

AGENDA ITEM

MARCH 132

Rules of Professional Conduct,
Final Report, Request for Public Comment

DATE: February 9, 2009

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

FROM: Randall Difuntorum, Director, Professional Competence

RE: Commission for the Revision of the Rules of Professional Conduct: Proposed Amendments to the Rules of Professional Conduct – Final Report, Request for Release for Public Comment

EXECUTIVE SUMMARY

This agenda item requests Board of Governor (“the Board”) authorization to publish all of the Rules Revision Commission’s (“the Commission”) proposed amendments to the Rules of Professional Conduct for a 90-day public comment period. A total of seventy proposed rules are anticipated to be included in this request. This agenda item also requests Board authorization to conduct a public hearing on all of the proposed rules.

Representatives of the Commission will attend the Board’s meetings on this matter. 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."

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 and Admissions ("RAC") oversees the Commission's requests for public comment authorization. This agenda item requests authorization (1) to publish proposed amendments to the Rules of Professional Conduct for a 90-day public comment period and (2) to gather additional input by conducting a public hearing.

Thus far, the Board has conditionally adopted the proposed rules submitted by the Commission as Batches 1, 2, 3 and 4. Adoption of the Batch 5 rules will be considered at the Board's March meeting as Board Agenda Item MARCH 131. Action on Agenda Item MARCH 131 will occur prior to action on this agenda item and will resolve the issue of Board adoption of the Batch 5 rules.

If the Board adopts all of the Batch 5 rules, then Batches 1 through 5 will include fifty-eight of the Commission's proposed rules. Adoption of the anticipated last batch of proposed rules, Batch 6, is scheduled for the Board's May meeting, following the Batch 6 public comment deadline of March 12, 2010. Batch 6 includes twelve rules and, if adopted by the Board, would bring the total number of proposed rules to seventy.

The Board's action in adopting the proposed rules in batches has been conditioned on the consideration of possible revisions following a comprehensive public comment distribution of all of the proposed new rules as a final report and recommendation. This comprehensive public comment distribution will allow public commenters to study the proposed rules as an integrated whole and is consistent with the State Bar's practice of re-distributing proposals that have been materially revised after an initial public comment distribution. After the rules return from the comprehensive public comment distribution, the Board will be positioned to unconditionally adopt them and direct that they be submitted to the California Supreme Court with a recommendation that the Court approve the rules.

This agenda item requests authorization to conduct the comprehensive public comment distribution using a 90-day period that begins with the fifty-eight rules in Batches 1 through 5, and is later supplemented with the twelve rules in Batch 6. At the time of the Board's action on this agenda item, it is anticipated that the proposed rules in Batches 1 through 5 will have been adopted by the Board. This means that the Batch 6 rules initially will not be included, but will be added promptly after the Board takes action on the Batch 6 rules at the Board's May meeting. At that time, there will be at least 30-days remaining of the 90-day public comment period on the final report and recommendation.

Because the Batch 6 rules will be added during the course of the 90-day comment period, staff's public comment notice will encourage commenters to begin studying the proposal by first focusing on the anticipated fifty-eight proposed rules which will already have been conditionally adopted by the Board, and to reserve the final 30-days of the comment period to study the anticipated twelve Batch 6 rules that are scheduled for Board action in May. This approach is being used to maximize the time period for commenters, such as local bar associations, to consider all of the proposed rules, while keeping the State Bar on track for completing the rules revision project in the current Board year.

BACKGROUND & DISCUSSION

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 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 to completely revise the ABA Model Rules of Professional Conduct.

Batch 1. 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 had 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. Following Commission revision in response to the public input, these rules were considered by the Board and with a few exceptions conditionally adopted at the Board's November 14, 2009 meeting.

Batch 2. 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 lawyer purchase of property at a foreclosure sale. Following Commission revision in response to the public input, these rules were considered by the Board and with a few exceptions conditionally adopted at the Board's November 14, 2009 meeting.

Batch 3. 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; conflicts of interest: current clients; sale of a law practice; business transactions with clients; and fees for legal services. Following Commission revision in response to the public input, these rules were considered by the Board and with a few exceptions conditionally adopted at the Board's November 14, 2009 meeting.

Batch 4. In July of 2009, the Commission distributed its fourth group of proposed rules. This fourth batch presented eight rules issued for a 90-day public comment period which ended on October 23, 2009 and addressed topics such as: third party payors of attorney fees; trial publicity; aggregate settlements; handling of client trust funds and property; and lawyers acting as witnesses. Following Commission revision in response to the public input, these rules were considered by the Board and with one exception conditionally adopted at the Board's January 9, 2010 meeting.

Batch 5. In September of 2009, the Commission distributed its fifth group of proposed rules. This fifth batch presented eleven rules issued for a 60-day public comment period which ended on November 13, 2009 and addressed topics such as: scope of representation, confidentiality of information, use of confidential information, imputation of personal conflicts, imputation of conflicts in general, duties to former clients, responsibilities of a prosecutor and choice of law. Consideration of the Commission's revisions in response to the public input is the subject of Board agenda item MARCH 131.

Batch 6. Last month, the Commission distributed its sixth group of proposed rules. This sixth batch presented twelve rules issued for a 60-day public comment period which will end on March 12, 2010 and addressed topics such as: duties to prospective clients; sale of a law practice; advocacy in a non-adjudicative proceeding; and respect for rights of third persons. A public hearing on the Batch 6 rules is scheduled for March 11 at the State Bar office in Los Angeles. Consideration of the Commission’s revisions in response to public input is scheduled for the Board’s May meeting.

While an initial public comment distribution either has been completed or soon will be completed in the case of the Batch 6 rules, a comprehensive public comment distribution of the entire proposed rules has not yet occurred and now is needed to: (1) facilitate public input on the rules as a whole; and (2) obtain comments on substantive revisions made by the Commission and Board after the various initial public comment distributions.

ATTACHMENT ONE – ALL OF THE PROPOSED RULES

Attachment One provides all seventy of the rules anticipated to be encompassed by the requested comprehensive public comment distribution. The rules are presented in a familiar two-column format used in the State Bar’s rule book know as “Publication No. 250.” The comprehensive rules document organizes the rules in numerical order and implements the eight chapter divisions used in the ABA Model Rules. This format is intended to promote evaluation of the proposal as a comprehensive set of new California Rules of Professional Conduct. In this document, the Batch 5 and Batch 6 rules are distinguished by italicized text and by a note in brackets after each rule title. Distinguishing the Batch 5 and 6 rules at this time is important because those rules are tentative in that the Board has not yet conditionally adopted those rules. The Board will consider the Commission’s recommendation on the Batch 5 rules in agenda item MARCH 131 and the Batch 6 rules are scheduled for consideration at the Board’s May meeting.

After the Board’s March meeting, the comprehensive rules document will be revised to include the actual Board adopted versions of the Batch 5 rules, leaving only the Batch 6 rules marked as tentative. Later, after the Board’s May meeting, the rules document will be revised a second time to include the actual Board adopted versions of the Batch 6 rules and, at that point, none of the rules will be marked as tentative.

For convenient reference, the table below indicates all seventy of the rules anticipated to be included in the requested comprehensive public comment distribution. The table also indicates: the “level of controversy” (from the proposed rule “dashboard”); the comparison of the rule to an ABA Model Rule counterpart (also, from the “dashboard”); and the rule’s batch number. Note that Batch 5 rules and Batch 6 rules also are marked by shaded rows. The dashboard entries for the Batch 5 and Batch 6 rules reflect the public comment rule drafts.

| PROPOSED RULE | Batch # | Controversy Level | ABA Comparison (Rule) |
|---|----------------|--------------------------|------------------------------|
| 1.0 Purpose and Scope of the Rules of Professional Conduct | 1 | Moderately | No Model Rule Counterpart |
| 1.0.1 Terminology | 6 | Not Controversial | Substantially Adopted |

| PROPOSED RULE | Batch # | Controversy Level | ABA Comparison (Rule) |
|---|----------------|--------------------------|------------------------------|
| 1.1 Competence | 1 | Moderately | Substantially Rejected |
| 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer | 5 | Moderately | Substantially Adopted |
| 1.4 Communication | 1 | Not Controversial | Substantially Adopted |
| 1.4.1 Disclosure of Professional Liability Insurance | 6 | Not Controversial | No Model Rule Counterpart |
| 1.5 Fees for Legal Services | 3 | Very | Substantially Rejected |
| 1.5.1 Financial Arrangements Among Lawyers | 1 | Moderately | Substantially Rejected |
| 1.6 Confidential Information of a Client | 5 | Very | Material Additions/Deletions |
| 1.7 Conflict of Interests: Current Clients | 3 | Very | Substantially Rejected |
| 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client | 3 | Very | Substantially Adopted |
| 1.8.2 Use of Current Client's Confidential Information | 5 | Moderately | Substantially Adopted |
| 1.8.3 Gifts from Client | 2 | Moderately | Material Additions/Deletions |
| 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client | 2 | Not Controversial | Material Additions/Deletions |
| 1.8.6 Payments Not From Client | 4 | Not Controversial | Substantially Adopted |
| 1.8.7 Aggregate Settlements | 4 | Moderately | Substantially Adopted |
| 1.8.8 Limiting Liability to Client | 1 | Not Controversial | Substantially Rejected |
| 1.8.9 Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review | 2 | Moderately | No Model Rule Counterpart |
| 1.8.10 Sexual Relations with Client | 1 | Very | Substantially Adopted |
| 1.8.11 Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9) | 5 | Not Controversial | Substantially Adopted |
| 1.9 Duties to Former Clients | 5 | Moderately | Material Additions/Deletions |
| 1.10 Imputation of Conflicts of Interest: General Rule | 5 | Moderately | Material Additions/Deletions |
| 1.11 Special Conflicts of Interest for Former And Current Government Officers And Employees | 6 | Moderately | Substantially Adopted |
| 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral | 5 | Moderately | Material Additions/Deletions |
| 1.13 Organization as Client | 3 | Moderately | Material Additions/Deletions |
| 1.14 Client with Diminished Capacity | 5 | Moderately | Material Additions/Deletions |
| 1.15 Handling Funds and Property of Clients and Other Persons | 4 | Very | Substantially Rejected |
| 1.16 Declining Or Terminating Representation | 3 | Not Controversial | Substantially Rejected |
| 1.17 Purchase and Sale of a Law Practice | 6 | Moderately | Material Additions/Deletions |
| 1.18 Duties to Prospective Clients | 6 | Moderately | Substantially Adopted |
| 2.1 Advisor | 5 | Moderately | Substantially Adopted |

| PROPOSED RULE | Batch # | Controversy Level | ABA Comparison (Rule) |
|--|----------------|--------------------------|------------------------------|
| 2.4 Lawyer as Third-Party Neutral | 1 | Very | Substantially Adopted |
| 2.4.1 Lawyer as Temporary Judge | 1 | Not Controversial | No Model Rule Counterpart |
| 3.1 Meritorious Claims | 1 | Not Controversial | Substantially Adopted |
| 3.3 Candor Toward the Tribunal | 4 | Moderately | Substantially Adopted |
| 3.4 Fairness to Opposing Party and Counsel | 3 | Not Controversial | Material Additions/Deletions |
| 3.5 Impartiality and Decorum of the Tribunal | 3 | Not Controversial | Substantially Rejected |
| 3.6 Trial Publicity | 4 | Moderately | Substantially Adopted |
| 3.7 Lawyer As A Witness | 4 | Moderately | Substantially Rejected |
| 3.8 Special Responsibilities of a Prosecutor | 5 | Moderately | Substantially Adopted |
| 3.9 Advocate In Non-adjudicative Proceedings | 6 | Not Controversial | Material Additions/Deletions |
| 3.10 Threatening Criminal, Administrative, or Disciplinary Charges | 3 | Not Controversial | No Model Rule Counterpart |
| 4.1 Truthfulness in Statements to Others | 6 | Moderately | Substantially Adopted |
| 4.2 Communication with a Represented Person | 3 | Very | Material Additions/Deletions |
| 4.3 Dealing with Unrepresented Person | 3 | Moderately | Substantially Adopted |
| 4.4 Respect for Rights of Third Persons | 6 | Moderately | Substantially Rejected |
| 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers | 1 | Moderately | Substantially Adopted |
| 5.2 Responsibilities of a Subordinate Lawyer | 1 | Moderately | Substantially Adopted |
| 5.3 Responsibilities Regarding Nonlawyer Assistants | 1 | Not Controversial | Substantially Adopted |
| 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member | 1 | Moderately | No Model Rule Counterpart |
| 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence | 3 | Not Controversial | Substantially Adopted |
| 5.5 Unauthorized Practice of Law; Multijurisdictional Practice | 1 | Not Controversial | Material Additions/Deletions |
| 5.6 Restrictions on Right to Practice | 1 | Not Controversial | Substantially Adopted |
| 6.1 Voluntary Pro Bono Publico Service | 6 | Moderately | Substantially Adopted |
| 6.2 Accepting Appointments | 6 | Not Controversial | Substantially Adopted |
| 6.3 Legal Services Organizations | 4 | Not Controversial | Substantially Adopted |
| 6.4 Law Reform Activities | 4 | Moderately | Material Additions/Deletions |
| 6.5 Limited Legal Services Programs | 6 | Not Controversial | Substantially Adopted |
| 7.1 Communications Concerning the Availability of Legal Services | 1 | Not Controversial | Material Additions/Deletions |
| 7.2 Advertising | 1 | Not Controversial | Substantially Adopted |

| PROPOSED RULE | Batch # | Controversy Level | ABA Comparison (Rule) |
|--|---------|--|---|
| 7.3 Direct Contact with Prospective Clients | 1 | Moderately | Substantially Adopted |
| 7.4 Communication of Fields of Practice and Specialization | 1 | Not Controversial | Substantially Adopted |
| 7.5 Firm Names and Letterheads | 1 | Not Controversial | Substantially Adopted |
| 8.1 False Statement Regarding Application for Admission to Practice | 1 | Not Controversial | Material Additions/Deletions |
| 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline | 1 | Not Controversial | No Model Rule Counterpart |
| 8.2 Judicial and Legal Officials; Lawyer as Candidate or Applicant for Judicial Office | 6 | Not Controversial | Substantially Adopted |
| 8.3 Reporting Professional Misconduct | 1 | Very | Substantially Rejected |
| 8.4 Misconduct | 1 | Moderately | Material Additions/Deletions |
| 8.4.1 Prohibited Discrimination in Law Practice Management and Operation | 2 | Moderately | No Model Rule Counterpart |
| 8.5 Disciplinary Authority; Choice of Law | 5 | Moderately | Material Additions/Deletions |
| TOTALS = 70 rules recommended for adoption | | Very = 9 Moderately = 33 Not = 28 | Subs. Adopted = 33 Subs. Rejected = 11 Material Changes = 18 No ABA Rule = 8 |

ATTACHMENT TWO – INDIVIDUAL RULE MATERIALS

For each rule in Batches 1 through 4 (the rules already conditionally adopted by the Board as of the date of this memorandum), Attachment Two provides the rule’s Introduction, Dashboard, Model Rule Comparison Explanation, Clean Version and State Variations excerpt. For the Batch 5 rules, Board agenda item MARCH 131 will include these documents prior to the Board’s March meeting. The Batch 6 rules will remain in the tentative initial public comment form until the Board’s May meeting. The documents for the public comment versions of the Batch 6 rules are posted at the Public Comment page of the State Bar website. The individual rule materials will be available to the public to enhance the ability of commenters to study the rule revisions, especially the proposed variations from the Model Rules.

ATTACHMENT THREE – PROPOSED PUBLIC COMMENT NOTICE

Attachment Three is the proposed request for public comment notice that will appear on the State Bar website. The notice explains the special procedure of starting the 90-day public comment period with the Batch 1 through 5 rules that have been conditionally adopted by the Board, and later adding the Batch 6 rules after the Board’s May meeting when there will be at least 30-days remaining of the 90-day comment period. The public comment notice also encourages commenters to begin studying the proposal by first focusing on the anticipated fifty-eight proposed rules in Batches 1 through 5, and to reserve the final

30-days of the comment period to study the anticipated twelve Batch 6 rules that are scheduled for Board action in May.

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. Under the current project plan, the Board will be positioned to take final action to adopt all of the proposed rules at its July 2010 meeting.

In addition, in submitting the rule amendments to the Supreme Court, it is 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

Authorization of public comment and a public hearing on the Commission's proposed rules will not have an impact on the Board Book.

RULE AMENDMENTS

No rule amendments are effectuated by the Board Committee's action to authorize public comment. Only after consideration of public comments received, and following anticipated adoption by the Board and approval by the Supreme Court, would this matter result in amendments to the Rules of Professional Conduct of the State Bar of California.

PROPOSED BOARD COMMITTEE RESOLUTION

Should the Regulation and Admissions Oversight Committee approve the request to release the Commission's proposed amended Rules of Professional Conduct, the following resolution would be appropriate:

RESOLVED, that the Board Committee on Regulation and Admissions Oversight recommends that the Board of Governors authorizes staff to make available for public comment for a period of 90-days, the proposed new or amended Rules of Professional

Conduct prepared by the Special Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that the Board Committee on Regulation and Admissions Oversight recommends that the Board of Governors authorizes staff to conduct a public hearing on the proposed new or amended Rules of Professional Conduct; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

PROPOSED BOARD RESOLUTION

Should the Board of Governors concur with the recommendation of the Board's Regulation and Admissions Oversight Committee, the following resolution would be appropriate:

RESOLVED, that the Board of Governors authorizes staff to make available for public comment for a period of 90-days, the proposed new or amended Rules of Professional Conduct prepared by the Special Commission for the Revision of the Rules of Professional Conduct, in the form attached; and it is

FURTHER RESOLVED, that the Board of Governors authorizes staff to conduct a public hearing on the proposed new or amended Rules of Professional Conduct; and it is

FURTHER RESOLVED, that this authorization for release for public comment and authorization to conduct a public hearing is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.