

**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, September 30, 2016**  
**(10:00 am – 4:30 pm)**

Marriott Marquis San Diego Marina  
333 West Harbor Drive  
South Tower, 4th Floor, Coronado Room  
San Diego, CA 92101  
415-531-0061

**Members Present:** Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Raul Martinez, Toby Rothschild, Hon. Dean Stout and Mark Tuft.

**Members Not Present:** Carol Langford and Dean Zipser.

**Advisors Present:** Wendy Chang and Heather Rosing.

**Liaisons Present:** Greg Fortescue (California Supreme Court).

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

**Others Present:** Sam Bellicini (Association of Discipline Defense Counsel), Carol Buckner (Committee on MFA); Carin Fujisaki (Supreme Court of California), Diane Karpman (Beverly Bar Association), Edward McIntyre (SDCBA), Andrew Servais (SDCBA) and Teresa Schmid (LACBA).

**I. CHAIR'S REMARKS**

**A. Oral Report**

The Chair thanked all of the members, advisors and liaisons for their hard work and observed that the conclusion of the initial 90-day public comment period represented a key benchmark in the progress of the Commission's work. The Chair recognized visitor Carin Fujisaki, Principal Attorney to the Chief Justice of the Supreme Court of California and expressed appreciation for the Court staff's support for the State Bar's rule revision project. The Chair also thanked Commission Advisor Heather Rosing for contributing an article to the Daily Journal that encouraged submission of public comment. The Chair reminded all persons present that the plan for the meeting was to discuss comment received but that no action would be taken until the Commission's next meeting.

The Chair requested, and Mr. Difuntorum provided, announcements concerning next steps for the Commission. Mr. Difuntorum reported on the anticipated Board action on October 1, 2016 to consider the Chair's presentation of the Commission's recommendation that proposed amended rules 5-110 and 5-220 be adopted on an expedited basis and that Mr. Rothschild and Judge Clopton were planning to attend the meeting. Mr. Difuntorum reported that the next meeting of the Commission on October 21 and 22, 2016 would involve consideration and action on all of the proposed rules based on public comments received. Mr. Difuntorum encouraged members to review public comments before the posting of agenda materials and to submit input to staff and the consultant as soon as possible to facilitate the drafting team's work to review the public comments.

Lastly, the Chair recognized visitor Edward McIntyre who because of scheduling conflicts requested, and was granted, permission to speak to various rules on the agenda. The rules addressed were: 1.6; 1.14; 3.2; 4.1; 4.4; 8.4.1; and 7.1 through 7.5.

## **II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY**

### **Approval of Action Summary – Regular Meeting on August 26, 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 August 26, 2016 meeting.

All members present voted yes.

## **III. ACTION**

### **A. Report and Recommendation on Rule 2.1 (Advisor)**

The Chair recognized Mr. Eaton who reported that the drafting team had no changes to the proposal approved at the Commission's August 26, 2016 meeting.

### **B. Consideration of Proposed Rules 1.0 - 1.3, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

#### **RULE 1.0:**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 1.0 and the drafting team's recommended responses to those comments. Mr. Eaton indicated his continuing concern that Comment [5] should be deleted.

#### **RULE 1.0.1:**

The Chair recognized Mr. Chou who gave an oral report on the public comments received on Rule 1.0.1 and the drafting team's recommended responses to those comments.

**RULE 1.1:**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 1.1 and the drafting team's recommended responses to those comments. Mr. Kehr noted that all comments received were favorable. Mr. Blumenthal noted the Office of Chief Trial Counsel's concern about dividing the duty of competence into several rules: competence, diligence and supervision.

**RULE 1.2:**

The Chair recognized Mr. Mohr who gave an oral report on the public comments received on Rule 1.2 and indicated that the drafting team will report on comments from COPRAC and OCTC at the October meeting.

**RULE 1.2.1:**

The Chair recognized Mr. Mohr who gave an oral report on the public comments received on Rule 1.2.1 and the drafting team's recommended responses to those comments. Mr. Mohr also described the drafting team's tentative revised draft of the proposed rule intended to address the public comments concerning the omission of an explicit reference to criminal conduct in the rule.

**RULE 1.3:**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 1.3 and the drafting team's recommended responses to those comments. Mr. Tuft also described the drafting team's tentative view that the phrase "without just cause" should be deleted from paragraph (b) as suggested by a COPRAC comment.

**C. Consideration of Proposed Rules 1.4 - 1.4.2, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

**RULE 1.4:**

The Chair recognized Mr. Harris who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.4. Mr. Harris noted that after the September meeting cut-off date for assigned public comments, comments were received that will be presented at the next meeting.

**RULE 1.4.1:**

The Chair recognized Mr. Kornberg who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.4.1. Mr. Kornberg noted that after the September meeting cut-off date for assigned public comments, comments were received that will be presented at the next Commission meeting.

**RULE 1.4.2:**

The Chair recognized Ms. Clinch who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.4.2.

#### **D. Consideration of Proposed Rules 1.5, 1.5.1, 1.15, and 1.16, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

##### **RULE 1.5:**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 1.5 and the drafting team's recommended responses to those comments. The Chair also recognized visitors Doug Hull and Carol Buckner (appearing on behalf of the State Bar's Committee on Mandatory Fee Arbitration) who provided oral public comment on the definition of a "flat fee" and recommended that the Commission consider the definition used in the State Bar's sample written fee agreements.

##### **RULE 1.5.1:**

The Chair recognized Mr. Ham who gave an oral report on the public comments received on Rule 1.5.1 and the drafting team's recommended responses to those comments. Mr. Ham also noted that a COPRAC comment had been received after the September meeting cutoff date about the rule's writing requirements that will be presented at the next Commission meeting.

##### **RULE 1.15:**

The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.15.

##### **RULE 1.16:**

The Chair recognized Mr. Kornberg who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.16. Mr. Kornberg noted that after the September meeting cut-off date for assigned public comments, comments were received that will be presented at the next Commission meeting.

#### **E. Consideration of Proposed Rules 1.6 and 1.14, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

##### **RULE 1.6:**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 1.6 and the drafting team's recommended responses to those comments.

##### **RULE 1.14:**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 1.14 and the drafting team's recommended responses to those comments.

#### **F. Consideration of Proposed Rules 1.8.1 - 1.8.11, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

**RULE 1.8.1:**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 1.8.1 and the drafting team's discussion of those comments, in particular comments addressing the applicability of the rule to fee agreement modifications.

**RULE 1.8.2:**

The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.2.

**RULE 1.8.3:**

The Chair recognized Mr. Ham who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.3.

**RULE 1.8.5:**

The Chair recognized Mr. Rothschild who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.5.

**RULE 1.8.6:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.6.

**RULE 1.8.7:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.7.

**RULE 1.8.8:**

The Chair recognized Mr. Harris who gave an oral report on the public comments received on Rule 1.8.8 and the drafting team's recommended response to the comments.

**RULE 1.8.9:**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 1.8.9 and the drafting team's recommended response to the comments.

**RULE 1.8.10:**

The Chair recognized Mr. Ham who gave an oral report on the public comments received on Rule 1.8.10 and the drafting team's recommended responses to those comments. Mr. Eaton noted that he will submit a constitutional analysis for consideration at the October meeting.

**RULE 1.8.11:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.8.11.

## **G. Consideration of Proposed Rules 1.7, 1.9 - 1.12, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

### **RULE 1.7:**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 1.7 and the drafting team's recommended responses to those comments. Mr. Cardona described the drafting team's tentative revised draft of the proposed rule, in part, intended to address the public comments suggesting that the "check-box" examples in the rule should be deleted. Mr. Martinez indicated that he preferred COPRAC's approach over the team's tentative revised draft.

### **RULE 1.9:**

The Chair recognized Mr. Martinez who deferred to Mr. Cardona who gave an oral report on the public comment received on Rule 1.9 and the drafting team's recommended response to that comment. Mr. Cardona also described the drafting team's tentative revised draft of the proposed rule, in part, intended to delete paragraph (c)(3) in response to public comments asserting that paragraph (c)(3) was confusing and possibly redundant of paragraphs (a) and (b).

### **RULE 1.10:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.10.

### **RULE 1.11:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.11.

### **RULE 1.12:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 1.12.

## **H. Consideration of Proposed Rules 1.13 and 1.17, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

### **RULE 1.13:**

The Chair recognized Mr. Rothschild who gave an oral report on the public comments received on Rule 1.13 and the drafting team's recommended responses to those comments.

### **RULE 1.17:**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 1.17 and the drafting team's recommended responses to the comments. For the drafting team's further consideration, Ms. Rosing observed that limiting the scope of this rule to a sale

of “all or substantially all” of a law practice might result in inadequate public protection for sales that are outside of the rule.

### **I. Consideration of Proposed Rules 2.4 and 2.4.1, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission’s understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

#### **RULE 2.4:**

The Chair recognized Judge Clopton who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission’s consideration of proposed Rule 2.4.

#### **RULE 2.4.1:**

The Chair recognized Judge Clopton who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission’s consideration of proposed Rule 2.4.1.

### **J. Consideration of Proposed Rules 3.1 - 3.10, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission’s understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

#### **RULE 3.1:**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 3.1 and the drafting team’s recommended responses to the comments.

#### **RULE 3.2:**

The Chair recognized Mr. Ham who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission’s consideration of proposed Rule 3.2. Mr. Kehr asked that the team consider whether the phrase “substantial purpose” should be changed or deleted.

#### **RULE 3.3:**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 3.3 and the drafting team’s recommended response to the comments. Mr. Tuft also described the drafting team’s tentative revised draft of the proposed rule, in part, intended to clarify paragraph (d) in response to a public comment from COPRAC.

#### **RULE 3.4:**

The Chair recognized Ms. Croker who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission’s consideration of proposed Rule 3.4.

#### **RULE 3.5:**

The Chair recognized Judge Stout who gave an oral report on the public comments received on Rule 3.5 and the drafting team’s recommended response to the comments. Judge Stout also described the drafting team’s tentative revised draft of the proposed rule, in part, intended to address a public commenter’s concern about contributions to a labor union by a court employee.

**RULE 3.6:**

The Chair recognized Judge Clopton who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.6.

**RULE 3.7:**

The Chair recognized Mr. Cardona who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.7.

**RULE 3.8:**

The Chair recognized Mr. Rothschild who gave an oral report on the public comments received on Rule 3.8 and the drafting team's recommended response to the comments.

**RULE 3.9:**

The Chair recognized Mr. Tuft who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.9.

**RULE 3.10:**

The Chair recognized Mr. Bleich who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 3.10.

**K. Consideration of Proposed Rules 4.1 - 4.4, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

**RULE 4.1:**

The Chair recognized Mr. Cardona who gave an oral report on the public comments received on Rule 4.1 and indicated that all comments received supported the proposed rule.

**RULE 4.2:**

The Chair recognized Mr. Tuft who gave an oral report on the public comments received on Rule 4.2 and indicated that all comments received supported the proposed rule.

**RULE 4.3:**

The Chair recognized Mr. Tuft who deferred to Mr. Cardona who gave an oral report on the public comments received on Rule 4.3 and the drafting team's tentative revised draft of the proposed rule, in part, intended to address covert investigations.

**RULE 4.4:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 4.4. Mr. Martinez noted that Mr. McIntyre's suggestion to add the second prong of the *Rico* decision concerning inadvertent disclosure will be presented at the next Commission meeting.



## **L. Consideration of Proposed Rules 5.1 - 5.6, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

### **RULE 5.1:**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 5.1 and the drafting team's tentative revised draft of the proposed rule, in part, intended to respond to a comment from COPRAC.

### **RULE 5.2:**

The Chair recognized Mr. Kehr who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.2.

### **RULE 5.3:**

The Chair recognized Mr. Kehr who gave an oral report on the public comments received on Rule 5.3 and the drafting team's recommended response to the comments.

### **RULE 5.3.1:**

The Chair recognized Mr. Rothschild who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.3.1.

### **RULE 5.4:**

The Chair recognized Mr. Harris who gave an oral report on the public comments received on Rule 5.4 and the drafting team's recommended response to the comments.

### **RULE 5.5:**

The Chair recognized Mr. Tuft who reported on public hearing testimony received on Rule 5.5 and the drafting team's recommended response to the testimony.

### **RULE 5.6**

The Chair recognized Mr. Tuft who reported that no public comments were assigned for proposed Rule 5.6 and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 5.6.

## **M. Consideration of Proposed Rules 6.3 and 6.5, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

### **RULE 6.3:**

The Chair recognized Mr. Martinez who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 6.3.

### **RULE 6.5:**

The Chair recognized Mr. Martinez who gave an oral report on the public comments received on Rule 6.5 and the drafting team's recommended response to the comments.

## **N. Consideration of Proposed Rules 7.1 - 7.5, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULES 7.1, 7.2, 7.3, 7.4 and 7.5:

The Chair recognized Mr. Tuft who gave an oral report on the public comments received on these rules and the drafting team's recommended responses to the comments.

## **O. Consideration of Proposed Rules 8.1 - 8.5, including any public comments**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

RULE 8.1:

The Chair recognized Ms. Clinch who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.1. Ms. Clinch noted that after the September meeting cut-off date for assigned public comments, comments were received that will be presented at the next Commission meeting.

RULE 8.1.1:

The Chair recognized Mr. Ham who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.1.1.

RULE 8.2:

The Chair recognized Judge Stout who reported that no public comments were assigned and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.2. Judge Stout noted that after the September meeting cut-off date for assigned public comments, comments were received and the teams' response to those comments will be presented at the next Commission meeting.

RULE 8.4:

The Chair recognized Mr. Cardona who gave an oral report on the public comments received on Rule 8.4 and the drafting team's tentative revised draft of the proposed rule, in part, intended to respond to public comments concerning the inclusion of the phrase "moral turpitude" in the black letter of the proposed rule.

RULE 8.4.1:

The Chair recognized Mr. Cardona who gave an oral report on the public comments received on Rule 8.4.1, the drafting team's recommended responses to those comments and the drafting team's tentative revised draft of the proposed rule, in part, intended to respond to a public comment on the prohibition against retaliation.

RULE 8.5:

The Chair recognized Mr. Eaton who reported that no public comments were assigned for proposed Rule 8.5 and that the drafting team had no discussion issues to raise for the Commission's consideration of proposed Rule 8.5.

**P. Consideration of Model Rules Rejected by Commission [if warranted by public comment received on a rejected rule or as a result of consideration of any other agenda item]**

Where applicable, reports were provided on public comments assigned to a drafting team and the Chair confirmed the Commission's understanding that any Commission action would be taken only after the conclusion of the 90-day public comment period.

**MODEL RULE 1.18:**

The Chair recognized Mr. Tuft who gave an oral report on the drafting team's tentative recommendation that the Commission reconsider its prior decision to not recommend any version of Model Rule 1.18. Mr. Tuft explained that the team's position on non-consensual screening remained pending and that a revised draft rule will be presented at the October meeting.

**MODEL RULES 2.3, 5.7, 6.1, 6.2, 6.4, 7.6 and 8.3.**

The Chair reported that no public comments were assigned for these Model Rules.

***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.