

AGENDA ITEM

NOV 132
**Rules of Professional Conduct,
Return from Public Comment**

DATE: October 23, 2009

TO: Members of the Board of Governors
Members of the Board Committee on Regulation and Admissions

FROM: Randall Difuntorum, Director, Professional Competence

RE: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batches 1, 2 and 3 – Return From Public Comment

EXECUTIVE SUMMARY

This agenda item requests adoption of proposed new and amended Rules of Professional Conduct of the State Bar of California developed by the Board of Governor's ("the Board") Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"). The attached proposed rules were amended following public comment.

The proposed rules presented cover the Commission's first three public comment groups of draft rules. In 2006, the Commission completed work on a group of twenty-seven proposed rules and those rules were distributed for a public comment period, which ended on October 16, 2006. In 2007, the Commission completed work on a group of five proposed rules and those rules were distributed for a public comment period, which ended on October 26, 2007. In 2008, the Commission completed work on a group of thirteen proposed rules and those rules were distributed for a public comment period, which ended on June 6, 2008. With a few exceptions, all of these rules are now being presented for Board adoption; however, the action to adopt the rules is subject to potential revisions that might be considered by the Board following a final comprehensive public comment distribution of the entire proposed new and amended rules. The Commission's fourth and fifth groups of public comment drafts are presently out for public comment. The anticipated sixth and final group of public comment drafts is scheduled to be issued for public comment in January 2010.

Representatives of the Commission will attend the Board's meetings. Board members with questions about this matter may contact Randall Difuntorum at (415) 538-2161.

ISSUE

The Board of Governors (“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 Court for approval and, upon approval, become binding disciplinary standards for all members of the State Bar.^{2/}

This agenda item requests the Board to adopt the first three groups of the Commission’s proposed new and amended Rules of Professional Conduct. The Commission has reviewed the public comment received and has modified many of the proposed rules in response to the public comment. The Board is requested to adopt the rules for an eventual comprehensive submission to the California Supreme Court with a recommendation that the Supreme Court approve the rules.

As the proposed rules presented in this agenda item comprise only a portion of the Commission’s work, it is requested that the Board’s action to adopt the rules be taken subject to the consideration of potential revisions that might be considered by the Board following a final comprehensive public comment distribution of the Commission’s entire proposed new and amended rules.

BACKGROUND

The last complete revision of the California Rules of Professional Conduct occurred in the 1980’s. It was at that time that the State Bar established its Special Commission for the Revision of the Rules of Professional Conduct (“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 that entailed a complete review and substantial revision of the ABA Model Rules of Professional Conduct.

The Commission made a presentation to the Board at the Board’s January 10, 2009 planning meeting and in accordance with the commentary from Board members, the Commission has changed the format for presenting the proposed rules. The proposed rules are presented in a comparison table format. The comparison table format has three columns. The first column presents the clean version of an ABA Model Rule counterpart, if any. The second column presents a redline draft of the Commission’s proposal that shows changes to the ABA Model Rule counterpart. The third column

^{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."

^{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."

presents the Commission's explanation of each deviation from the ABA Model Rule language. The main purpose of this format is to simplify identification of changes to the ABA Model Rules and to make plain the Commission's rationale whenever a rule deviates from the Model Rule counterpart.

In addition to the Model Rule comparison table, the following are also provided for each rule: (1) a "dashboard" cover sheet that serves as a quick reference guide for each proposed rule; (2) an introduction that describes the proposed revisions and, where relevant, notes Commission minority positions; (3) a clean version of the Commission's proposed rule; (4) a public comment synopsis chart that summarizes the public comments received and includes a brief description of the Commission's response to the points raised by the commenters; and (5) a book excerpt that presents selected state variations of the relevant Model Rule.

DISCUSSION

There are forty-five rules in the current California Rules. There are sixty ABA Model Rules (including the Model Rule Preamble and Scope as a rule). To facilitate public comment on the great breadth of the Commission's work, the proposed rules have been issued for public comment in groups or batches. Addressed in this agenda item are forty proposed rules developed by the Commission.

Batch 1: 27 Rules. In 2006, the Commission completed its initial work on twenty-seven proposed new and amended rules and these rules were the Commission's first public comment group. This first batch was distributed for a 120-day public comment period, which ended on October 16, 2006 and addressed topics such as: lawyer advertising; competent representation; communication with clients; and lawyers acting as third-party neutrals.

Batch 2: 5 Rules. In 2007, the Commission distributed its second group of proposed rules. This second batch presented five rules issued for a 90-day public comment period, which ended on October 26, 2007 and addressed topics such as: prohibited discrimination in law practice operation; client gifts to lawyers; payment of a client's personal expenses by a lawyer; and purchase of property by a lawyer at a foreclosure sale.

Batch 3: 13 Rules. In 2008, the Commission distributed its third group of proposed rules. This third batch presented thirteen rules issued for a 90-day public comment period, which ended on June 6, 2008 and addressed topics such as: communication with a party represented by counsel; sale of a law practice; business transactions with clients; and fees for legal services.^{3/}

The Commission has reviewed the written public comments and the public hearing testimony on each of these groups of proposed rules.^{4/} Many of the rules have been revised in response to the public

^{3/} The Commission's fourth batch of rules is presently out for public comment with a deadline of the October 23, 2009. The Commission's fifth batch of rules also is presently out for public comment with a deadline of November 13, 2009. The anticipated sixth and last discrete batch is scheduled to be issued for public comment in January 2009.

^{4/} After consideration of the public comments received on the rules distributed in the first three batches, the Commission determined to postpone further action on the following rules: Rule 1.0.1 (definition of "law firm") [this proposal is being combined with the Commission's consideration of a global terminology rule]; Rule 1.2.1 (assisting the violation of law) [this proposal

comments received. While the consensus was achieved on many of the substantive issues and policy concerns posed by the proposed rules, within the Commission there were minority positions expressed and these minority views are noted in the materials presented for the rules. In particular, if there is a minority position on proposed rule, that fact will be identified on the dashboard cover sheet and described in the rule introduction.

Attachment One to this memorandum provides the dashboard cover sheet, introduction, Model Rule comparison table, clean version, public comment synopsis table, and state variations excerpt for each of the following proposed rules.^{5/}

Batch 1 Proposed Rules:

- 1.0 Purpose of the Rules [1-100]
- 1.1 Competence [3-110]
- 1.4 Communication [3-500, 3-510]
- 1.5.1 Financial Arrangements Among Lawyers [2-200]
- 1.8.8 Limiting Liability to Client [3-400]
- 1.8.10 Sexual Relations With Client [3-120]
- 2.4 Lawyer as Third-Party Neutral
- 2.4.1 Lawyer as Temporary Judge [1-710]
- 3.1 Meritorious Claims [3-200]
- 3.2 Expediting Litigation^{6/}
- 5.1 Responsibilities of Partners
- 5.2 Responsibilities of a Subordinate Lawyer
- 5.3 Responsibilities Regarding Nonlawyer Assistants
- 5.3.1 Employment of Disbarred Member [1-311]
- 5.5 Unauthorized Practice of Law; MJP [1-300]
- 5.6 Restrictions on Right to Practice [1-500]
- 7.1 Communications Concerning Availability of Services [1-400]
- 7.2 Advertising [1-400]

is being combined with other related sections of proposed Rule 1.2, a Batch 5 rule, for which there are no California counterparts]; Rule 2.4.2 (lawyer as candidate for judicial office) [this rule is being combined with the consideration of Model Rule 8.2(a), a Batch 6 rule, for which there is no California Rule counterpart]; Rule 1.17.1 (sale of an entire law practice); and Rule 1.17.2 (sale of a part of a law practice) [these two sale of a law practice rules were distributed for public comment as separate rules but the Commission has now integrated the proposals into a single rule, Rule 1.17]. Rules 1.0.1, 2.4.2, and 1.17 will be presented to the Board as a part of the Commission's sixth batch of proposed rules. As noted, Rule 1.2.1 will be presented to the Board as a part of proposed Rule 1.2, which is part of the Commission's fifth batch of proposed rules.

^{5/} Where applicable, the number of a current California Rule counterpart appears in brackets at the end of the rule title. (If you are viewing this memorandum online, the California Rules are found at: http://www.calbar.ca.gov/calbar/pdfs/rules/Rules_Professional-Conduct.pdf and the ABA Model Rules are found at: http://www.abanet.org/cpr/mrpc/mrpc_toc.html .)

^{6/} For the reasons stated in the rule materials, proposed Rule 3.2 is the Commission's recommendation that a California version of Model Rule 3.2 not be adopted. Consistent with past practice, it is anticipated that the Commission's final report will include a comprehensive summary of all Model Rule concepts considered but not recommended for adoption.

- 7.3 Direct Contact with Prospective Clients [1-400]
- 7.4 Fields of Practice and Specialization [1-400]
- 7.5 Firm Names and Letterheads [1-400]
- 8.1 Application for Admission to Practice [1-200]
- 8.1.1 Compliance with Conditions of Discipline [1-110]
- 8.3 Reporting Misconduct [1-500(B)]
- 8.4 Misconduct [1-120]

Batch 2 Proposed Rules:

- 1.8.3 Gifts from Client [4-400]
- 1.8.5 Payment of Expenses for a Client [4-210]
- 1.8.11 Relationship with Other Party's Lawyer [3-320]^{7/}
- 1.8.12 Purchasing Property at a Foreclosure Sale [4-300]
- 8.4.1 Prohibited Discrimination in Law Practice [2-400]

Batch 3 Proposed Rules:

- 1.5 Fees for Legal Services [4-200]
- 1.7 Conflicts of Interests: Current Clients [3-310]
- 1.8.1 Business Transactions and Adverse Interests [3-300]
- 1.13 Organization as Client [3-600]
- 1.16 Terminating Representation [3-700]
- 3.4 Fairness to Opposing Party/Counsel [5-200(E)][5-220][5-310]
- 3.5 Impartiality of the Tribunal [5-300, 5-320]
- 3.10 Threatening Charges [5-100]
- 4.2 Communication with a Represented Person [2-100]
- 4.3 Dealing with Unrepresented Person
- 5.4 Professional Independence [1-310][1-320][1-600]

Attachment Two to this memorandum provides the full text of the written public comments received on each of the three batches. Each collection of comment letters includes graphic data tables that provide a quick overview of the comments received.

Attachment Three to this memorandum provides a copy of the transcripts of the public hearings conducted on each of the three batches.

Attachment Four to this memorandum provides the clean version text of the proposed rules as distributed for public comment.

In recognition of the voluminous materials provided and the need to facilitate the Board's consideration of major policy issues, the Commission included information on each rule's dashboard coversheet that indicates the level of controversy that the Commission attributes to its proposal. The categories are: "not controversial" (19 rules are in this category); "moderately controversial" (14 rules are in this category); and "very controversial" (7 rules are in this category).

^{7/} The substance of proposed Rule 1.8.11 is no longer being recommended as a standalone rule. Instead, to track the Model Rule structure, which addresses the conflicts in proposed Rule 1.8.11 in Model Rule 1.7, the Commission is recommending that the substance of proposed Rule 1.8.11 be included as subparagraphs of proposed Rule 1.7. See proposed Rule 1.7(d)(5)-(7).

Listed below, in no particular order, are the seven proposed rules that the Commission has designated as “very controversial.” Each rule is accompanied by a brief staff description of at least one aspect of potential controversy. Board members are strongly encouraged to review the entire materials provided for each of these controversial rules.

Rule 1.8.10 Sexual Relations with Client [3-120]

Issue: 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: (i) required as a condition of a representation; (ii) obtained by coercion, intimidation or undue influence; or (iii) cause the lawyer to perform legal services incompetently; or adopt the ABA Model Rule standard that prohibits all sexual relations unless such relations are between spouses or are ongoing relations that predate the initiation of a lawyer-client relationship.

Commission's current position: Adopt the ABA Model Rule standard. (See materials for a minority view.)

Rule 2.4 Lawyer as Third-Party Neutral

Issue: Whether to add a new rule, similar to the ABA Model Rule standard, that (1) describes a lawyer's role when serving as a third-party neutral and (2) requires a lawyer, who knows or reasonably should know that a party does not understand that role, to explain the differences between service as a third-party neutral and service as an advocate and representative of a client.

Commission's current position: Adopt a new rule similar to the ABA Model Rule. (See materials for a minority view concerning expansion of the proposed rule to facilitate State Bar discipline of a lawyer who serves as a third party neutral pursuant to the agreement of the parties, by expressly subjecting such lawyers to the arbitration and mediation standards promulgated by the Judicial Council.)

Rule 8.3 Reporting Misconduct

Issue: Whether to add a new rule, similar to the ABA Model Rule standard, requiring under penalty of discipline that a lawyer must report to the State Bar information concerning misconduct by committed another lawyer.

Commission's current position: Adopt a new rule that generally provides for permissive reporting but also includes a very limited mandatory reporting obligation for egregious criminal conduct. (See materials for a minority view.)

Rule 1.5 Fees for Legal Services [4-200]

Issue: Whether to retain California's standard that prohibits an “unconscionable fee” or change the rule to follow the ABA Model Rule standard that prohibits an “unreasonable fee.”

Commission's current position: Retain the current California standard. (See materials for a minority view.)

Rule 1.7 Conflicts of Interests: Current Clients [3-310]

Issue: Whether to add rule comments, similar to the comments found in the counterpart ABA Model Rule, stating that a law firm may seek advance client consent to unspecified conflicts that might arise at some point in the future and, in addition, note that the validity of such advance consent is necessarily a fact specific inquiry based on various identified factors. The current California rules do not expressly address blanket waivers of future conflicts.

Commission's current position: Follow the ABA Model Rule approach of including guidance on advance consents to future conflicts. (See Comment [31] of the Commission's proposed Rule 1.7.) (See materials for minority views on other aspects of the rule.)

Rule 1.8.1 Business Transactions and Adverse Interests [3-300]

Issue: Whether to retain the status quo of the existing California rule which is silent on the issue of whether a fee agreement modification is an adverse interest/business transaction, or seek to clarify that issue by expressly stating that a fee agreement modification does not trigger the rule unless the modification confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Like the current California rule, the ABA Model Rule counterpart is silent on this issue.

Commission's current position: Revise the rule to clarify the issue. (See materials for a minority view.)

Rule 4.2 Communication with a Represented Person [2-100]

Issue: Whether to retain California's existing prohibition on ex parte communications that has been interpreted in a recent disciplinary decision to apply only to a represented "party" or adopt the ABA Model Rule approach that more explicitly extends the rule to all represented "persons." Both the current California rule and ABA Model Rule counterpart include an important exception for "communications authorized by law" which has been interpreted to govern law enforcement investigatory conduct that might otherwise be subject to the prohibition.

Commission's current position: Follow the ABA Model Rule approach and use the term "person."

The fourteen proposed rules identified by the Commission as "moderately controversial" are:

- 1.0 Purpose of the Rules [1-100]
- 1.1 Competence [3-110]
- 1.5.1 Financial Arrangements Among Lawyers [2-200];
- 3.2 Expediting Litigation [N/A]
- 5.1 Responsibilities of Partners
- 5.2 Responsibilities of a Subordinate Lawyer
- 5.3.1 Employment of Disbarred Member [1-311]
- 7.3 Direct Contact with Prospective Clients [1-400]
- 8.4 Misconduct [1-120]

- 1.8.3 Gifts from Client [4-400]
- 1.8.12 Purchasing Property at a Foreclosure Sale [4-300]
- 8.4.1 Prohibited Discrimination in Law Practice [2-400]
- 1.13 Organization as Client [3-600]
- 4.3 Dealing with Unrepresented Person

The nineteen proposed rules identified by the Commission as “not controversial” are:

- 1.4 Communication [3-500, 3-510]
- 1.8.8 Limiting Liability to Client [3-400]
- 2.4.1 Lawyer as Temporary Judge [1-710]
- 3.1 Meritorious Claims [3-200]
- 5.3 Responsibilities Regarding Nonlawyer Assistants
- 5.5 Unauthorized Practice of Law; MJP [1-300]
- 5.6 Restrictions on Right to Practice [1-500]
- 7.1 Communications Concerning Availability of Services [1-400]
- 7.2 Advertising [1-400]
- 7.4 Fields of Practice and Specialization [1-400]
- 7.5 Firm Names and Letterheads [1-400]
- 8.1 Application for Admission to Practice [1-200]
- 8.1.1 Compliance with Conditions of Discipline [1-110]
- 1.8.5 Payment of Expenses for a Client [4-210]
- 1.16 Terminating Representation [3-700]
- 3.4 Fairness to Opposing Party/Counsel [5-200(E)][5-220][5-310]
- 3.5 Impartiality of the Tribunal [5-300, 5-320]
- 3.10 Threatening Charges [5-100]
- 5.4 Professional Independence [1-310][1-320][1-600]

It must be emphasized that all of the proposed rules warrant due consideration and that the above lists are not intended to minimize the importance of considering any and all of the substantive changes to the rules. Representatives of the Commission and staff will be present at the Board meetings to address questions about any of the proposed rules.

EFFECTIVE DATE OF PROPOSAL

Amendments to the Rules of Professional Conduct become operative only after they have been adopted by the Board and approved by the Supreme Court. The instant proposal accounts for only a portion of the Commission’s ongoing comprehensive study. It is anticipated that the Commission’s final comprehensive report and recommendation will be presented to the Board for adoption in 2010, and, if adopted, thereafter to the Supreme Court for approval.

In submitting the rule amendments to the Supreme Court, it is further anticipated the State Bar would request that the Supreme Court set an operative date for the amended rules that would afford a six month lead time to allow the State Bar to publicize the new rules.

FISCAL AND PERSONNEL IMPACT

The fiscal and personnel impact that will result from authorizing the requested public comment distribution and public hearing is anticipated to be absorbed by the presently budgeted funds and the staff of the Office of Professional Competence.

IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Adoption of the Commission's proposed rules will not have an impact on the Board Book.

RULE AMENDMENTS

The action requested in this agenda item would result in amendments to the Rules of Professional Conduct of the State Bar of California, provided that the adopted rules are thereafter approved by the Supreme Court.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Board Committee on Regulation and Admissions agree with the recommendation that the proposed new and amended Rules of Professional Conduct be adopted by the Board (subject to consideration of possible revisions following a comprehensive public comment distribution of the entire proposed rules), and transmitted for approval to the Supreme Court, approval of the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of comments received, that the Board Committee on Regulation and Admissions, recommends that the Board of Governors of the State Bar of California adopt, the proposed new and amended Rules of Professional Conduct of the State Bar of California, in the form attached to these minutes and made a part hereof, and hereby directs that said rules be transmitted by staff to the Supreme Court with a request that it be approved by the Court; and it is

FURTHER RESOLVED, that the Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment distribution of the entire body of proposed rules.

PROPOSED BOARD RESOLUTION

Should the Board of Governors concur with the recommendation of the Board Committee on Regulation and Admissions, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of comments received, that the Board of Governors of the State Bar of California hereby adopts the proposed new and amended Rules of Professional Conduct of

the State Bar of California, in the form attached to these minutes and made a part hereof, and hereby directs that said rules be transmitted by staff to the Supreme Court with a request that it be approved by the Court; and it is

FURTHER RESOLVED, that the Board's adoption of the proposed rules is subject to consideration of possible revisions following a comprehensive public comment distribution of the entire body of proposed rules.