph here.

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[2] One professor of the 13, Fred Zacharias, did not oppose this paragraph. Unfortunately, Prof. Zacharias passed away in the last year and is not available at all as a signatory to this letter.

B. Other comments to Rule 1.7 – in need of careful consideration

This letter does not – and could not succinctly – address each and every paragraph of the Comment section to Rule 1.7, other than as follows: We note that the comments are extensive and complex. While the Commission's history shows that earlier comments came about as the product of much discussion and deliberation, the ultimate comments as revised were not as carefully vetted.

Accordingly, we encourage the Board to carefully review these comments and re-refer to the Commission those comments that are unclear, overly dense, puzzling, or otherwise lacking. We believe more study of the verbiage of these comments, including some simplification, would be helpful to guide the average practitioner, and would ensure clarity and harmony between the rule and the comments.

2. *Rule 1.8.1 – Doing business with a client*

This analysis tracks the comment in the *June 2008 Ethics Profs. Letter* joined by 13 California ethics professors. The current Rule 1.8.1 draft would improperly allow lawyers to bypass the current requirements of Rule 3-300 when they modify their fee agreements with clients, and also be at odds with California case law on fiduciary duty. Despite widespread criticism, the Commission has improvidently insisted on a clearly anti-client rule that serves only the interests of lawyers wishing to change their fee structure in the middle of a representation.

A. The current and proposed rules

Lawyers have long been able to enter into initial fee contracts with clients at arms' length. As in most states, California case law makes it clear that a lawyer's fiduciary duty to a client begins only *after* inception of the attorney-client relationship. This allows lawyers and clients to negotiate freely over the retention of lawyer by client.

Any *subsequent modification* of a fee agreement with a client, however, is done under circumstances where the lawyer has already taken on *ongoing fiduciary duties to the client*. Thus, a modification of a fee agreement is a business transaction with a client, and may involve acquiring a pecuniary interest adverse to the client as well. Current Rule 3-300 would therefore require that before such modification could be entered into, the lawyer must: (a) make the terms of the transaction fair and reasonable; (b) advise in writing that the client seek independent counsel to advise about the transaction; and (c) give the client a reasonable period of time to seek that advice.

B. Modification of fee contracts excluded

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.

Indeed, Comment 5 acknowledges that lawyers do have "fiduciary principles [that] might apply" to fee agreements. Formerly, prior to the *June 2008 Ethics Profs. Letter*, the proposed comments also stated that "[o]nce a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the modification of the agreement." While this language has been eliminated, the truth of this statement remains. In essence, then, the Commission's draft sets up a *conflict between common law principles of fiduciary duty and the ethics rules themselves*. In advising lawyers to "consult case law and ethics opinions" about their fiduciary duties, the Commission even begs the question of attempting to reconcile these duties with their proposed rule.

The phrase relating to modifications of fee contracts in Comment ¶ 5 must be stricken.

C. Inappropriate use of independent counsel

The current draft of Rule 1.8.1(b) eliminates the requirement that the lawyer wishing to engage in a business transaction or acquisition of pecuniary interest of a client must advise the client of the opportunity to seek the advice of independent counsel. The modified rule – with limiting language that is absent from the ABA rule, MR 1.8(a)(2) – states that if the client is already represented by independent counsel, there need be no notice. This, read together with Comments 13 and 14 of the proposed rule, substantially diminishes client protection.

Comments 13 and 14 define independent counsel in such a way as to include any corporate general counsel. Such counsel need not be California counsel and need not be schooled in the requirements of California rules or contracts. Thus, independent counsel not hired for the specific purpose of examining the transaction in question may well miss the very issues necessary to evaluate the transaction. Moreover, under the ABA's Comment, ¶ 4, written disclosure is still required from one of the involved lawyers. This is not true of the current California comments.

In short, having independent counsel is no substitute for adequate disclosure and advice by the lawyer wishing to engage in the transaction. The ABA rule language in MR 1.8(a)(2) and Comment ¶ 4 should replace the ill-advised Commission language.

3. Rule 1.0.1(e) – Definition of informed consent

While the definition of "informed consent" contained in Rule 1.0.1(e) conforms to the ABA Model Rule, it is something of a retrenchment of the broader – and more client-protective – existing California definition currently contained in the conflicts of interest rule. At least in this one case, the Commission has chosen ABA congruence over better California language more protective of clients' interests.

The existing definition of informed consent in the case of conflicts of interest is embodied in current CRPC 3-310(A), which combines disclosure and consent:

(1)"Disclosure" means informing the client or former client of the *relevant*

> *circumstances and of the actual and reasonably foreseeable adverse consequences* to the client or former client; (Emphasis added.)
>
> (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure....

The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1(e), in the redlined language below:

> 'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained ~~adequate information and explanation about~~ the relevant circumstances and the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

This will provide a more clearly informed consent to clients not only as to conflicts of interest, as the current rule now stands, but in all informed-consent situations.

4. Rule 3.7 – Lawyer as witness – conflicts of interest – jury trial vs. tribunal

We note that the proposed California rule remains broader than the ABA rule in that it allows clients to give informed written consent to allow a lawyer to testify as a witness. The ABA rule narrowly allows lawyers to testify on broadly substantive matters only when the lawyer's disqualification, essentially in order to enable testimony, "would work substantial hardship" on the client, even when the lawyer's testimony could be significantly helpful to the client's case.

We agree with the California construction. We note that the client *should* be able to get the full assistance of counsel, including testimony, *so long as* informed consent is given.

Nevertheless, conflicts of interest can and may occur despite informed consent. For example, the lawyer might be impeached based on collateral issues relating to credibility, a circumstance that would have been included the document obtaining the client's informed consent. However, *if* such conflict of interest exists or occurs between lawyer and client, the distinction between testimony at a *jury trial* vs. other adjudicative proceedings makes little if any sense. The issue is the conflict of interest by virtue of the lawyer's testimony, not the forum. The rule should be modified to strike the word "jury" and add the word "tribunal."[3]

II. Rules relating to able representation

1. Rule 1.1 – Competence

This comment is closely connected to the next comment, on MR 1.3, Diligence.

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[3] We see no reason to limit application to "trial," as under the ABA Model Rule, as opposed to "tribunal." We note, however, that the definition of "tribunal," as it has been proposed by the Commission, is seriously flawed in its narrow construction. See *infra*.

The competence rule, as modified, gives an unfortunate and overly broad "free pass" to a lawyer committing any first act of negligence, or any first "mistake," *no matter how egregious* that mistake may be. Section (a) of the rule remains unchanged: "A lawyer shall not *intentionally*, *recklessly*, or *repeatedly* fail to perform legal services with competence." (Emphasis added.) However, Comment ¶ 6 has been added, explicitly stating that the rule is "not intended to apply to *a single act* of negligent conduct *or a single mistake*...." (Emphasis added.)

This comment is seriously misguided. The comment is supported by the Commission's rules introduction, which claims that "most jurisdictions" apply the competence rule only to intentional, reckless, or repeated acts." Evidence is to the contrary, however, as is the ABA rule. At best the Commission relies on an unsupported anecdotal statement.

Moreover, Comment ¶ 6 would forbid discipline even if the "single act" would meet a "gross negligence" standard. Use of the common non-legal word "mistake," muddies the scope of 1.1(a) and creates the possibility that *any* single mistake, however great, would fall outside the rule.

Fixing this rule is not difficult. First, we strongly recommend that this Board eliminate ¶ 6 of the Comment. At the very least, the Board should strike the words "or a single mistake" and add the word "simple" before "negligent conduct," so that the comment would only excuse a first act of simple negligence.

Second, we recommend that the Board add the words "gross negligence" to 1.1(a): "A lawyer shall not intentionally, recklessly, repeatedly, or with gross negligence...."

2. *Rule 1.3 – Diligence*

Most unfortunately, the Commission also determined not to approve Rule 1.3 on diligence. The Commission's explanation, in its document updated May 17, 2010 entitled "Rules and Concepts that Were Considered, But Are Not Recommended for Adoption" ("*May 2010 Non-Adoption Summary*") argues that "diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence." This is not so.

Although proposed Rule 1.1 pays lip service to the concept of diligence in subsection (b) and Comment ¶ 2, this is not close to adequately replacing the diligence rule. For instance, while proposed Comment ¶ 2 is similar to ABA Rule 1.3's Comment ¶ 1, other important components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work overload (ABA Rule 1.3, Comment ¶ 2), procrastination and delay (ABA Comment ¶ 3), and following through on matters to completion (ABA Comment ¶ 4).

We strongly agree with the Commission's minority report with respect to this rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: *paying adequate attention*. MR 1.3 and its comments need to be approved by the Board.

III. Rules omitted in whole or part by the Commission

1. *Rule 1.0.1(m) – Definition of Tribunal*

The excellent definition of "tribunal" under the ABA Model Rules "denotes a court, an arbitrator ... or a legislative body, administrative agency or other body acting in an adjudicative capacity," that is, where the body "will render a binding legal judgment directly affecting a party's interests...."

Unfortunately, that broad and appropriate definition was not followed by the Commission. The Commission's definition is limited to courts, arbitrators, administrative law judges and special masters referred by the court. The result is that adjudications may occur in other forums that are simply deemed by the Commission *not* to be tribunals.

The effect of this can be enormous. The limited definition of "tribunal" could have a significant effect on how Rules 3.7, 3.9 and, if passed, 4.1 (see *infra*) are interpreted. Most tellingly, however, is the substantial and material effect on the vitally important Model Rule 3.3, "Candor to a Tribunal." If the definition of tribunal is unduly limited, lawyers in California will not have any ethical requirement to be candid towards a number of adjudicative bodies that are making binding decisions.

Surely, we hope and expect that California's integrated State Bar would not want to convey to its lawyers or the public that members of the California bar may be less than candid before certain adjudicative bodies. Nevertheless, that is what the current proposal implies. This definition must be changed to conform to the broader ABA definition.

2. *Rule 4.1 – Truthfulness to others*

Similar issues about the integrity of California bar members are raised by the absence of Model Rule 4.1. This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.

The Commission in its *May 2010 Non-Adoption Summary* argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business & Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.

We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.

3. *Rule 3.3 – Duty of candor*

Similarly, proposed Rule 3.3 implies the same kind of limitation on attorney candor. In sharp contrast to the ABA rule, which requires candor until the matter is resolved, Section (c) of the proposed CRPC requires that the duty of candor continue until the conclusion of the proceeding "or the representation, whichever comes first." Paragraph 13 of the proposed rule is also modified.

Apparently, there was a concern among some Commission members in creating this narrower language that lawyers might have an affirmative obligation to reveal information discovered after they no longer represented a client. However, the effect of this modification is to permit lawyers to withdraw from representation while an adjudicative proceeding is pending and thereby absolve themselves from any ongoing duty of candor. Moreover, because a lawyer need not have made an appearance before the tribunal to implicate the obligation of candor, the CRPC version may also allow a lawyer to "withdraw" from the client – and thus the duty – without any imprimatur from the tribunal.

The limiting language in section (c) and Comment ¶ 13 must be removed, conforming to the ABA rule. If the Board is concerned about after-acquired information, it could consider inserting the words "When representing a client" to the very beginning of the rule.

Note our concern, *supra*, that the definition of "tribunal" *must* be broadened.

4. Rule 3.9 – Advocate in non-adjudicative proceeding

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance *is* required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

5. Rule 4.4(a) – Barring use of embarrassment, delay, or burden

Similarly, the Commission has not recommended implementation of Rule 4.4(a), because – according to the *May 2010 Non-Adoption Summary* – the terms "embarrass, delay, or burden a third party" are seen as vague and overbroad. The Commission is concerned that such a rule might have "a chilling effect on legitimate advocacy."

However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply *prevent* actions that embarrass, delay and burden. Rather it *limits* a lawyer where s/he uses "means that have *no substantial purpose other than*" these impermissible goals. Emphasis added. Legitimate advocacy is, of course, a legitimate goal.

We strongly recommend implementation of this rule.

6. Rule 5.7 – Rule application to "law-related services"

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

7. Rule 2.1 – Lawyer as advisor

A. Strengthening the comments

The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include ¶ 3 and the first two sentences of ¶ 5 of the ABA rule. Also, the Commission eliminated the sentence in ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."

B. Independent professional judgment

We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we *strongly caution* the Board about adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any effort to equate "independent professional judgment" with "loyalty" – two vital and important concepts that are nevertheless not the same.

IV. Rules related to confidentiality

1. Rule 1.6 – Basic confidentiality

We remind the Board that this rule is based on the statutory modification to Bus. & Profs. Code § 6068(e) of 2004.[4] The Board should be very careful to ensure that in any modifications to the comments to the rule, the Commission has not overstepped the narrow bounds created by the legislature in drafting the original exceptions to confidentiality.

2. Rule 1.13 – Organization as client

Similarly, it is not possible to expect the Commission to draft Model Rule 1.13 in a way that would enable the whistleblower to ever go outside the organization, as the ABA has allowed in narrow circumstances, due to legislative pre-emption.

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[4] The California Supreme Court declined to modify issues relating to confidentiality on at least three occasions prior to 2004, demonstrating its clear view that this issue was the province of the legislature.

V. Rules related to lawyers' financial interests

1. *Rule 1.5 – Use of the term "unconscionable"*

The California Commission has insisted, repeatedly and counter-intuitively, in retaining the word "unconscionable" to define the propriety of fees and – even more puzzlingly – some expenses. The ABA uses the far more intelligible word "unreasonable." Moreover, California's own Business & Professions Code, in evaluating fee recoveries without written contracts, *also* uses the "reasonable" standard. Finally, the term "unconscionable" appears to create a higher threshold than "unreasonable," thus being lawyer- rather than client-protective.

Thus, the California rule would perpetuate use of a difficult-to-define, rather archaic, and lawyer-protective term that is at odds with the ABA formulation *and* at the same time perpetuates two California standards – one under the ethics rules and one under the State Bar Act.

This simply makes no sense. We strongly urge the Board to remove the word unconscionable and replace it with "unreasonable."

2. *Rule 1.15 – Trust accounts*

The Commission has developed an extraordinarily detailed and complicated trust account rule. We commend the Commission for the time and energy involved in fashioning such a detailed series of requirements.

However, we remain quite concerned that details of this extraordinary nature read more like a handbook than a disciplinary rule. While we have stated that we believe the CRPC must provide guidance as well as simple rules of discipline, we are concerned as to whether the trust account rule may be so complicated as to pose traps for both unwary *and wary* practitioners.

We note that the proposed CRPC rule runs 30 paragraphs, while the ABA rule is five paragraphs long. We believe more work needs to be done on this rule in order to provide practitioners with clear guidance and sufficient simplicity to enable California lawyers to comply with reasonable requirements without getting lost in the interstices of complex linguistics.

The Board should return this rule to the Commission with appropriate instructions.

3. *Rule 1.17 – Sale of a law practice*

A. Geographical area

The Commission has conflated the reference to "geographic area of practice" in the ABA rule – allowing a selling lawyer to cease practice in a state or particular "geographic area" – into selling off different geographic areas themselves. This is clearly a misinterpretation of the current ABA rule, intended or otherwise.

Importantly, this also damages clients. Sale of an "area" would allow a large law firm to sell all its San Diego clients, or San Joaquin clients, to another firm even while it continues to

practice in the same field. Clients will then be shunted to another law firm not of their choosing in a wide variety of circumstances.

This rule was designed to allow lawyers or law firms that are retiring or moving or materially changing their practice to forward their practices to other qualified lawyers. The geographical area sale proposed by CRPC 1.17 is far too broad, allowing buying and selling of areas as if the practice of law were only a business and not also a profession, and clients were products to be bought and sold.

This breadth should be narrowed substantially.

B. No increase of fees

Section (e) of the current proposed rule says that the fee to the client shall not be increased "solely" by reason of the purchase of the practice. Section (d) of the ABA rule makes this fee increase absolute. We strongly believe that the California language should also be absolute, and that the word "solely" should be stricken.

Respectfully submitted,

Drafters:

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