



THE STATE BAR OF CALIFORNIA

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DATE: December 19, 2008

TO: Members of the Board of Governors

FROM: Randall Difuntorum, Director, Professional Competence

RE: Special Report of the Commission for the Revision of the Rules of Professional Conduct - Selected Comparisons with the ABA Model Rules

EXECUTIVE SUMMARY

This agenda item presents a special report of the State Bar's Commission for the Revision of the Rules of Professional Conduct ("Commission"). The Commission is a Board of Governor ("Board") sub-entity charged with the task of conducting a thorough review of all of the rules and recommending comprehensive amendments.

At the Commission's October 31, 2008 meeting, the State Bar President assigned the Commission to present selected comparisons of the Commission's proposed rules with the ABA Model Rules. With prior input from the Board's liaisons to the Commission, a comparison table format was designed and the Commission selected eight representative proposed rules from the Commission's rules that have been revised following consideration of public comment and public hearing testimony. The table shows changes to the ABA Model Rules in redline/strikeout style and presents the Commission's explanation for the differences with the ABA Model Rules. As this is a report item, no Board action is needed. However, the Commission welcomes the Board's input and guidance.

Representatives of the Commission will attend the Board's meeting to present this agenda item. Board members with questions about this item may contact Randall Difuntorum at (415) 538-2161.

BACKGROUND

The Board has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct.^{1/} The amendments adopted by the Board are submitted to the Supreme

^{1/} Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Governors may formulate and enforce rules of professional conduct for all members of the bar of this State."

Court for approval and upon approval become binding disciplinary standards for all members of the State Bar.^{2/}

The last complete revision of the California Rules of Professional Conduct occurred in the 1980's and it was at that time that the State Bar first established the Commission. At the end of its work, the Commission was placed in an abeyance status until such time that another complete revision of the rules would be needed. That time came in 2001 when the State Bar reactivated the Commission and assigned it to conduct a thorough study of the rules and to recommend comprehensive amendments. In part, the State Bar's action responded to the American Bar Association's ("ABA") near completion of its own "Ethics 2000" project to completely revise the ABA Model Rules of Professional Conduct.

The State Bar's procedures for considering amendments to the Rules of Professional Conduct require publication for public comment. (Board Book, Tab 12, Title 1, Division 2, Rule 1.10.) The Board Committee on Regulation, Admissions, and Discipline ("RAD") oversees the Commission's requests for public comment authorization. In 2006, the Commission completed work on a group of twenty-seven proposed new and amended rules and with RAD authorization, those rules were distributed for a public comment period, which ended on October 16, 2006. Two more groups followed: in 2007, a group of five proposed amended rules were distributed with a public comment deadline of October 26, 2007; and in 2008, a group of thirteen rules were distributed with a public comment deadline of June 6, 2008. Public hearings were conducted in connection with each of the three public comment distributions.

In total, forty-five proposed rules have been distributed for public comment. To complete its inventory of work, it is anticipated that the Commission will seek authorization to distribute two more groups of proposed rules. In these remaining groups, the estimated number of rules ranges from ten to twenty-five, as the actual number will depend on the number of draft rules that the Commission will develop based on ABA Model Rules that have no California counterparts and rules that are state rule variations.^{3/} At the Commission's October 31, 2008 meeting, the State Bar President urged the Commission to complete as much of its work as possible by the end of the current Board year and the Commission is determined to expedite its remaining work.

DISCUSSION

The table provided as Attachment 1 is a special report from the Commission that presents selected comparisons of the Commission's proposed rules with the ABA Model Rules.

^{2/} Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

^{3/} After all of the individual groups have been distributed for an initial public comment and have been revised in response to the comments received, the Commission will seek RAD authorization to issue a final further public comment distribution of the Commission's entire proposed rules to give commentators an opportunity to evaluate the proposed rules as an integrated whole.

The selected proposed rules and a brief statement of a key substantive or policy issue posed by each rule is listed below.

Rule 1.1 Competence

Whether to retain California's existing rule on competence that prohibits only an intentional, reckless or repeated act of incompetence or adopt the ABA approach that prohibits any incompetent act, including a single act of negligence.

Rule 1.5.1 Financial Arrangements Among Lawyers

Whether to retain California's policy of permitting "pure referral fees" among lawyers in different law firms or adopt the ABA approach that allows such fee splits only if the division is commensurate with the division of labor or assumption of responsibility between the lawyers.

Rule 1.8.10 Sexual Relations With Client

Whether to retain California's existing rule on sexual relations between a lawyer and client that prohibits such relations in limited circumstances where the relations: are required as a lawyer's condition to a client's representation; obtained by coercion, intimidation or undue influence by the lawyer; or cause the lawyer to perform legal services incompetently, or adopt the ABA approach that prohibits all sexual relations unless the relations are between spouses or are ongoing relations that predate the initiation of a client-lawyer relationship.

Rule 3.2 Expediting Litigation

California has no rule counterpart to ABA Model Rule 3.2 (requiring a lawyer to make reasonable efforts to expedite litigation consistent with the interests of a client) and the issue is whether a disciplinary rule should be adopted.

Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

The ABA Model Rules do not have a rule counterpart to this existing California rule (imposing notice and supervision requirements on a lawyer who hires or otherwise practices with a disbarred, suspended or involuntarily inactive lawyer) and one issue is whether this rule should be continued in California.

Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law

Whether to adopt the approach of the comparable ABA Model Rule by regulating multi-jurisdictional practice as a disciplinary standard or retain the existing California approach of addressing multi-jurisdictional practice within the California Rules of Court as a part of the regulation of special admission categories.

Rule 8.3 Reporting Professional Misconduct

California has no rule counterpart to ABA Model Rule 8.3(a) (requiring a lawyer to report knowledge of another lawyer's misconduct to the proper attorney regulatory

authority) and the issue is whether a disciplinary rule should be adopted and, if so, whether it should be permissive or mandatory.

Rule 8.4 Misconduct

Rule 8.4 gathers in one rule a number of disciplinary standards that for the most part are found in various existing statutes and rules. In addition to whether California should adopt such a rule, another issue is whether to add a new rule prohibiting lawyer statements or conduct that manifest bias or prejudice on the basis of race, sex, religion, national origin, disability, age or sexual orientation.

With prior input from the Board's liaisons to the Commission, a comparison table format was designed for presenting the Commission's selected proposed rules. Each of the selected proposed rules is a draft that has been revised following consideration of public comment and public hearing testimony. The table shows changes to the ABA Model Rules in redline/strikeout style and presents the Commission's explanation for the differences with the ABA Model Rules. Consideration of the ABA Model Rules, as an indicator of a national standard on attorney professional responsibility, is one important component in the Commission's charge. The Commission's full charge states:

"The Commission is to evaluate the existing California Rules of Professional Conduct in their entirety considering developments in the attorney professional responsibility field since the last comprehensive revision of the rules occurred in 1989 and 1992. In this regard, the Commission is to consider, along with judicial and statutory developments, the Final Report and Recommendations of the ABA Ethics 2000 Commission, the American Law Institute's Restatement of the Law Third, The Law Governing Lawyers, as well as other authorities relevant to the development of professional responsibility standards. The Commission is specifically charged to also consider the work that has occurred at the local, state and national level with respect to multi-disciplinary practice, multi-jurisdictional practice, court facilitated *in propria persona* assistance, discrete task representation and other subjects that have a substantial impact upon the development of professional responsibility standards.

The Commission is to develop proposed amendments to the California Rules that:

- 1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
- 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
- 3) Promote confidence in the legal profession and the administration of justice; and
- 4) Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues."

The objective of the attached comparison table is to give the Board a user-friendly tool for examining the Commission's proposed rules in relation to the ABA Model Rules. While the table provides much information, it is not intended to be the exclusive mechanism for assessing the Commission's work product. For example, consideration of public comments received and the Commission's action in response to those public comments is an important factor in the Board's evaluation of the Commission's work. The Commission's comprehensive final report and recommendation will present information on public comments as well as comparisons with the ABA Model Rules and also all other pertinent information, such as the minority positions of some Commission members and the interrelationship between certain proposed rules and existing statutory provisions governing lawyer conduct. The final report and recommendation will be prepared by the Commission after a final comprehensive public comment distribution of all of the Commission's proposed rules as a single document.

CONCLUSION

With the limits of the special report in mind, the Commission greatly desires any and all input and interim guidance from the members of the Board. In particular, the Commission hopes that Board members will take this opportunity to ask questions and express comments on the Commission's efforts to consider the ABA Model Rules.