

## ATTACHMENT 3

Proposed Request for Public Comment Notice

## SUMMARY OF PUBLIC COMMENT PROPOSAL

**SUBJECT:** 90-day public comment on seventy proposed new or amended Rules of Professional Conduct of the State Bar of California developed by the State Bar's Special Commission for the Revision of the Rules of Professional Conduct ("the Commission"). Fifty-eight of the proposed rules are adopted by the Board of Governors subject to a condition and twelve are tentative drafts. The tentative drafts will be substituted with conditionally adopted rules at least thirty days prior to the public comment deadline. When the substitution is made, this public comment proposal will cover all seventy Rules of Professional Conduct conditionally adopted by the Board of Governors to replace the current California Rules of Professional Conduct.

**BACKGROUND:** The Rules of Professional Conduct of the State Bar of California are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, rule amendment proposals may be formulated by the State Bar for submission to the Supreme Court of California for approval. The State Bar has assigned the Commission to conduct a thorough study of the rules and to recommend comprehensive amendments.

The Commission has distributed six groups of draft rules for an initial public comment period. Each of these distributions has been accompanied by a public hearing held during the respective public comment period. To date, five groups of draft rules have been reconsidered in light of public input received. Many of the draft rules have been revised in response to public input. Beginning in 2008, the Board of Governors began its review of the proposed draft rules and has proceeded to adopt proposed final rules included in these five groups. The Board's adoption of these proposed draft rules has been conditioned on an understanding that further changes to the rules may be effectuated following a subsequent comprehensive public comment distribution and period during which the public would be afforded an opportunity to review all of the proposed draft rules as a single, integrated whole.

This 90-day public comment serves as the subsequent comprehensive distribution of the entire set of seventy rules. As of the posting date, 57 of the rules have been conditionally adopted and twelve are tentative drafts that are still under their initial public comment review. Following that review, these twelve tentative drafts will be replaced with rules conditionally adopted by the Board and the public afforded an opportunity to review the replacement drafts at least thirty days prior to the deadline for this 90-day public comment. It is anticipated that the Board of Governors will take action to adopt conditionally the tentative drafts of the twelve rules at the Board meetings on May 13-15, 2010.

After Commission consideration of the input received from this 90-day public comment, the Commission will forward to the Board of Governors a final, comprehensive set of Rules so that the Board may take final action to adopt the Rules as an integrated whole and direct the State Bar staff to transmit them to the Supreme Court of California with a recommendation that the Supreme Court approve the Rules. Rules of Professional Conduct become operative and binding upon all members of the bar only if approved by the Supreme Court.

The State Bar's rule revision project reflects an overarching recommendation that the Supreme Court accept the format, rule numbering system, and in many instances, the substance, of the American Bar Association's Model Rules of Professional Conduct ("the Model Rules"). Currently, California is the only state that does not have rules that are patterned on the Model Rules. In part, the decision to give significant consideration to the Model Rules was made in an effort to eliminate unnecessary and potentially confusing differences between California and other states, and to foster the evolution of a national standard with respect to professional responsibility issues.

**PROPOSAL:** The seventy proposed new and amended rules are listed below in numerical order by proposed new rule number. Where applicable, the rule number of the comparable current California rule is indicated in brackets. An asterisk denotes a rule that is one of the twelve tentative drafts that will be substituted with a Board adopted rule at least thirty days prior to deadline for this 90-day public comment. The public is encouraged to focus attention first on the fifty-eight rules that have been conditionally adopted

and reserve the latter portion of the public comment period for consideration of the twelve rules that will be substituted into this proposal.

<b><u>Rule</u></b>	<b><u>Title</u></b>	<b><u>Page</u></b>
1.0	Purpose and Scope of the Rules of Professional Conduct	XX
1.0.1	Terminology	XX
1.1	Competence	XX
1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer	XX
1.4	Communication	XX
1.4.1	Disclosure of Professional Liability Insurance	XX
1.5	Fees for Legal Services	XX
1.5.1	Financial Arrangements Among Lawyers	XX
1.6	Confidential Information of a Client	XX
1.7	Conflict of Interests: Current Clients	XX
1.8.1	Business Transactions with a Client and Acquiring Interests Adverse to the Client	XX
1.8.2	Use of Current Client's Confidential Information	XX
1.8.3	Gifts from Client	XX
1.8.5	Payment of Personal or Business Expenses Incurred by or for a Client	XX
1.8.6	Payments Not From Client	XX
1.8.7	Aggregate Settlements	XX
1.8.8	Limiting Liability to Client	XX
1.8.9	Purchasing Property at a Foreclosure Sale or a Sale Subject to Judicial Review	XX
1.8.10	Sexual Relations with Client	XX
1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)	XX
1.9	Duties to Former Clients	XX
1.10	Imputation of Conflicts of Interest: General Rule	XX
1.11	Special Conflicts for Former and Current Government Officers and Employees	XX
1.12	Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	XX
1.13	Organization as Client	XX
1.14	Client with Diminished Capacity	XX
1.15	Handling Funds and Property of Clients and Other Persons	XX
1.16	Declining Or Terminating Representation	XX
1.17	Purchase and Sale of a Law Practice	XX
1.18	Duties to Prospective Clients	XX
2.1	Advisor	XX
2.4	Lawyer as Third-Party Neutral	XX
2.4.1	Lawyer as Temporary Judge	XX
3.1	Meritorious Claims	XX
3.3	Candor Toward the Tribunal	XX
3.4	Fairness to Opposing Party and Counsel	XX
3.5	Impartiality and Decorum of the Tribunal	XX
3.6	Trial Publicity	XX
3.7	Lawyer As A Witness	XX
3.8	Special Responsibilities of a Prosecutor	XX
3.9	Advocate In Non-adjudicative Proceedings	XX
3.10	Threatening Criminal, Administrative, or Disciplinary Charges	XX
4.1	Truthfulness in Statements to Others	XX
4.2	Communication with a Person Represented by Counsel	XX
4.3	Dealing with Unrepresented Person	XX
4.4	Respect for Rights of Third Persons	XX
5.1	Responsibilities of Partners, Managers, and Supervisory Lawyers	XX
5.2	Responsibilities of a Subordinate Lawyer	XX
5.3	Responsibilities Regarding Nonlawyer Assistants	XX
5.3.1	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	XX
5.4	Duty to Avoid Interference with a Lawyer's Professional Independence	XX
5.5	Unauthorized Practice of Law; Multijurisdictional Practice	XX
5.6	Restrictions on Right to Practice	XX
6.1	Voluntary Pro Bono Publico Service	XX

6.2	Accepting Appointments	XX
6.3	Legal Services Organizations	XX
6.4	Law Reform Activities	XX
6.5	Limited Legal Services Programs	XX
7.1	Communications Concerning the Availability of Legal Services	XX
7.2	Advertising	XX
7.3	Direct Contact with Prospective Clients	XX
7.4	Communication of Fields of Practice and Specialization	XX
7.5	Firm Names and Letterheads	XX
8.1	False Statement Regarding Application for Admission to Practice	XX
8.1.1	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline	XX
8.2	Judicial and Legal Officials; Lawyer as Candidate or Applicant for Judicial Office	XX
8.3	Reporting Professional Misconduct	XX
8.4	Misconduct	XX
8.4.1	Prohibited Discrimination in Law Practice Management and Operation	XX
8.5	Disciplinary Authority; Choice of Law	XX

Each proposed rule is presented in a comparison table format preceded by a summary cover sheet and a general introduction. The comparison table format has three columns. The first column presents the clean version of a Model Rule counterpart, if any. The second column presents a redline draft of the proposal with redline legislative changes to the Model Rule counterpart. The third column presents the Commission's explanation of each deviation from the Model Rule language. (If there is no Model Rule counterpart but there is a California rule counterpart, or if the Model Rule counterpart has been rejected in favor of the current California rule, then the chart compares the proposed rule to the current California rule.) This format is intended to simplify the consideration of any changes to the Model Rules and to make plain the Commission's rationale for such changes. After the comparison table in the materials, provided are: the clean version of the proposed rule; a chart that summarizes the initial public input received the rule, and an excerpt that summarizes selected state variations. A redline rule draft, comparing the proposed conditionally-adopted draft to the initial public comment version, is also included where substantive changes have been made to a rule following consideration of public comment. In some instances, a statement from a minority of the Commission also will be included.

In addition to the seventy proposed new or amended rules, there are Model Rules that were considered by the Commission but that are not recommended for adoption. Listed below in numerical order by Model Rule number are the Model Rules that are not recommended for adoption. Materials are provided that set forth the Commission's explanation for the recommendation against adoption of the Model Rule. In some instances, the materials will include a Commission minority statement urging that the Model Rule should be adopted. Public input is encouraged on this important aspect of the Commission's recommendation.

*List of Model Rules Considered but not Recommended for Adoption:*

<b><u>Model Rule</u></b>	<b><u>Title</u></b>	<b><u>Page</u></b>
1.3	Diligence	XX
2.3	Evaluation for Use by 3rd Parties	XX
3.2	Expediting Litigation	XX
5.7	Law Related Services	XX
7.6	Contributions to Obtain Government Service	XX

Lastly, the Commission also considered concepts for rules that have no counterpart in either the Model Rules or the current California rules. These concepts were considered but are not being recommended for adoption. The concepts are listed below and are summarized in a memorandum included in the public comment materials. Where applicable, a Commission minority statement urging adoption of a rule is included. Public input also is encouraged on this aspect of the Commission's work.

List of Concepts for New Rules Considered but not Recommended for Adoption:

**Concept of a Possible New Rule**

*Hourly/Time Billing Rule*  
*Class Action Rule*  
*Law Firm Discipline Rule*  
*Good Faith Reliance on Advice of Counsel Rule*  
*Waiver of Attorney-Client Privilege Rule*  
*Use of Private Will Depositories*  
*Practice Succession Plan*  
*Lawyer Acting As Lobbyist*

**FISCAL/PERSONNEL IMPACT:** No unbudgeted fiscal or personnel impact.

**SOURCE:** State Bar Special Commission for the Revision of the Rules of Professional Conduct

**COMMENT DEADLINE:** 5 p.m., \_\_\_\_\_, 2010

**NOTE:** Comments may be sent in writing to the address below or submitted online to:

[Public Comment Form](#)

**ATTACHMENTS:**

[Final Report Discussion Draft \(March 2010\)](#)

**SOURCE:** Board Committee on Regulation and Admissions [or - Board of Governors]  
March 4 [or 6], 2010  
[Randy and Lauren - is there a BOG agenda item number? If so, it should be inserted on this line]

**COMMENT DEADLINE:** \_\_\_\_\_, 2010

**DIRECT COMMENTS TO:**

Audrey Hollins  
Office of Professional Competence, Planning and Development  
The State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
415-538-2167  
415-538-2171 Fax