

**STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**

OPEN SESSION ACTION SUMMARY

Friday, February 19, 2016 (10:00 am – 4:30 pm)

Saturday, February 20, 2016 (9:00 am – 4:30 pm)

State Bar of California
180 Howard Street
Room 4A-C, 4th Floor
San Francisco, CA 94105

Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), Dean Zipser (Co-Vice-Chair); George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Mark Tuft.

Members Absent: Tobi Inlender (Public Member) and Hon. Dean Stout.

Advisors Present: Wendy Chang, Hon. Richard Fybel, Edith Matthai and Heather Rosing.

Liaisons Present: Greg Fortescue (California Supreme Court) and Jason Lee (Board of Trustees).

State Bar Staff Present: Allen Blumenthal (Office of Chief Trial Counsel), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel), Kevin Mohr (Consultant/Reporter), and Andrew Tuft (Office of Professional Competence).

Others Present: Diane Karpman, Stan Lamport, Michael McDermott, Teresa Schmid, and Richard Zitrin.

I. CHAIR'S REMARKS

The Chair requested and Mr. Difuntorum provided an oral report on the Commission's schedule and the Board of Trustees' plan for considering the Commission's proposed Rules. Regarding the Commission's schedule, members were: (1) reminded that the March 31st – April 1st meeting is a Thursday and Friday meeting rather than the usual Friday and Saturday schedule; and (2) asked to anticipate the possibility that the Commission's currently-scheduled one-day June 3rd meeting may be changed to a two-day meeting on June 3rd and 4th.

Regarding the Board's plan to consider the Commission's proposed Rules, Mr. Difuntorum thanked Board liaison Jason Lee for recommending and facilitating the Board's planned consideration of executive summaries of selected proposed Rules at the Board's March and May meetings. The executive summaries will be considered by the Board's Committee on Regulation and Discipline and will be on the agenda for information and discussion rather than

action. The objective is to provide Board members with an opportunity to become familiar with rule revision issues prior to the Board's special meeting tentatively set for June 23, 2016, at which the Commission's comprehensive set of proposed rules will be considered for public comment distribution.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

a. Approval of Action Summary - Regular Meeting on January 22 and 23, 2016 (Open Session).

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's January 22 and 23, 2016 meeting.

All members present voted yes.

III. ACTION

a. Report and Recommendation on Proposed Rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice)

The Chair recognized Mr. Cardona who presented the report and recommendation of the joint drafting team on rules 1-120 and 2-400. Following discussion, the proposed rule submitted by the joint drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team on rules 1-120 and 2-400, the Commission hereby adopts the text of proposed amended rule 2-400 (8.4.1) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr who voted no and Mr. Ham and Mr. Martinez who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team on rules 1-120 and 2-400, the Commission hereby adopts the Comments to proposed amended rule 2-400 (8.4.1) of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Chou, Mr. Ham, Mr. Kehr and Mr. Martinez who abstained.

b. Report and Recommendation on Rule 3-200 (Prohibited Objectives of Employment) (including ABA Model Rule 3.1 (Meritorious Claims and Contentions))

The Chair recognized Mr. Martinez who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-200 drafting team, the Commission hereby adopts proposed amended rule 3-200 [3.1] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

c. Report and Recommendation on Rule 3-120 (Sexual Relations With Client) (including ABA Model Rule 1.8(j) re sexual relations with client)

The Chair recognized Mr. Ham who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. A separate vote was taken on the entire text of the proposed rule followed by a vote on the entire proposed comments to the rule.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-120 drafting team, the Commission hereby adopts the text of proposed amended rule 3-120 [1.8.10] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Ham who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-120 drafting team, the Commission hereby adopts the Comments to proposed amended rule 3-120 [1.8.10] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

d. Report and Recommendation on Rule 1-400 (Advertising and Solicitation) (Including ABA Model Rules 7.1 – 7.5 re advertising, communications and direct contact)

Prior to the meeting, this agenda item was withdrawn.

e. Report and Recommendation on Rule 3-210 (Advising the Violation of Law) (including ABA Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer))

The Chair recognized Ms. Langford who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended, including deleting all of paragraph (b) and separating the remainder of the team's

proposed rule into two separate rules: rule 1.2 (paragraphs (a) and (c)); and rule 1.2.1 (paragraph (d)). Votes were taken on the text of each rule with consideration of the comments postponed until the next meeting to give the drafting team an opportunity to allocate comments between the two separate rules.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-210 drafting team, the Commission hereby adopts the text of proposed new rule 1.2 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Chou who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-210 drafting team, the Commission hereby adopts the text of proposed amended rule 3-210 [1.2.1] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

f. Report and Recommendation on Rule 3-310 (Avoiding the Representation of Adverse Interests) (including ABA Model Rules 1.7, 1.8.6, 1.8.7 & 1.9) ***

The Chair welcomed Richard Zitrin who addressed the Commission on behalf of approximately fifty-five law professors who were joint signatories on a letter submitted to the Supreme Court in 2014 concerning the proposed amendments to the rules adopted by the Board. A letter, signed by most of the same professors from this group and dated February 16, 2016, was submitted to the Commission with comments on the drafting team's proposed rule 1.7.

Following Mr. Zitrin's presentation, the Chair recognized Mr. Martinez who deferred to Mr. Cardona to present the report and recommendation of the drafting team. The report included four proposed rules, which parallel the subject matter addressed in current rule 3-310: rule 1.7, rule 1.8.6, rule 1.8.9 and rule 1.9. Mr. Cardona presented proposed new rule 1.7 that would encompass the concepts found in current rule 3-310(B) and (C). Following discussion, the proposed rule submitted by the drafting team was amended. A vote was taken on the text of the rule with consideration of the comments postponed until the next meeting to give the drafting team an opportunity to conform the comments to the revised text.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-310 drafting team, the Commission hereby adopts the text of proposed new rule 1.7 of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kornberg and Mr. Tuft who voted no, and Mr. Chou, Mr. Harris and Mr. Martinez who abstained.

Consideration of proposed rules 1.8.6, 1.8.9 and 1.9 was postponed to the next meeting.

g. Report and Recommendation on Rule 3-600 (Organization as Client) (including ABA Model Rule 1.13 (Organization as Client))

The Chair recognized Mr. Rothschild who presented the report and recommendation of the drafting team. Following discussion of the proposed rule, there was no change to the text as submitted by the drafting team and only one revision to the comments to the rule. A separate vote was taken on the entire text of the proposed rule followed by a vote on the entire proposed comments to the rule.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-600 drafting team, the Commission hereby adopts the text of proposed amended rule 3-600 [1.13] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the rule 3-600 drafting team, the Commission hereby adopts the Comments to proposed amended rule 3-600 [1.13] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

CLOSED SESSION

*None**

*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**PROPOSED RULE 1.8.10 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE FEBRUARY 19TH – 20TH MEETING**

Rule 1.8.10 Sexual Relations With Client

- (a) A lawyer shall not engage in sexual relations with a client unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.
- (b) For purposes of this Rule, “sexual relations” means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse.

Comment

[1] Although this Rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. See, e.g., Rules 1.1 (competence), 1.7 (conflicts of interest) and [2.1 (independent judgment)].

[2] When the client is an organization, this Rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters. See Rule 1.13.

[3] Business and Professions Code § 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This Rule and the statute impose different obligations.

**PROPOSED RULE 1.13 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE FEBRUARY 19TH – 20TH MEETING**

Rule 1.13 Organization as Client

- (a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.
- (b) If a lawyer representing an organization knows that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows or reasonably should know is (i) a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In taking any action pursuant to paragraph (b), the lawyer shall not violate his or her duty of protecting all information protected by Business and Professions Code § 6068(e)(1).
- (d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and is likely to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with [Rule 1.16].
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of Rules [1.7], 1.8.2, [1.8.6, and 1.8.7]. If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by an appropriate official or body of the

organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] This Rule applies to all forms of private, public and governmental organizations. See Comment [6]. An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. Any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization for purposes of the authorized matter.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Rule 1.4 and Business and Professions Code § 6068(m). Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes are sufficiently important to refer in the best interest of the organization subject to Rule 1.6 and Business and Professions Code § 6068(e).

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows or reasonably should know that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably imputable to the organization, and (ii) likely to result in substantial injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see Rule 5.2.

[5] This Rule does not authorize a lawyer to substitute the lawyer's judgment for that of the organization or to take action on behalf of the organization independently of the direction the lawyer receives from the highest authorized constituent overseeing the particular engagement. In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

Governmental Organizations

[6] It is beyond the scope of this Rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Rule 1.6 and Business and Professions Code § 6068(e). This Rule is not intended to limit that authority.

**PROPOSED RULE 3.1 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE FEBRUARY 19TH – 20TH MEETING

Rule 3.1 Meritorious Claims and Contentions

- (a) A lawyer shall not:
 - (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
 - (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.
- (b) A lawyer for the defendant in a criminal proceeding, 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.

**PROPOSED RULE 8.4.1 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE FEBRUARY 19TH – 20TH MEETING**

Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

- (a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic or for the purpose of retaliation.
- (b) In relation to a law firm’s operations, a lawyer shall not, on the basis of any protected characteristic or for the purpose of retaliation, unlawfully:
 - (1) discriminate or knowingly permit unlawful discrimination;
 - (2) harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or
 - (3) refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment.
- (c) For purposes of this rule:
 - (1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;
 - (2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
 - (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and
 - (4) “retaliation” means to take adverse action because a person has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by this Rule.
- (d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this Rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part,

on the same conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

- (e) Upon issuing a notice of a disciplinary charge under this Rule:
 - (1) If the notice is of a disciplinary charge under paragraph (a) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section.
 - (2) If the notice is of a disciplinary charge under paragraph (b) of this Rule, the State Bar shall provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.
- (f) This Rule shall not prevent a lawyer from representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation.

Comment

[1] Conduct that violates this Rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). In relation to a law firm's operations, this Rule imposes on all law firm lawyers the responsibility to advocate corrective action to address known harassing or discriminatory conduct by the firm or any of its other lawyers or non-lawyer personnel. Law firm management and supervisory lawyers retain their separate responsibility under Rules 5.1 and 5.3. Neither this Rule nor Rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this Rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Canon 3B(6) of the Code of Judicial Ethics providing, in part, that: "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others.") A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. This Rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, § 2 of the California Constitution. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm implementing that policy or practice. For example, a law firm non-management and non-supervisory lawyer who becomes aware that the law firm is

engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm management lawyer who would have responsibility under Rule 5.1 or 5.3 to take reasonable remedial action upon becoming aware of a violation of this Rule.

[4] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this Rule should be abated.

[5] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[6] This Rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.