

AGENDA ITEM

JULY 131

Rules Revision Commission's Final Report, All Proposed New and Amended Rules, Return from Public Comment

DATE: July 8, 2010

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

FROM: Randall Difuntorum, Director, Professional Competence

RE: Rules Revision Commission's Final Report, All Proposed New and Amended Rules, Return from Public Comment

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 Commission"). The proposed rules presented cover all of the proposed new and amended rules recommended by the Commission. Subject to further public comment on those rules which require further public comment, the recommendations presented constitute the Commission's final report and recommendation.

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.

BACKGROUND

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

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."

members of the State Bar.² Upon the recommendation of the Board Committee on Regulation and Admissions (“RAC”), at its meeting on March 6, 2010 the Board authorized a comprehensive public comment distribution of all of the Commission’s proposed new and amended rules.³ This 90-day public comment period ended on June 15, 2010. In addition, public hearings on the proposed rules were held on: May 21, 2010 at the San Francisco State Bar Office; and June 10, 2010 at the Los Angeles State Bar office.

DISCUSSION

This agenda item requests the Board to adopt the Commission’s recommendations on all of its proposed new and amended rules. Unlike the prior conditional adoption of the rules when the rules were distributed as separate batches, the adoption now requested is unconditional final adoption that will include a direction to staff to submit the Board’s adopted rules to the California Supreme Court together with a recommendation that the Supreme Court approve those rules.⁴ While the great majority of the proposed rules are anticipated to fall into this category of Board action, some rules will require further public comment, in compliance with the State Bar’s rules governing public comment procedures, before the Board

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 The Board’s prior action over the course of the last Board year has involved tentative adoption of the proposed rules in discrete batches, following an initial public comment distribution, and this tentative adoption was conditioned expressly on the consideration of possible revisions following a subsequent comprehensive public comment distribution of all of the proposed new rules as a final report and recommendation. The public comment distribution authorized by the Board at its March 6, 2010 meeting served as this comprehensive public comment distribution. At the time of the Board’s action at the March meeting, the proposed rules in Batches 1 through 5 had been conditionally adopted by the Board. The Batch 6 rules were added to the public comment distribution promptly after the Board acted on the Batch 6 rules at the Board’s May 15, 2010 meeting. At that time, there was 30-days remaining of the 90-day public comment period on the final report and recommendation and the public comment notices at the State Bar website were updated to reflect the addition of the Batch 6 rules.

⁴ It is recognized that the promulgation of proposed new and amended Rules of Professional Conduct will affect existing law including: State Bar rules; the California Rules of Court; the State Bar Act provisions of the Business and Professions Code; and other California Codes. In some instances, the updating of a rule number citation in an existing law will be sufficient to implement a conforming amendment; however, in other instances, close coordination with law makers will be necessary to consider major changes in policy. Once the Board acts on the proposed rules, the Office of the Executive Director and the Office of Governmental Affairs will review the adopted rules to ascertain appropriate coordination strategies. For informational purposes, a draft table identifying current references to the Rules of Professional Conduct throughout the California Rules of Court, the Rules of the State Bar, the State Bar Act section of the California Business and Professions Code, and other California Codes is provided as Attachment Six.

may take final action.⁵ It is anticipated that any such rules will be identified at the Board meeting based upon the action actually taken by the Board.

There are sixty-eight proposed rules that are recommended by the Commission for adoption. The great majority of these rules have not been substantively revised in response to the recent comprehensive public distribution. Therefore, they remain in essentially the same form as they were when they were previously adopted conditionally by the Board and authorized for inclusion in the comprehensive public comment distribution. To facilitate Board attention on certain selected rules, the rules listed below satisfy two criteria: (1) they have been substantively revised by the Commission in response to the recent comprehensive public comment distribution; and (2) they have been categorized by the Commission as “very controversial” on their respective dashboard cover sheet.⁶

1) 1.5 Fees for Legal Services

⁵ Title 1, Division 2, Rule 1.10 of the Rules of State Bar states the standards governing public comment procedures. This rule provides:

(A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Governors. The State Bar also makes available for public comment its proposals for the California Rules of Court. Proposals are circulated for a forty-five day period, which can be shortened to a minimum of 30 days or extended to a maximum of 90 days, as designated by the board.

(B) Public comment is not required

(1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;

(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal; or

(3) to add or modify an appendix to these rules.

(C) The board may determine that an emergency requires it to adopt, amend, or suspend a rule on an interim basis without first circulating it for public comment. No interim measure may remain in effect for more than 120 days.

(D) The adoption, amendment, or repeal of a rule becomes effective as of the date specified by the board. If it specifies no date, the date of its action is the effective date.

⁶ There are also a number of proposed rules that have been substantively revised but are not categorized by the Commission as “very controversial.” They are: *Moderately Controversial Rules* – 1.0.1 Terminology, 1.2 Scope of Representation, 1.5.1 Financial Arrangements Among Lawyers, 1.8.7 Aggregate Settlements, 3.3 Candor Toward the Tribunal, and 4.4 Duties Concerning Inadvertently Transmitted Writings (the Commission recommends that this latter rule not be adopted); and *Not Controversial Rules* – 1.4 Communication, 1.8.6 Payments Not from Clients, 1.16 Declining or Terminating Representation, and 5.4 Financial and Similar Arrangements with Nonlawyers.

- 2) 1.7 Conflicts of Interest: Current Clients
- 3) 1.8.1 Business Transactions & Adverse Interests
- 4) 1.10 Imputation of Conflicts General Rule
- 5) 1.11 Special Conflicts for Former and Current Government Officers and Employees
- 6) 1.18 Duties to Prospective Clients
- 7) 2.1 Advisor
- 8) 3.7 Lawyer as Witness
- 9) 3.8 Special Responsibilities of a Prosecutor
- 10) 4.2 Communications with a Represented Person
- 11) 6.1 Voluntary Pro Bono Publico Service

Summary of Primary Issue Raised by Each of the Above Proposed Rules:

(Note: The electronic version of this document includes an attached PDF file for each of the listed proposed rules. The attachments appear in the Attachment Pane located in the lower part of the Adobe Reader window when viewing this document. This permits easy access to the full materials for each of the listed rules, in particular the Introduction to the Rule which provides a complete summary.)

1) 1.5 Fees for Legal Services

Whether to retain California's standard of prohibiting "unconscionable" fees or adopt the Model Rule prohibition against "unreasonable" fees. Also, whether to include new provisions regulating a lawyer's description of a fee agreement as "non-refundable" or "earned on receipt."

2) 1.7 Conflicts of Interest: Current Clients

Whether to retain California's unique rules on conflicts of interest or adopt rules based upon the Model Rules. Also, whether to include a comment that addresses the issue of advance client consent to future conflicts of interest.

3) 1.8.1 Business Transactions & Adverse Interests

Whether to retain California's disclosure requirements that presently apply even if a client is represented by an independent lawyer in the relevant business transaction. Also, whether the rule should be revised so that it is applicable to all fee agreement modifications.

4) **1.10 Imputation of Conflicts General Rule**

Whether to include a limited unconsented screening provision in the private firm context that is similar to provisions adopted in other jurisdictions and would permit screening only of lawyers who had previously been involved peripherally, or expressly leave the issue of screening to case law.

5) **1.11 Special Conflicts for Former and Current Government Officers and Employees**

Whether to codify in this rule California law that requires the imputation of conflicts when a lawyer moves into government service but to permit screening in such circumstances, or to adopt the Model Rule's approach of not imposing imputation.

6) **1.18 Duties to Prospective Clients**

Whether to include an unconsented screening provision that is available in only limited circumstances and is similar to the Model Rule adopted in nearly every other jurisdictions, or expressly leave the issue of screening to case law.

7) **2.1 Advisor**

Whether to adopt, as a rule, the entire Model Rule standard that includes both a lawyer's duty of independent professional judgment and a permissive provision stating that a lawyer's advice may include non-legal considerations such as moral, economic and political factors, or adopt only that portion of the rule that concerns independent professional judgment. Also, whether the rule should include a comment clarifying the concept of "independent professional judgment," although such clarification is not included in the Model Rule.

8) **3.7 Lawyer as Witness**

Whether to retain California's standard that limits the application of the rule to jury trials, or adopt the Model Rule standard that applies to both jury and bench trials, and takes into account not only whether a lawyer appearing as a witness will prejudice the client, but also whether it will adversely affect the integrity of the judicial process.

9) **3.8 Special Responsibilities of a Prosecutor**

Whether to adopt recently added Model Rule provisions addressing a prosecutor's obligation to respond to new exculpatory evidence (by giving notice and taking other steps) even in situations where the criminal prosecution did not occur in the prosecutor's jurisdiction.

10) **4.2 Communications with a Represented Person**

Whether to retain California's ex parte contact rule that extends protection to a "*party* represented by counsel," or adopt the Model Rule standard that protects a "*person* represented by counsel."

11) 6.1 Voluntary Pro Bono Publico Service

Whether to include a “rule” stating that all lawyers should aspire to completing 50 hours of pro bono services each year, or omit the rule in light of other existing California provisions found in the State Bar Act and in the Board of Governors Pro Bono Resolution.

Given the controversial nature of these rules and the fact that each has been substantively changed following public comment, staff believes that the Commission’s recommendation on each of these rules should be called individually for Board discussion and not be the subject of an aggregate Board vote. In addition, there are two rules recommended for adoption by the Commission that, although *not* substantively revised, staff recommends that they be individually discussed. Those two rules are:

- Rule 1.6 Confidentiality of Information; and
- Rule 1.8.10 Sexual Relations with Clients.

In preparation for the meeting, it is recommended that Board members prioritize study of the Commission materials (Dashboard Cover Sheet; Introduction; ABA Model Rule Comparison Explanation; Public Commenter Synopsis Table; Commission Minority Statement, if any; and State Variations excerpt) for each of these rules.

Consistent with RAC’s established time management methodology, the Chair of RAC encourages Board members to identify any other proposed rules that are of interest so that time can be allocated for additional separate discussions and votes. Otherwise, it is anticipated that the Chair of RAC will invite a motion to adopt the Commission’s recommendation on all of the rules that staff has not recommended be the subject of a separate vote. For convenient reference, the table below lists all of the proposed rules that the Commission recommends for Board adoption. The table 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 total number of written public comments received during the comprehensive public comment distribution.

PROPOSED RULE RECOMMENDED FOR ADOPTION	Public Comment Received	Controversy Level	ABA Model Rule Comparison (rule text only, not comments)
1.0 Purpose and Scope of the Rules of Professional Conduct	6	Moderately	No Model Rule Counterpart
1.0.1 Terminology	6	Moderately	Material Additions/Deletions
1.1 Competence	7	Moderately	Substantially Rejected
1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer	5	Moderately	Substantially Adopted
1.4 Communication	6	Not Controversial	Substantially Adopted
1.4.1 Disclosure of Professional Liability Insurance	5	Not Controversial	No Model Rule Counterpart

PROPOSED RULE RECOMMENDED FOR ADOPTION	Public Comment Received	Controversy Level	ABA Model Rule Comparison (rule text only, not comments)
1.5 Fees for Legal Services	65	Very	Substantially Rejected
1.5.1 Fee Divisions Among Lawyers	3	Moderately	Substantially Rejected
1.6 Confidentiality of Information	6	Very	Material Additions/Deletions
1.7 Conflict of Interests: Current Clients	7	Very	Substantially Adopted
1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client	5	Very	Substantially Adopted
1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e)	2	Moderately	Substantially Adopted
1.8.3 Gifts from Client	3	Moderately	Material Additions/Deletions
1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client	2	Not Controversial	Material Additions
1.8.6 Third Party Payments	4	Not Controversial	Substantially Adopted
1.8.7 Aggregate Settlements	3	Moderately	Substantially Adopted
1.8.8 Limiting Liability to Client	2	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	7	Very	Substantially Adopted
1.8.11 Imputation of Prohibitions Under Rules 1.8.1 through 1.8.9	3	Not Controversial	Substantially Adopted
1.9 Duties to Former Clients	2	Moderately	Substantially Adopted
1.10 Imputation of Conflicts of Interest: General Rule	3	Very	Material Additions/Deletions
1.11 Special Conflicts for Former And Current Government Officers And Employees	4	very	Substantially Adopted
1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral	2	Moderately	Material Additions
1.13 Organization as Client	5	Moderately	Material Additions/Deletions
1.14 Client with Diminished Capacity	7	Moderately	Material Additions/Deletions
1.15 Handling Funds and Property of Clients and Other Persons	3	Very	Substantially Rejected
1.16 Declining Or Terminating Representation	6	Not Controversial	Substantially Rejected
1.17 Purchase and Sale of a Law Practice	3	Very	Substantially Adopted
1.18 Duties to Prospective Clients	4	Very	Substantially Adopted
2.1 Advisor	6	Very	Material Deletions
2.4 Lawyer as Third-Party Neutral	2	Very	Substantially Adopted
2.4.1 Lawyer as Temporary Judge	2	Not Controversial	No Model Rule Counterpart
3.1 Meritorious Claims	3	Not Controversial	Substantially Adopted

PROPOSED RULE RECOMMENDED FOR ADOPTION	Public Comment Received	Controversy Level	ABA Model Rule Comparison (rule text only, not comments)
3.3 Candor Toward the Tribunal	3	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	5	Very	Substantially Rejected
3.8 Special Responsibilities of a Prosecutor	6	Moderately	Substantially Adopted
3.9 Advocate In Non-adjudicative Proceedings	4	Very	Material Additions/Deletions
3.10 Threatening Criminal, Administrative, or Disciplinary Charges	3	Not Controversial	No Model Rule Counterpart
4.2 Communication with a Person Represented by Counsel	6	Very	Material Additions
4.3 Dealing with Unrepresented Person	4	Moderately	Substantially Adopted
5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers	3	Moderately	Substantially Adopted
5.2 Responsibilities of a Subordinate Lawyer	3	Moderately	Substantially Adopted
5.3 Responsibilities Regarding Nonlawyer Assistants	3	Not Controversial	Substantially Adopted
5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	4	Moderately	No Model Rule Counterpart
5.4 Financial and Similar Arrangements with Nonlawyers	3	Not Controversial	Substantially Adopted
5.5 Unauthorized Practice of Law; Multijurisdictional Practice	4	Not Controversial	Material Additions/Deletions
5.6 Restrictions on Right to Practice	3	Not Controversial	Substantially Adopted
6.1 Voluntary Pro Bono Publico Service	44	Very	Substantially Adopted
6.2 Accepting Appointments	4	Not Controversial	Substantially Adopted
6.3 Legal Services Organizations	3	Not Controversial	Substantially Adopted
6.4 Law Reform Activities	3	Moderately	Material Deletions
6.5 Limited Legal Services Programs	3	Not Controversial	Substantially Adopted
7.1 Communications Concerning the Availability of Legal Services	4	Not Controversial	Material Additions
7.2 Advertising	4	Not Controversial	Substantially Adopted
7.3 Direct Contact with Prospective Clients	4	Moderately	Substantially Adopted
7.4 Communication of Fields of Practice and Specialization	3	Not Controversial	Substantially Adopted
7.5 Firm Names and Letterheads	5	Not Controversial	Substantially Adopted
8.1 False Statement Regarding Application for Admission to Practice	3	Not Controversial	Material Additions/Deletions

PROPOSED RULE RECOMMENDED FOR ADOPTION	Public Comment Received	Controversy Level	ABA Model Rule Comparison (rule text only, not comments)
8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline	2	Not Controversial	No Model Rule Counterpart
8.2 Judicial and Legal Officials; Lawyer as Candidate or Applicant for Judicial Office	3	Not Controversial	Substantially Adopted
8.3 Reporting Professional Misconduct	4	Very	Substantially Rejected
8.4 Misconduct	4	Moderately	Material Additions/Deletions
8.4.1 Prohibited Discrimination in Law Practice Management and Operation	3	Moderately	No Model Rule Counterpart
8.5 Disciplinary Authority; Choice of Law	5	Moderately	Material Additions/Deletions
TOTALS = 68 rules recommended for adoption⁷	366	Very = 17 Moderately = 25 Not = 26	Subs. Adopted = 33 Subs. Rejected = 9 Material Changes = 18 No ABA Rule = 8

- **Attachment One** to this memorandum provides the dashboard cover sheet, introduction, Model Rule comparison table, Commission minority statements (where applicable), clean version text of the proposed rule, 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 hearings conducted on May 21, 2010 and June 10, 2010.
- **Attachment Four** to this memorandum provides the clean version text of the proposed rules as distributed for public comment with a deadline of June 15, 2010.
- **Attachment Five** to this memorandum provides a summary of the rules and concepts considered by the Commission but not recommended for adoption at this time.

⁷ This list includes the Commission's proposed new and amended rules that are recommended for Board adoption. In accordance with the State Bar Act provisions that describe the Board's role in the promulgation of Rules of Professional Conduct (see Footnotes 1 and 2), no Board action is required on rules and concepts for rules that the Commission has studied but is not recommending for adoption. A summary of the rules and concepts for rules that the Commission is not recommending for adoption is provided as Attachment Five.

- ***Attachment Six*** to this memorandum provides a draft table identifying current references to the Rules of Professional Conduct throughout the California Rules of Court, the Rules of the State Bar, the State Bar Act section of the California Business and Professions Code, and other California Codes.
- ***Attachment Seven*** to this memorandum provides separately written dissents to the Commission's overall recommendations.
- ***Attachment Eight*** to this memorandum provides a letter from Barry Tarlow requesting to testify before the Board of Governors regarding opposition to proposed Rule 1.5(e)-(f)

Representatives of the Commission and staff will be present at the Board meetings to address questions about any of the proposed rules. In addition, it is anticipated that stakeholders may attend the Board meetings and seek permission to address RAC. Finally, certain Commission members have submitted dissenting reports to the Commission's overall recommendation that the Board adopt the proposed rules. The dissenting reports are provided as Attachment Seven.

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. Some of the proposed rules may require additional public comment prior to final Board adoption. 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 authorizing the requested public comment distribution 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

See above entry concerning the "Effective Date of Proposal."

PROPOSED RESOLUTIONS

I. PROPOSED BOARD COMMITTEE RESOLUTION FOR BOARD ADOPTION OF PROPOSED RULES

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 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 Oversight recommends 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 they be approved by the Court.

II. PROPOSED BOARD RESOLUTION FOR BOARD ADOPTION OF PROPOSED RULES

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 they be approved by the Court.

III. PROPOSED BOARD COMMITTEE RESOLUTION AUTHORIZING ADDITIONAL PUBLIC COMMENT ON PROPOSED RULES

Should the Regulation and Admissions Oversight Committee approve the request to release the Commission's proposed amended Rules of Professional Conduct for additional public comment, 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 30-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 this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.

IV. PROPOSED BOARD RESOLUTION AUTHORIZING ADDITIONAL PUBLIC COMMENT ON PROPOSED RULES

Should the Board of Governors approve the request to release the Commission's proposed amended Rules of Professional Conduct for additional public comment, the following resolution would be appropriate:

RESOLVED, that upon the recommendation of the Board Committee on Regulation and Admissions Oversight, that the Board of Governors authorizes staff to make available for public comment for a period of 30-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 this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed new or amended Rules of Professional Conduct.