

# AGENDA ITEM

## SEPTEMBER 131

Rules of Professional Conduct,  
Return from Public Comment

**DATE:** September 3, 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, Rules of Professional Conduct, Proposed New and Amended, Seven Rules Returning from Additional Public Comment

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### 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 are seven rules that were last considered by the Board Committee at its July 23, 2010 meeting. At that meeting, further revisions were made to these rules and an additional 30-day public comment period was authorized. The 30-day public comment period ended on August 25, 2010 and the Commission met on August 27, 2010 to review the comments received. The Commission requests Board adoption of the seven rules and if the Board concurs, then the Commission's work to draft comprehensive amendments to the entire Rules of Professional Conduct will be complete, and it would be appropriate for the Board to place the Commission in an abeyance status until such time as the Commission is needed again to assist the Board.

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.<sup>1/</sup> The amendments adopted by the Board are

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<sup>1/</sup> 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.<sup>2/</sup>

At its July 22 - 24, 2010 meeting, the Board considered a Commission request that the Board adopt all of the Commission's proposed new and amended rules. Board consideration of this request followed the conclusion of a comprehensive public comment distribution of all of the Commission's proposed rules that ended on June 15, 2010. The Commission requested Board adoption of sixty-eight proposed rules. Of these sixty-eight proposed rules, sixty were adopted and one proposed rule, Rule 8.3 (re reporting misconduct), was not adopted. For the remaining seven rules, the Board authorized an additional 30-day public comment period to seek input on changes made to those rules after the comprehensive comment period that ended on June 15, 2010.

The 30-day public comment period ended on August 25, 2010 and the Commission met on August 27, 2010 to review the comments received. At its meeting, the Commission took action on each of the proposed rules after discussing the public input. Four of the proposed rules were revised and three were approved for submission to the Board without any modifications. The Commission received State Bar staff input on the specific changes made to each of the four revised rules and is informed that the changes do not require additional public comment.

The three proposed rules that have not been revised are the following.

<b>Rule</b>	<b>Title [current California rule counterpart, if any]</b>
Rule 2.1	Advisor [N/A]
Rule 5.4	Financial and Similar Arrangements with Nonlawyers [1-310, 1-320, 1-600]
Rule 8.4	Misconduct [1-120]

The four proposed rules that have been revised in response to the public comments received are the following.

<b>Rule</b>	<b>Title [current California rule counterpart, if any]</b>
Rule 1.0.1	Terminology [1-100(B)]
Rule 3.3	Candor Toward the Tribunal [5-200]
Rule 3.8	Special Responsibilities of a Prosecutor [5-110]
Rule 4.2	Communications with a Represented Person [2-100]

Each of the seven proposed rules 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 an American Bar Association (ABA) Model Rule counterpart, if any. The second column presents a redline draft of the Commission's proposal that shows changes to the ABA Model Rule counterpart. The third column presents the Commission's explanation of each deviation from the ABA Model Rule language. In part, this format is intended to facilitate the consideration of

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<sup>2/</sup> 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."

any changes to the ABA Model Rules and to make plain the Commission’s rationale for such changes. In addition, following each ABA Model Rule comparison table is the clean version of the Commission’s proposed rule, a comparison version of the proposed rule in redline/strikeout style showing the revisions to the previous public comment version of the rule, and an excerpt that summarizes selected state variations.

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 some of the information found on the rule dashboards.

<b>PROPOSED RULE RECOMMENDED FOR ADOPTION</b>	<b>Public Comment Received</b>	<b>Controversy Level</b>	<b>ABA Model Rule Comparison (rule text only, not comments)</b>
<i>The Following Rules Were Not Revised Following Public Comment</i>			
<b>2.1</b> Advisor	2	Very	Material Deletions
<b>5.4</b> Financial and Similar Arrangements with Nonlawyers	3	Not Controversial	Substantially Adopted
<b>8.4</b> Misconduct	2	Moderately	Material Additions/Deletions
<i>The Following Rules Were Revised Following Public Comment</i>			
<b>1.0.1</b> Terminology	3	Moderately	Material Additions/Deletions
<b>3.3</b> Candor Toward the Tribunal	6	Moderately	Substantially Adopted
<b>3.8</b> Special Responsibilities of a Prosecutor	12	Very	Substantially Adopted
<b>4.2</b> Communication with a Person Represented by Counsel	13	Very	Material Additions
<b>TOTALS = 7 rules recommended for adoption</b>	<b>41</b>	<b>Very = 3 Moderately = 3 Not = 1</b>	<b>Subs. Adopted = 3 Subs. Rejected = 0 Material Changes = 4</b>

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 on the seven rules that were issued for public comment and a graphic data table that provides a quick overview of those comments. In addition, this attachment also provides the full text of three miscellaneous comment letters addressing, in part, general issues about the Commission’s recommendation or specific rules that were not the subject of the last public comment distribution. A public comment synopsis table with Commission responses is provided with the full text of these miscellaneous comment letters.

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

Attachment Four to this memorandum provides a table summarizing selected “dashboard” cover sheet information for all of the rules adopted by the Board, including the seven rules presented in this agenda

item that are pending final Board action. Also provided is the clean version of all of the rules collected in a single document in two-column format.

**Summary of the Post-Public Comment Revisions Recommended by the Commission:**

(Important: Refer to the individual rule materials in Attachment One, especially the Introduction to the Rule, for a complete summary of each rule.)

**Rule 1.0.1 Terminology**

Proposed Rule 1.0.1, which is based on Model Rule 1.0 (“Terminology”), defines sixteen terms used in the proposed rules. Most of these definitions exactly track or closely track the corresponding Model Rule definition.

Regarding paragraph (e)(1), the definition of “informed written consent,” a public comment was received which suggested a possible ambiguity in the language as to whether a lawyer’s disclosure to a client and the consent rendered by the client must be in writing. In response to this public comment, the Commission made a minor non-substantive revision intended to clarify that both the disclosures to a client and the consent received from a client must be in writing.

**Rule 3.3 Candor Toward the Tribunal**

Proposed Rule 3.3, which is based on Model Rule 3.3, sets forth specific duties of a lawyer in representing a client in a matter before a tribunal. The Rule replaces current Rule 5-200 (Trial Conduct), which is narrower in scope than Model Rule 3.3. Like the Model Rule, proposed Rule 3.3 generally addresses a lawyer’s obligation to protect the integrity of the adjudicative process.

Regarding paragraph (d), concerning a lawyer’s disclosure obligations in an ex parte proceeding, a public comment was received which suggested that the language was overly broad and might be construed to apply even in situations when an opposing party or its representative is present during the proceeding. In response to this public comment, the Commission added new Comment [14], based on Model Rule 3.3, cmt. [14], which delimits the scope of the term “ex parte proceeding” and provides:

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in some ex parte proceedings, there is no balance of presentation by opposing advocates. When the judge has an affirmative responsibility to accord the absent party just consideration, the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

**Rule 3.8 Special Responsibilities of a Prosecutor**

Proposed Rule 3.8, which is based on Model Rule 3.8, states the responsibilities of a prosecutor to assure that charges are supported by probable cause and also addresses a prosecutor’s duties to disclose exculpatory information. Two revisions were made to the rule following consideration of public comments received.

First, regarding paragraph (c), which limits a prosecutor’s ability to seek a waiver of important pretrial rights from an unrepresented accused, it was brought to the Commission’s attention that the reference to an unrepresented person’s waiver of a “preliminary hearing” conflicts with Penal Code section 860, as interpreted in *In re Jones* (1968) 265 Cal.App.2d 376, 381. The court in *Jones* held that an accused can waive a preliminary hearing only if represented by counsel. Accordingly, the Commission deleted the reference to a waiver of a “preliminary hearing” in paragraph (c) and also made conforming deletions in Comment [2], the comment which gives guidance on complying with paragraph (c).

Second, regarding paragraph (d), which addresses a prosecutor’s duty to disclose to the defense evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, public comments were received that urged the Commission to revise the rule to conform the disclosure obligation to existing California law.

Some background is helpful in understanding this issue. In response to a letter to the Board from the Los Angeles Public Defender, the Board Committee decided at its July 23, 2010 meeting to solicit comment on whether California should adopt the broader scope of duty provided in Model Rule 3.8(d). See ABA Formal Ethics Op. 09-454, available at <http://www.abanet.org/cpr/pubs/ethicopinions.html>. In previous versions of proposed Rule 3.8 circulated for public comment, paragraph (d) generally followed the Model Rule but clarified that the requirement of a prosecutor’s timely disclosure to the defense is circumscribed by the constitution, as defined and applied in relevant case law. During the public comment period that ended on August 25, 2010, the Commission received a substantial amount of comments from the prosecution bar that uniformly objected to the adoption of the Model Rule language. The commenters all pointed out that the approach used in Model Rule 3.8(d) conflicted with California statutes that had been approved with the passage of Proposition 115 in 1991.

After considering the arguments submitted by members of the prosecution bar, none of whom were represented at the July 23, 2010 Board Committee meeting, the Commission voted to recommend that the Board restore the previous version of paragraph (d), slightly revised to include a reference to statutory obligations in addition to constitutional obligations. As recommended by the Commission, paragraph (d) states that a prosecutor must:

comply with all statutory and constitutional obligations, as interpreted by relevant case law, to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. (The underlined language identifies words added to the Model Rule language.)

As revised, paragraph (d) would not conflict with existing California law. It bears noting, however, that public comments received from criminal defense counsel support the broader disclosure duty that would be imposed by adoption of the Model Rule language.

#### **Rule 4.2      Communication with a Represented Person**

Proposed Rule 4.2, which is based on Model Rule 4.2, states a general prohibition against a lawyer’s unauthorized communications with persons represented by counsel in the matter which is the subject of

the communication. Two revisions were made to the rule following consideration of public comments received. Both changes are to the comments to the rule.

First, regarding Comment [15] of the public comment draft, which was included in the proposed rule to give guidance on the rule's application to in-house counsel employed by client organizations, a public commenter suggested that the language was unclear to the extent that it did not address situations where an in-house counsel might also be within the rule's definition of a person represented by counsel (for example, an in-house counsel who also serves as a corporate officer or other control group member).

In response to this comment, the Commission has recommended that Comment [15] be deleted. Inclusion of a comment concerning the application of the rule to in-house counsel is not typical in the jurisdictions that have adopted Model Rule 4.2 (see Comment [5] to District of Columbia Rule 4.2, which is the only variation found by the Commission). The Commission believes a potentially overly simplistic comment would belie the complexity and fact-bound nature of the rule's application to situations involving in-house counsel, such as the situation where an in-house counsel also is acting as a corporate officer. At its meeting, a member of the Commission observed that an ethics opinion addressing several different factual situations involving in-house counsel would be preferable to a comment in proposed Rule 4.2.

Second, regarding Comment [19] of the public comment draft, which gives guidance on the exception to the Rule in paragraph (c)(3) for "communications authorized by law or a court order," public comments were received that essentially asked the Commission to reconsider its recommendation to include extensive language addressing the application of the exception to law enforcement investigations by prosecutors.

In response, the Commission has revised a key sentence in the comment that had suggested to several of the commenters that the exception had been created by the Commission. The revision instead emphasizes that it is the courts that have recognized and established a public policy exception for legitimate law enforcement functions that would otherwise be prohibited communications. It is the Commission's view that the "authorized by law" exception as it pertains to prosecutors is not created by the language of the Rule but rather arises from decisional law. The Commission notes, by analogy, Rule 3.8(d) (regarding the duty of prosecutors to disclose exculpatory information) in observing that for sound public policy reasons the law may impose different standards on prosecutors that must be accounted for in the development of professional responsibility standards.

While the Commission has determined that this revision is an important clarification, the Commission acknowledges that the change likely will not persuade criminal defense counsel commenters who generally oppose any Rule 4.2 exception that encompasses law enforcement investigations, notwithstanding that the exception is a longstanding policy in California as well as in the majority of jurisdictions. As more fully discussed in the Rule 4.2 public comment chart, the Commission believes the recommended version of the Rule appropriately balances the interests of lawyer advocacy and protection of the important lawyer-client relationship.

#### **Placement of the Commission in an Abeyance Status:**

The Commission requests Board adoption of the seven rules and if the Board concurs, then the Commission's assignment to draft comprehensive amendments to the entire Rules of Professional Conduct will be complete, and it would be appropriate for the Board to place the Commission in an

abeyance status until such time as the Commission is needed again to assist the Board, for example, to help respond to requests from the Supreme Court for clarification of the rules submitted for approval.

This was the approach taken with the Commission when it previously served the Board after its initial creation in the 1980s. The goal is to retain the option of recalling the Commission into service without the delay of a new appointment procedure, while at the same time acknowledging the completion of the Commission's current assignment. Resolution language is provided and has been patterned on the resolution adopted by the Board in 1991.

#### ***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. 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 and undertake other implementation action.

#### ***FISCAL AND PERSONNEL IMPACT***

The fiscal and personnel impact that will result from the Board's adoption of the proposed rules is anticipated to be absorbed by the presently budgeted funds and the staff of the Office of Professional Competence. Should the Supreme Court approve the proposed rules, staff will consider the fiscal and personnel impact of the implementation of the rules with regard to general publicity, notice to members, internal training, State Bar publication updates, educational activities, and other implementation action.

#### ***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 concerning the "Effective Date of Proposal."

#### ***PROPOSED RESOLUTIONS***

##### ***I. PROPOSED BOARD COMMITTEE RESOLUTION FOR BOARD ADOPTION OF PROPOSED RULES AND PLACEMENT OF THE COMMISSION INTO AN ABEYANCE STATUS***

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 the rules be approved by the Court.

**FURTHER RESOLVED**, that the Board Committee on Regulation and Admissions Oversight recommends that the Board of Governors of the State Bar of California thank the members of the Special Commission for the Revision of the Rules of Professional Conduct for the completion of their assigned project, and authorize the placement of said Commission on inactive status until reactivated by the Board.

*II. PROPOSED BOARD RESOLUTION FOR BOARD ADOPTION OF PROPOSED RULES AND PLACEMENT OF THE COMMISSION INTO AN ABEYANCE STATUS*

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.

**FURTHER RESOLVED**, upon the recommendation of the Board Committee on Regulation and Admissions Oversight, that the Board of Governors of the State Bar of California thank the members of the Special Commission for the Revision of the Rules of Professional Conduct for the completion of their assigned project, and authorize the placement of said Commission on inactive status until reactivated by the Board.