

ATTACHMENT 5

Initial MARCH 131 agenda item dated February 9, 2010

AGENDA ITEM

MARCH 131

Rules of Professional Conduct,
Return from 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: Proposed New and Amended Rules of Professional Conduct of the State Bar of California, Batch 5 – 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 fifth public comment group of draft rules. The proposed rules were posted for a 60-day public comment period and the comments received have been provided to the Commission. This item also includes two proposed rules, Rule 1.7 (Conflicts of Interest: Current Clients) and Rule 3.3 (Candor Toward the Tribunal), previously submitted to the Board for adoption that were returned to the Commission for further consideration.

The Commission is scheduled to meet on February 26 & 27, 2010 to complete its review of the public comments and to finalize all of the rule revisions implemented in response to the public comments. This memorandum is a placeholder and will be substituted with the final agenda item as soon as possible after the Commission's February meeting.

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.

DISCUSSION

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

^{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."

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

At its meeting on September 13, 2009, the Board's Committee on Regulation and Admissions authorized a 60-day public comment distribution of the Commission's fifth group of proposed rules. This public comment period ended on November 13, 2009. In addition, a public hearing on the proposed rules was held on November 10, 2009 at the San Francisco State Bar office.

This agenda item requests the Board to adopt the fifth group of proposed new and amended Rules of Professional Conduct as drafted by the Board's Special Commission for the Revision of the Rules of Professional Conduct ("the Commission") following consideration of public comments and public hearing testimony. The eleven proposed amended rules are listed below by proposed new rule number. Where applicable, the rule number of a comparable current California rule or rules is indicated in brackets.

Rule	Title
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.6	Confidential Information of a Client [3-100, B&P 6068(e)]
Rule 1.8.2	Use of Current Client's Confidential Information [3-100, 3-310]
Rule 1.8.11 ³	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)
Rule 1.9	Duties to Former Clients [3-310]
Rule 1.10	Imputation of Conflicts of Interest: General Rule
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third Party Neutral
Rule 1.14	Client with Diminished Capacity
Rule 2.1	Advisor
Rule 3.8	Special Responsibilities of a Prosecutor [5-110]
Rule 8.5	Disciplinary Authority; Choice of Law [1-100(D)]

The comments received have been provided to the Commission. The Commission is scheduled to meet on February 26 & 27, 2010 to complete its review of the public comments and to finalize all of the rule revisions drafted in response to the public comments. This memorandum is a placeholder that will be substituted with the final agenda item as soon as possible after the Commission's February meeting.

In addition to the Batch 5 rules, two additional proposed rules are being submitted for adoption: Rule 1.7; and Rule 3.3. Regarding Rule 1.7, 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. Three of the four rules were resubmitted to the Board and adopted at the Board's January 7, 2010 meeting. The one remaining rule from Batches 1 through 3 is proposed Rule 1.7 (Conflicts of Interests: Current Clients). The Commission's reconsideration of

^{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/} Proposed Rule 1.8.11 previously was numbered 1.8.13 when it was circulated as part of Batch 5. The Commission now recommends that it be numbered 1.8.11, which conforms more closely to its Model Rule counterpart, Model Rule 1.8(k).

Rule 1.7 began at the Commission’s December 11 & 12, 2009 meeting, continued at its January 22-23, 2010 meeting, and will continue at the Commission’s February meeting. A revised Rule 1.7 will be resubmitted for adoption, together with the Batch 5 rules.

Regarding Rule 3.3, at the Board’s January 7, 2010 meeting twelve rules were submitted to the Board and one rule, Rule 3.3, was returned to the Commission for further consideration. Rule 3.3 was discussed at the Commission’s January 22 & 23, 2010 meeting and a revised version of this rule will be resubmitted for adoption together with the Batch 5 rules.

As is the Commission’s practice, each of the proposed rules includes a “dashboard” cover sheet that offers key indicators about a rule. For convenient reference, the table provided below summarizes and totals some of the information found on the rule “dashboard” coversheets with regard to the versions of the rules as issued for public comment last September. Because the Commission is revising the rules in response to the public comments received, this information may change. When a final agenda is submitted after the Commission’s February meeting, that agenda item will include an updated table presenting the latest information.

PROPOSED RULE		Controversy Level	ABA Comparison (Rule)	Minority Position
Rule 1.2	Scope of Representation and Allocation of Authority Between Client and Lawyer	Moderately	Substantially Adopted	YES
Rule 1.6	Confidential Information of a Client	Very	Material Changes	YES
Rule 1.7	Conflicts of Interest: Current Clients	Very	Substantially Rejected	YES
Rule 1.8.2	Use of Current Client’s Confidential Information	Moderately	Substantially Adopted	YES
Rule 1.8.11	Imputation of Personal Conflicts (Rules 1.8.1 to 1.8.9)	Not Controversial	Substantially Adopted	NO
Rule 1.9	Duties to Former Clients	Moderately	Material Changes	YES
Rule 1.10	Imputation of Conflicts: General Rule	Moderately	Material Changes	YES
Rule 1.12	Former Judge, Arbitrator, Mediator or Other Third Party Neutral	Moderately	Material Changes	NO
Rule 1.14	Client with Diminished Capacity	Moderately	Material Changes	YES
Rule 2.1	Advisor	Moderately	Substantially Adopted	YES
Rule 3.3	Candor Toward the Tribunal	Moderately	Substantially Adopted	YES
Rule 3.8	Special Responsibilities of a Prosecutor	Moderately	Substantially Adopted	YES
Rule 8.5	Disciplinary Authority; Choice of Law	Moderately	Material Changes	NO
TOTALS 13 rules are recommended for adoption		Very = 2 Moderately = 10 Not = 1	Subs. Adopted = 6 Subs. Rejected = 1 Material Changes = 6	Yes = 10 No = 3

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

As this memorandum is a preliminary agenda item, the proposed Board Committee and Board resolutions are not provided and will appear in the final agenda item.