

**STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL
CONDUCT OF THE STATE BAR OF CALIFORNIA**

DRAFT OPEN SESSION ACTION SUMMARY

Friday, June 26, 2015
(10:00 am – 4:30 pm)

State Bar of California
180 Howard Street
Room 4A-C, 4th Floor
San Francisco, CA 94105

Members Present: Justice Edmon (Chair), Mr. Bleich (Co-Vice Chair), Mr. Zipser, Mr. Cardona, Mr. Chou, Ms. Clinch, Mr. Eaton, Mr. Harris, Mr. Kehr, Mr. Kornberg; Ms. Langford, Mr. Martinez, Mr. Peters, Mr. Rothschild, Judge Stout, and Mr. Mark Tuft.

Advisors Present: Justice Fybel.

Liaisons Present: Mr. Fortescue (California Supreme Court).

State Bar Staff Present: Mr. Blumenthal (Office of Chief Trial Counsel), Mr. Difuntorum (Office of Professional Competence), Mr. Grenier (State Bar Court), Ms. Lee (Office of Professional Competence), Ms. Leighton (Office of General Counsel), Ms. McCurdy (Office of Professional Competence), Mr. Mohr (Consultant/Reporter), Mr. Andrew Tuft (Office of Professional Competence).

Others Present: Stephen Bundy, Richard Falk, Diane Karpman (Beverly Hills Bar Association) (by teleconference), Stanley Lamport, Teresa Schmidt (by teleconference), and Michele Trausch (COPRAC).

I. CHAIR'S REMARKS

The Chair inquired if any visitors present wished to address the Commission and Ms. Trausch introduced herself as a member of COPRAC assigned to monitor the Commission's meeting.

The Chair requested and Mr. Difuntorum provided an oral report summarizing the results of the 45-day general public comment solicitation authorized by the Board Committee. In addition, instructions were provided for viewing or downloading copies of the comments received from the Commission's Dropbox cloud storage site.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

The consent agenda was presented to the Commission, and upon motion made and seconded, the following consent agenda item was unanimously adopted:

a. Approval of Action Summary - Regular Meeting on May 29 & 30, 2015 (Open Session).

All members present voted yes.

III. ACTION

a. Report and Recommendation on Rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member)

The Chair recognized Mr. Rothschild who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted with the agenda was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-311 drafting team, the Commission hereby adopts the proposed amendments to Rule 1-311 [rule 5.3.1] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Eaton who voted no. Mr. Eaton submitted a written dissent to the recommendation to adopt the rule.

b. Report and Recommendation on Rule 2-100 (Communication With a Represented Party)

The Chair recognized Mr. Tuft who presented the report and recommendation of the drafting team. The report and recommendation included proposals for an amended rule 2-100 [proposed rule 4.2] and a new rule on communicating with an unrepresented person [proposed rule 4.3]. Following discussion, proposed rule 4.2 as submitted with the agenda was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 2-100 drafting team, the Commission hereby adopts the proposed amendments to Rule 2-100 [rule 4.2] of the Rules of Professional Conduct of the State Bar of California in the form attached to this action summary and made a part hereto.

All members present voted yes.

Regarding proposed rule 4.3, the Commission discussed the black letter and reached a tentative consensus on that language. For the proposed rule comments, the drafting team was asked to consider any input from Commission members, or any public comments received, and to present a recommendation for rule comments at the next regular meeting of the Commission.

c. Report and Recommendation on Rule 3-500 (Communication)

Matter not called for discussion.

d. Report and Recommendation on Rule 3-510 (Communication of Settlement Offer)

Matter not called for discussion.

CLOSED SESSION

There was no closed session.*

*Closed under Bus. & Prof. Code § 6026.5(a) to consult with counsel concerning pending or prospective litigation.

*Closed under Bus. & Prof. Code Sec. 6026.5(d) to consider a personnel matter.

**PROPOSED RULE 1-311 [5.3.1] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION ON JUNE 26, 2015**

Rule 1-311 [5.3.1] Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer

- (a) For purposes of this Rule:
- (1) “Employ” means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;
 - (2) “Member” means a member of the State Bar of California.
 - (3) “Involuntarily inactive member” means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code §§ 6007, 6203(d)(1), or California Rule of Court 9.31(d).
 - (4) “Resigned member” means a member who has resigned from the State Bar while disciplinary charges are pending.
 - (5) “Restricted lawyer” means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.
- (b) A lawyer shall not employ, associate in practice with, or assist a person the lawyer knows or reasonably should know is a restricted lawyer to perform the following on behalf of the lawyer’s client:
- (1) Render legal consultation or advice to the client;
 - (2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

- (3) Appear as a representative of the client at a deposition or other discovery matter;
 - (4) Negotiate or transact any matter for or on behalf of the client with third parties;
 - (5) Receive, disburse or otherwise handle the client's funds; or
 - (6) Engage in activities that constitute the practice of law.
- (c) A lawyer may employ, associate in practice with, or assist a restricted lawyer to perform research, drafting or clerical activities, including but not limited to:
- (1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;
 - (2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
 - (3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.
- (d) Prior to or at the time of employing, associating in practice with, or assisting a person the lawyer knows or reasonably should know is a restricted lawyer, the lawyer shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the restricted lawyer will not perform such activities. The lawyer shall serve similar written notice upon

each client on whose specific matter such person will work, prior to or at the time of employing, associating with, or assisting such person to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the lawyer's employment by the client.

- (e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist a restricted lawyer whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
- (f) When the lawyer no longer employs, associates in practice with, or assists the restricted lawyer, the lawyer shall promptly serve upon the State Bar written notice of the termination.

Comment

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See Rule 3-600 [1.13].)

**PROPOSED RULE 2-100 [4.2] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION ON JUNE 26, 2015**

Rule 2-100 [4.2]: Communication With a Represented Person

- (a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.
- (b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this Rule prohibits communications with:
 - (1) A current officer, director, partner, or managing agent of the organization;
or
 - (2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.
- (c) This Rule shall not prohibit:
 - (1) communications with a public official, board, committee, or body; or
 - (2) communications otherwise authorized by law or a court order.
- (d) In any communication with a represented person not prohibited by this Rule, the lawyer shall comply with the requirements of Rule 4.3.
- (e) For purposes of this Rule:

- (1) “Managing agent” means an employee, member, agent, or other constituent of an organization with substantial discretionary authority over decisions that determine organizational policy.
- (2) “Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

Comment

[1] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[2] “Subject of the representation,” “matter,” and “person” are not limited to a litigation context. This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[2A] [PLACEHOLDER] This Rule applies where the lawyer has actual knowledge that the person to be contacted is represented by another lawyer in the matter. Actual knowledge may be inferred from the circumstances.

[3] The prohibition against communicating “indirectly” with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent,

investigator or the lawyer's client. This Rule, however, does not prevent represented persons from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The Rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person in that matter.

[4] This Rule does not prohibit communications with a represented person concerning matters outside the representation. Similarly, a lawyer who knows that a person is being provided with limited scope representation is not prohibited from communicating with that person with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, Rules 3.35 – 3.37; 5.425 [Limited Scope Representation].)

[5] This Rule does not prohibit communications initiated by a represented person seeking advice or representation from an independent lawyer of the person's choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this Rule.

[7] This Rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a

result of the right to petition conferred by the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this Rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (e)(2) of this Rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this Rule when the lawyer knows the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person that would otherwise be subject to this Rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The Rule is not intended to preclude communications with represented persons in the course of such legitimate investigative activities as authorized by law. This Rule also is not intended to preclude communications with represented persons in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons whom the

government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.