

AGENDA ITEM

MARCH 131 - Supplement Rules of Professional Conduct, Return from Public Comment

DATE: March 1, 2010

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 memorandum supplements the initial March 131 agenda item dated February 9, 2010 and 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 considered by 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 met 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 presents the Commission’s proposed rules as finalized at its 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

Refer to the initial March 131 agenda item dated February 9, 2010 for background on this matter. This agenda item requests Board adoption of 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. 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.

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 dashboards. The information in this chart presents the proposed rules as finalized at the Commission’s recent February meeting. The chart found in the initial March 131 agenda item is superseded by the below chart.

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 Adopted	YES
Rule 1.8.2 Use of Current Client’s Confidential Information	Moderately	Material Changes	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	Substantially Adopted	YES
Rule 1.10 Imputation of Conflicts: General Rule	Very	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	Very	Material Changes	YES
Rule 3.3 Candor Toward the Tribunal	Moderately	Substantially Adopted	YES
Rule 3.8 Special Responsibilities of a Prosecutor	Very	Substantially Adopted	YES
Rule 8.5 Disciplinary Authority; Choice of Law	Moderately	Material Changes	NO
TOTALS 13 rules are recommended for adoption	Very = 5 Moderately = 7 Not = 1	Subs. Adopted = 6 Subs. Rejected = 0 Material Changes = 7	Yes = 10 No = 3

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 proposed rules.

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 a transcript of the public hearing conducted on the Batch 5 rules.

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

Attachment Five to this memorandum provides, for convenient reference, the initial March 131 agenda item dated February 9, 2010.

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 is one rule in this category); "moderately controversial" (there are seven rules in this category); and "very controversial" (there are five rules in this category – please note that one of these five rules is proposed Rule 1.7 which was previously submitted to the Board for action at its November 2009 meeting).

VERY CONTROVERSIAL RULES:

Below are the five 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 1.6 Confidential Information of a Client

Issue: Whether to follow the ABA approach of codifying multiple confidentiality exceptions (e.g., include exceptions intended to prevent or rectify a client's financial crimes or fraud) or retain California's existing standard that includes only one express exception, an exception permitting but not requiring a lawyer to reveal confidential information to prevent a criminal act likely to result in death or substantial bodily harm.

Commission's current position: Adopt a rule that follows the basic Model Rule 1.6 framework but more closely adheres to California's current standard that affords clients substantially more notice and protection than the Model Rule. Although the proposed Rule includes exceptions not found in current California Rule 3-100, they are exceptions already recognized in California law.

Minority: A minority of the Commission objects to the proposed Rule for several reasons. Among these reasons is the minority's concern that there is an apparent disjunction in language between the subdivisions of Business & Professions Code § 6068(e), from which current Rule 3-100 is derived, California being the only jurisdiction in which a lawyer's duty of confidentiality is set forth in a statute. The minority is concerned that this issue in the statutory duty of confidentiality must be resolved in order to draft a sufficiently clear rule on confidentiality. (Refer to the proposed Rule 1.6 Introduction for a comprehensive discussion of this issue.) Other minorities of the Commission object to specific exceptions, which the Commission has recommended adopting because they are well-settled in California decisional law. (Refer to Explanation of Changes for paragraphs (b)(3) and (b)(4) of the Rule.)

Rule 1.7 Conflicts of Interest: Current Clients

Issues: (1) Whether to retain California's approach to conflicts of interest, which is unique to California, or adopt the Model Rule approach which is the rule in the overwhelming majority of jurisdictions; and (2) Whether to include rule comments, similar to the comments found in the commentary to Model Rule 1.7, 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 address advance consents to unspecified future conflicts.

At the Board Committee's November 2009 meeting, concerns were expressed generally about the clarity of the rule, citing the apparent overlap among certain rule paragraphs that seemed to be structured within the rule as discrete prohibitions. In addition, concerns were expressed that the proposed comment on advance consents to future conflicts would be difficult to enforce in a manner that offered meaningful client protection. In particular, it was observed that the comment did not expressly state that a lawyer who obtains advance consent to a future conflict nevertheless is bound by all other duties typically owed to a client, such as confidentiality and competent representation.

Commission's current position: After additional study, including further input from interested persons who attended the Commission's December 2009 and January 2010 meetings, the Commission voted to cease consideration of a rule based upon the existing unique California rule and, instead, develop a rule that is patterned on Model Rule 1.7. In part, this Commission decision was made in response to input from interested persons who asserted that Model Rule 1.7 was more understandable than a proposed rule that perpetuates the concepts and language of California's current unique rule.

In addition, the Commission revised the comment language addressing advance consents to future conflicts (see Comment [22] of the Commission's proposed Rule 1.7). The Commission's revised language primarily differs from the previous comment paragraph submitted to the Board by clarifying that: (1) a lawyer seeking an advanced consent is required to provide a client with disclosure, to the extent known by the lawyer, of facts and reasonably foreseeable consequences; and (2) a lawyer who obtains an advance consent from a client will continue to have all the duties of a lawyer to that client, except as expressly limited by the specific terms of the client's consent. Like the other revisions to this proposed Rule, the Commission's modified approach to advance consents to future conflicts was developed with input from interested persons who attended the Commission's meetings.

Minority: A minority of the Commission does not recommend adoption of a rule based upon Model Rule 1.7. The minority asserts that a conflicts rule based upon California's existing rule offers necessary client protection that is not possible under a rule patterned on Model Rule 1.7 because: (1) the terms of California's rule give greater guidance and certainty to lawyers in identifying conflicts of interest; and (2) unlike Model Rule 1.7, California's rule does not place a lawyer in the position of subjectively ascertaining whether there is a "significant risk" that the lawyer's representation will be "materially limited" by a conflict. The minority believes that this latter aspect of Model Rule 1.7 is very troubling because it is likely to lead California lawyers to conclude erroneously that there is no conflict as a result of the lawyer's self-confidence that the lawyer possesses the skills to neutralize or insulate the lawyer's representation of the client from the effects of a purported conflict. To assist the Board in its deliberations on Rule 1.7, the minority has included with its minority statement its own version of Rule 1.7. In this minority version of Rule 1.7, the prior draft of Rule 1.7 has been revised to respond to the concerns expressed by Board members at the November 2009 Board meeting.

Rule 1.10 Imputation of Conflicts: General Rule

Issue: Whether to follow the ABA approach of including, for lawyer disciplinary purposes, the concept of imputed conflicts of interests and related standards for avoiding such conflicts by timely use of an ethical screen (also referred to as an “ethical wall”). The current California rules do not provide for imputed conflicts or an ethical screen as disciplinary concepts; however, California case law does address these concepts in the context of lawyer disqualification and other non-disciplinary matters.

Commission’s current position: Adopt the ABA approach, that is, include the concept of imputation in a Rule of Professional Conduct, permit an ethical screen to rebut the imputation, but include a narrower concept for such ethical screens. Although the Commission’s proposed Rule does permit non-consensual screening, i.e., it permits a private law firm to erect, over a client’s objection, an ethical screen to avoid the imputation of a lawyer’s conflict to all other lawyers in the firm, the Commission’s proposed screening provision is more limited than that of the Model Rule. Under the Model Rule, a private firm can avoid imputation of a conflict that arises from a lawyer migrating from another private firm^{1/} even if the moving lawyer had played a substantial role in the prior representation that is the subject of the conflict and can be assumed to have acquired material confidential information. See Explanation of Changes for paragraph (a)(2). The Commission, however, was nearly unanimous in agreeing that such a broadly-permissive screening provision similar to the one in the Model Rule should not be adopted in California.

In addition, the proposed Rule adds public protection requirements not found in Model Rule 1.10. These requirements impose duties on the screening law firm and the screened lawyer to demonstrate the effectiveness of the screening procedures that have been implemented. Unlike the Model Rule, the screening firm must agree to provide to the client, at the firm’s expense, the opportunity to retain an independent lawyer to review and assess the firm’s screening procedures, and provide access to that lawyer. See Explanation of Changes for subparagraph (a)(2)(iii). Further, subparagraph (a)(2)(v) shifts responsibility for the cost of a successful challenge to the law firm’s screen, which should provide an added incentive to the law firm and screened lawyer to maintain the screen, thereby preserving the former client’s confidential information. See Explanation of Changes for subparagraph (a)(2)(v).

Minority. A minority of the Commission opposes the adoption of a rule that would permit screening in the context of a lawyer moving from one private law firm to another private law firm. The minority also opposes other aspects of the rule.

Rule 2.1 Advisor

Issue: Whether to adopt a new rule in the proposed new California rules, similar to Model Rule 2.1, which describes a lawyer’s role as an advisor to a client. The current California rules do not include a counterpart to Model Rule 2.1.

Commission’s current position: Model Rule 2.1 has only two sentences in the rule text. The first sentence concerns the settled principle that a lawyer must exercise independent professional

^{1/} Imputations of conflicts of interest that arise in the government lawyer context, i.e., where a government lawyer moves from the private sector to government employment or vice versa, are governed by proposed Rule 1.11, a Batch 6 rule that will be presented to the Board for consideration at its May 2010 meeting.

judgment in advising a client. The second sentence provides that a lawyer's advice may include considerations such as moral, economic, social or political factors. The Commission's proposed rule would adopt only the first sentence of the Model Rule stating that a lawyer is required to exercise independent professional judgment and to render candid advice. The Commission is recommending that the second sentence of the Model Rule not be adopted, but that the sentence be incorporated into Comment [2] of the rule. Three of the five written comment letters received during the public comment period (the letters from OCTC, COPRAC and the Santa Clara County Bar Association) maintain that the proposed Rule should not be adopted because: it is not a disciplinary rule; it is not enforceable; it is unnecessary; and it provides for advice that is beyond a lawyer's expertise. Although the Commission does not agree with these points, the Commission has categorized the adoption of this new rule as very controversial.

Minority: A minority of the Commission objects to the proposed rule because it imposes an undefined duty to exercise independent judgment. Largely due to the absence of a definition of "independent judgment," the minority is concerned that the vast majority of lawyers will not understand when and how this Rule applies.

Rule 3.8 Special Responsibilities of a Prosecutor

Issue: Whether to adopt the ABA's recent revisions to Model Rule 3.8 ("Special Responsibilities of a Prosecutor") which add duties requiring prosecutors to take action in response to certain newly discovered exculpatory evidence. The duties may apply even if the new information pertains to closed cases outside of the jurisdiction of the prosecutor. If the information suggests that a wrongful conviction has occurred within the prosecutor's jurisdiction, the duties require that the prosecutor act to remedy the wrongful conviction.

Commission's current position: Adopt the ABA revisions as they enhance public confidence in the legal system and increase the likelihood of remedies for convicted defendants when new exculpatory evidence has been discovered by a prosecutor but is not known by a defense counsel. The Commission notes that this recent addition to the Model Rule 3.8 is under consideration in a number of jurisdictions (e.g., Michigan and New York) but, to date, only Delaware and Wisconsin have adopted it.

Minority: A minority of the Commission objects to the inclusion of ABA's recent revisions to Model Rule 3.8 on the ground that it is unclear how a prosecutor whose jurisdiction did not obtain the conviction, would know if the information is "new, credible and material creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."

As has been the Board Committee's practice, it is anticipated that the above very controversial rules will be called for discussion by the Board Committee Chair and that any of the other rules may also be discussed if requested by a Board member. To facilitate time management, Board members should identify any such rules at the start of the discussion of this agenda item.

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 the rules 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 the rules 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.