

AGENDA ITEM

JANUARY 131
Rules of Professional Conduct,
Return from Public Comment

DATE: December 17, 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, Batch 4 – Return From Public Comment, and Rules Previously Submitted but Returned to the Commission for Further Consideration

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 Special Commission for the Revision of the Rules of Professional Conduct. The proposed rules presented cover the Commission's fourth public comment group of draft rules. The proposed rules were posted for a 90-day public comment period and the comments received have been reviewed by the Commission. This item also includes three proposed rules submitted for action at the Board's November 2009 meetings that were either tabled or returned to the Commission for further consideration.

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/}

^{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."

This agenda item requests the Board to adopt the fourth group of proposed new and amended Rules of Professional Conduct developed by the Board's Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"). The Commission has reviewed the public comment received and has modified several 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 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

At its meeting on July 16, 2009, the Board's Committee on Regulation, Admissions and Discipline authorized a 90-day public comment distribution of the Commission's fourth group of proposed rules. This public comment period ended on October 23, 2009. In addition, a public hearing on the proposed rules was held on September 12, 2009 at the 2009 State Bar Annual Meeting in San Diego.^{1/}

The Commission has reviewed the written public comments received on the eight rules included in the Commission's fourth batch of proposals and many of the rules have been revised in response to the public comments received. While 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 a proposed rule, that fact will be identified on the dashboard cover sheet and described in the rule introduction.

Included with these eight proposed rules are four additional proposed rules. At the Board's November 2009 meeting, thirty-five of the Commission's Batches 1 through 3 rules were adopted and four were either tabled or returned to the Commission for further consideration. The four rules are: Rule 1.7 (Conflicts of Interests: Current Clients); Rule 1.8.1 (Business Transactions and Adverse Interests); Rule 1.8.10 (Sexual Relations With Client); and Rule 8.3 (Reporting Misconduct). The Commission has reconsidered each of these four rules in light of the Board's discussion. With the exception of Rule 1.7, the Commission now recommends adoption of these rules as modified.^{2/} In addition, one of the thirty-five rules adopted at the Board's November meeting, Rule 1.5 (Fees for Legal Services), has been revised in conformance to changes to one of the four rules, Rule 1.8.1 (Business Transactions and Adverse Interests). It was anticipated at the November 2009 meeting that further changes to adopted rules might be required in light of the adoption of other rules. This is one such instance.

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.^{3/}

^{1/} No speakers appeared at the public hearing.

^{2/} Rule 1.7 was discussed at the Commission's December 11 & 12, 2009 meeting. At that meeting, stakeholders appeared and addressed concerns expressed by Board members concerning (i) the general complexity of the rule and (ii) the specific issue of advance consents to future conflicts. Governor Streeter attended that meeting and provided helpful insights during the discussion. Following discussion, the Commission determined that further redrafting was needed to prepare the rule for re-submission to the Board. The Commission has placed Rule 1.7 on its January 22 & 23, 2010 agenda and it is anticipated that a revised Rule 1.7 will be presented for adoption at the Board's March 4 & 5, 2010 meeting.

^{3/} 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 .) In addition, the four rules previously submitted for the Board's November 2009 meeting are denoted by an asterisk.

Rule 1.5*	Fees For Legal Services [4-200]
Rule 1.8.1*	Business Transactions and Adverse Interests [3-300]
Rule 1.8.6	Third Party Payors [3-310(F)]
Rule 1.8.7	Aggregate Settlements [3-310(D)]
Rule 1.8.10*	Sexual Relations With Client [3-120]
Rule 1.15	Safekeeping Property: Handling Funds and Property of Clients and Other Persons [4-100]
Rule 3.3	Candor Toward the Tribunal [5-100]
Rule 3.6	Trial Publicity [5-120]
Rule 3.7	Lawyer as Witness [5-210]
Rule 6.3	Membership in Legal Services Organization
Rule 6.4	Law Reform Activities Affecting Client Interests
Rule 8.3*	Reporting Misconduct [1-500(B)]

For convenient reference, the table provided below summarizes and totals some of the information found on the rule “dashboard” coversheets.

PROPOSED RULE	Controversy Level	ABA Comparison (Rule)	Minority Position
Rule 1.5 Fees For Legal Services	(This revised draft rule is supported only by a minority of the Commission.)		
Rule 1.8.1 Business Transactions and Adverse Interests	Very	Substantially Adopted	Yes
Rule 1.8.6 Third Party Payors	Not Controversial	Substantially Adopted	No
Rule 1.8.7 Aggregate Settlements	Moderately	Substantially Adopted	Yes
Rule 1.8.10 Sexual Relations With Client	Very	Substantially Adopted	Yes
Rule 1.15 Safekeeping Property: Handling Funds and Property	Very	Substantially Rejected	Yes
Rule 3.3 Candor Toward the Tribunal	Moderately	Substantially Adopted	Yes
Rule 3.6 Trial Publicity	Moderately	Substantially Adopted	No
Rule 3.7 Lawyer as Witness	Moderately	Substantially Rejected	Yes
Rule 6.3 Membership in Legal Services Organization	Not Controversial	Substantially Adopted	Yes
Rule 6.4 Law Reform Activities Affecting Client Interests	Moderately	Material Deletions	Yes
Rule 8.3 Reporting Misconduct	Very	Substantially Rejected	Yes
TOTALS (11 rules are recommended for adoption) (1 rule is supported only by a minority of the Commission)	Very = 4 Moderately = 5 Not = 2	Subs. Adopted = 7 Subs. Rejected = 3 Material Changes = 1	Yes = 9 No = 2

Attachment Two to this memorandum provides the full text of the written public comments received and a graphic data table that provides a quick overview of the comments received.

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

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” (there are two rules in this category);

“moderately controversial” (there are five rules in this category); and “very controversial” (there are four rules in this category – please note that three of these four rules are rules that were previously submitted to the Board for action at its November 2009 meeting).

VERY CONTROVERSIAL RULES;

Listed below, in no particular order, are the four 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.

Rule 1.8.10 Sexual Relations with Client [3-120]

Issue: At the Board Committee’s November 2009 meeting, concerns were expressed about the limited scope of the definition of “sexual relations” and the Commission was asked to consider broadening the definition in order to afford enhanced public protection. Specifically, the Commission was asked to consider revising the definition to prevent a respondent lawyer from defending against an alleged violation of the rule by a technical argument that the lawyer himself or herself did not “touch” an intimate part of the client but instead was a passive recipient of a client’s sexual favors. Comments at the November meeting indicated interest in a definition that would be broad enough to cover two potential situations: (1) where a lawyer is a passive recipient of physical contact initiated by the lawyer’s client; and (2) where a lawyer accomplishes exploitative sexual intimacy with a client without any physical contact through, for example, telephone or computer contacts. Other comments made during the meeting raised the possibility of having no definition in the Rule, as is the approach of the Model Rule.

Commission’s current position: Revise the rule and add language to Comment [1] clarifying that the definition of sexual relations is not limited to situations where a lawyer touches an intimate part of the client, and that the rule applies anytime a lawyer engages in sexual conduct with a client. In particular, the rule text has been changed to delete the term “have” and substitute the phrase “engage in” so that, when considered in conjunction with new language in Comment [1], the Rule can be construed to apply to sexual relations in which the lawyer is a passive but willing recipient of a client’s sexual favors, and that are an exploitation of the client by the lawyer in the course of the lawyer-client relationship. The new language in Comment [1] states: “The paragraph (a) prohibition applies equally whether the lawyer is the moving force in causing the sexual relations to take place or the client encourages or begins the sexual relations.”

The Commission considered, but is not recommending, an expansion of the definition of sexual relations to expressly encompass virtual sexual contact. After consideration of possible language, the Commission determined that the broadening of the definition would impair the bright-line standard set by the rule and raise questions about enforceability. In addition, the Commission believes that virtual contact that is exploitive and constitutes abuse of the client would be a form of lawyer conduct that would subject the lawyer to discipline under other standards, such as Rule 8.4 (Misconduct) and the statutory prohibition against acts and crimes that involve moral turpitude.

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

Issue: At the Board Committee’s November 2009 meeting, there were concerns expressed about the proposed rule’s limited application to a lawyer’s modification of a fee agreement

with an existing client. In part, the Board referenced prior Board Committee action *not* to adopt a proposed COPRAC ethics opinion that had analyzed fee agreement modifications in a manner similar to the Commission, and had reached the same conclusion as to the applicability of the current rule (carried forward in the proposed rule) to such modifications. Also, a representative of the Office of Trial Counsel explained a Bar prosecutorial view that all instances of fee modifications should be treated as circumstances involving potential overreaching given the existence of a fiduciary relationship and the trust placed by a client in their lawyer. The Office of Trial Counsel also observed that critical public protection is afforded when the client is advised by the lawyer that the client should seek the counsel of an independent lawyer and is given a reasonable opportunity to do so.

Commission's current position: The Commission was closely divided on this issue and a majority of the Commission still does not recommend imposing a requirement that a lawyer advise a client to seek independent counsel whenever there is a material modification of an existing fee agreement. While the Commission does not favor this policy direction, the Commission has developed a proposal that implements this approach. However, instead of placing the new requirement in Rule 1.8.1, the business transactions rule, the Commission has placed the requirement in Rule 1.5, the rule generally governing "Fees for Legal Services." Placing the requirement in that rule is logical as a lawyer seeking guidance on fee agreement modifications would likely first refer to that Rule. As developed by the Commission and supported by a Commission minority, new paragraph (f) in proposed Rule 1.5 states:

"(f) A lawyer shall not make a material modification to an agreement by which the lawyer is retained by the client that is adverse to the client's interests unless the client is either represented with respect to the modification by an independent lawyer or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice."

New comments to Rule 1.5 would further clarify the issue of what constitutes a "material" modification. New Comments [3] and [3A] state:

"[3] Paragraph (f) imposes a specific requirement with respect to modifications of agreements by which a lawyer is retained by a client, when the amendment is material and is adverse to the client's interests. A material modification is one that substantially changes a significant term of the agreement, such as the lawyer's billing rate or manner in which fees or costs are determined or charged. A material modification is adverse to a client's interests when the modification benefits the lawyer in a manner that is contrary to the client's interest. Increases of a fee, cost, or expense pursuant to a provision in a pre-existing agreement that permits such increases are not modifications of the agreement for purposes of paragraph (f). However, such increases may be subject to other paragraphs of this Rule, or other Rules or statutes.

[3A] Whether a particular modification is material and adverse to the interest of the client depends on the circumstances. For example a modification that increases a lawyer's hourly billing rate or the amount of a lawyer's contingency fee ordinarily is material and adverse to a client's interest under paragraph (f). On the other hand, a modification that reduces a lawyer's fee ordinarily is not material and adverse to a client's interest under paragraph (f). A modification that extends the time within which a client is obligated to pay a fee ordinarily is not material and adverse to a

client's interests, particularly when the modification is made in response to a client's adverse financial circumstances."

The Commission developed the above approach with input from Board members and from a representative of the Office of Trial Counsel. If the Board desires to pursue a policy of regulating fee agreement modifications, notwithstanding the Commission's reservations about that policy, then modifying the fee rule, Rule 1.5, to include a new requirement would be a method of implementing that policy. A detailed discussion of both the majority and minority views are set forth in the introduction and rule comparison chart for proposed Rule 1.8.1. Clean and redline drafts of revised Rule 1.5 are also provided to show the new requirement in the context of the entire fee rule.

Rule 8.3 Reporting Misconduct

Issue: At the Board's November 2009 meetings, this rule was not called for discussion due to insufficient time. However, at sidebar an individual Board member requested that the Commission consider including, as part of the limited mandatory reporting component in the rule, an obligation to report to law enforcement as well as to the State Bar. It was observed that the Commission's limited proposed mandatory reporting extended solely to certain felonious criminal acts committed by lawyers and that law enforcement might be the best agency for both stopping those criminal acts and preventing the harm that results from them.

Commission's current position: After consideration of possible language to implement in Rule 8.3 the suggested requirement for a mandatory report to law enforcement, the Commission concluded that the revision is not necessary to accomplish its purpose. A representative of the Office of Trial Counsel explained to the Commission that existing statutory law provides that the State Bar may refer complaints concerning lawyer misconduct to law enforcement whenever the alleged lawyer misconduct might subject the lawyer to "criminal prosecution for any felony, or any lesser crime committed during the course of the practice of law, or in any manner that the client of member was a victim." (Business and Professions Code §6044.5.) Given this existing law, the Commission concluded that the requirement in Rule 8.3 for mandatory reports to the State Bar concerning felonious criminal acts afforded sound public protection in serving as a complement to the existing law governing the Bar's cooperative liaison role with law enforcement.

Rule 1.15 Safekeeping Property: Handling Funds and Property of Clients and Other Persons

Issue: Whether to retain California's existing standard on the handling of advance fee payments that permits, but does not require, a lawyer to hold such fees in a client trust account until earned; or adopt the ABA Model Rule standard that requires placement of advanced fees in a client trust account until earned.

Commission's current position: Retain the existing California standard.

MODERATELY CONTROVERSIAL RULES:

Listed below, in no particular order, are the five proposed rules that the Commission has designated as "moderately controversial." Each rule is accompanied by a brief staff description of at least one aspect of potential controversy.

Rule 3.3 Candor Toward the Tribunal [5-200]

Issue: (1) Whether to retain California's existing limited rule on candor to a tribunal; or adopt the ABA Model Rule standard that is broader than California's rule. For example, the Model Rule would subject a lawyer to discipline for a failure to disclose to a tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not yet disclosed by opposing counsel. (2) Whether to adopt (i) the Model Rule approach that provides the Rule's obligations "continue to the conclusion of the proceeding," which imposes obligations on a lawyer even if the lawyer's representation of the client is terminated; or (ii) the approach taken in the Commission's proposed rule which provides that the obligations imposed on a lawyer "continue to the conclusion of the proceeding or the conclusion of the representation, whichever occurs first."

Commission's current position: As to issue (1), adopt the ABA Model Rule standard. As to issue (2), adopt the proposed Rule approach (See introduction and rule comparison chart in the materials for minority views on each issue.)

Rule 3.6 Trial Publicity [5-120]

Issue: Whether to retain California's existing rule on trial publicity that is substantially similar to the ABA Model Rule counterpart; or delete the rule and leave it to the courts to control trial publicity through "gag orders" and other similar mechanisms.

Commission's current position: Retain California's existing rule that is substantially similar to the ABA Model Rule counterpart.

Rule 3.7 Lawyer as Witness [5-210]

Issues: (1) Whether to retain California's existing standard that is applicable only when a lawyer acts as both an advocate and witness in litigation before a jury; or expand the rule to adopt the ABA Model Rule standard that applies to both bench and jury proceedings. (2) Whether to retain California's existing standard that permits a lawyer to act as both an advocate and witness in litigation with the client's informed written consent, or adopt the ABA Model Rule standard that would permit the dual role only if the court determines the lawyer's disqualification would work a substantial hardship on the client.

Commission's current position: (1) Retain the approach of the current California Rule that applies only in jury trials. (2) Retain California's existing standard permitting a lawyer to act as witness in litigation with the client's informed written consent. (See materials for minority views on each issue.)

Rule 6.4 Law Reform Activities Affecting Client Interests

Issue: Whether to adopt a new rule, similar to the ABA Model Rule standard, that: (1) expressly permits a lawyer to serve as a director, officer or member of an organization involved in law reform; and (2) requires such lawyers to make a disclosure when the lawyer knows that the interests of a client may be affected by the decisions of the organization.

Commission's current position: Adopt only that portion of the Model Rule which expressly permits a lawyer to serve as a director, officer or member of an organization involved in law reform. The Commission is not recommending adoption of the second sentence of the Model Rule that would subject a lawyer to discipline for failing to make a mandatory disclosure. (See materials for a minority view.)

Rule 1.8.7 Aggregate Settlements

Issue: Whether to retain California's existing standard that requires a lawyer to obtain the informed written consent from clients who agree to an aggregate settlement; or change California's existing standard to follow the comparable Model Rule that only imposes a requirement for "informed consent, in a writing signed by the client." The primary difference is that the California approach, by definition, mandates a written disclosure as a prerequisite to obtaining a client's informed written consent, while the Model Rule approach does not require a written disclosure.

Commission's current position: Retain the approach of the current California Rule that requires informed written consent. (See materials for a minority view.)

NOT CONTROVERSIAL RULES:

The two rules that the Commission has designated as "not controversial" are: Rule 1.8.6, Third Party Payments [3-310(F)]; and Rule 6.3 Membership in Legal Services Organization.

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 Board action to adopt the proposed new and amended rules 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.