

**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, August 14, 2015
(10:00 am – 4:30 pm)**

**State Bar of California
845 So. Figueroa Street
Room 2C-E, 2nd Floor
Los Angeles, CA 90017**

Members Present: Hon. Lee Edmon (Chair), Dean Zipser (Co- Vice-Chair); George Cardona, Danny Chou, Nanci Clinch, James Ham, Lee Harris, Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout, Mark Tuft.

Advisors Present: Wendy Chang, Hon. Richard Fybel, Edith Matthai.

Liaisons Present: Greg Fortescue (California Supreme Court).

State Bar Staff Present: Charles Murray (Office of Chief Trial Counsel), Randall Difuntorum (Office of Professional Competence), Gordon Grenier (State Bar Court), Mimi Lee (Office of Professional Competence), Erika Leighton (Office of General Counsel), Kevin Mohr (Consultant/Reporter), Andrew Tuft (by telephone, Office of Professional Competence).

Others Present: Yvonne Ascher (Trust & Estates Section Exec Comm), Diane Karpman (by telephone); Stan Lamport, Hon. Michael Marcus (LACBA), Teresa Schmid (LACBA), Peter Stern (Trust & Estates Section Exec Comm), and Neil Wertlieb (LACBA).

I. CHAIR'S REMARKS

The Chair requested and Mr. Difuntorum provided an oral report on the online posting of Commission open session action summaries, including proposed rule drafts. Mr. Difuntorum also reported that the meeting dates for 2016 have been revised and that an updated schedule will be distributed by staff and will note the changes.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

The consent agenda was presented to the Commission and 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 2-100 (Communication with a Represented Party).

The Chair noted that at the Commission's June 26, 2015 meeting two parts of this drafting team's report were voted upon: proposed Rule 4.2 (in its entirety); and proposed Rule 4.3 (black letter).

The Chair recognized Mr. Tuft who presented the report and recommendation of the drafting team on the proposed comments to Rule 4.3. Following discussion, the proposed comments submitted with the agenda were 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 proposed new Rule 4.3 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. Ham who abstained, and Mr. Harris, Mr. Kehr, and Ms. Langford who voted no.

b. Report Recommendation on Rule 3-500 (Communication).

The Chair recognized Mr. Harris who presented the report and recommendation of the drafting team. Following the presentation, the drafting team was asked to prepare a revised draft rule in accordance with the Commission's discussion.

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

The Chair recognized Mr. Kornberg 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 3-510 drafting team, the Commission hereby adopts the proposed amendments to Rule 3-510 [rule 1.4.1] 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. Chou who abstained.

The Chair clarified that the foregoing vote represented a Commission decision to retain the structure of the current California rules that assigns separate rule numbers to Rules 3-500 and Rule 3-510. There was no objection and this was deemed approved on unanimous consent.

d. Report and Recommendation on Rule 3-100 (Confidential Information of a Client).

The Chair recognized Mr. Zipser who presented the report and recommendation of the drafting team. The report addressed a proposed amended Rule 3-100 [1.6], a proposed new Rule 1.8.2, and the concept of a proposed new Rule 1.14. Following discussion, proposed amended Rule 3-100 [1.6] and proposed new Rule 1.8.2 rule, as submitted with the agenda, were amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 3-100 drafting team, the Commission hereby adopts the proposed amendments to Rule 3-100 [rule 1.6] 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. Cardona, Mr. Chou, Mr. Kehr, Mr. Kornberg and Mr. Martinez who voted no.

Upon motion made, seconded and unanimously adopted, it was

RESOLVED, that upon consideration of the report of the Rule 3-100 drafting team, the Commission hereby adopts proposed new Rule 1.8.2 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 the concept of a proposed new Rule 1.14, there was no objection to the drafting team's proposal to prepare a draft rule for consideration by the Commission.

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 NEW RULE 4.3 OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION ON AUGUST 14, 2015**

Rule 4.3 Communicating with an Unrepresented Person

- (a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.
- (b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

Comment

[1] This Rule is intended to protect unrepresented persons, whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows or reasonably should know that the interests of an unrepresented person are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer discloses that the lawyer represents an adverse party and not the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] [PLACEHOLDER] Paragraph (a) does not apply to lawful covert criminal, civil, or administrative investigations by government or private lawyers.

**PROPOSED RULE 3-510 [1.4.1] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION ON AUGUST 14, 2015**

Rule 3-510 [1.4.1] Communication of Settlement Offers

- (a) A lawyer shall promptly communicate to the lawyer's client:
 - (1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and
 - (2) All amounts, terms, and conditions of any written offer of settlement made to the client in all other matters.
- (b) As used in this Rule, "client" includes a person who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

Comment

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under Rule 1.4[*].

Note: [*] indicates that a reference to a specific subparagraph will be included after the referenced rule has been completed by the Commission.

**PROPOSED RULE 3-100 [1.6] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION ON AUGUST 14, 2015**

Rule 3-100 [1.6] Confidential Information of a Client

- (a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this Rule.
- (b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code § 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c).
- (c) Before revealing information protected by Business and Professions Code § 6068(e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable under the circumstances:
 - (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both (i) and (ii); and
 - (2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b).
- (d) In revealing information protected by Business and Professions Code § 6068(e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known to the lawyer at the time of the disclosure.
- (e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this Rule.

Comment

Duty of confidentiality.

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code § 6068(e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to

seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent, a lawyer must not reveal information protected by Business and Professions Code § 6068(e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality.

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal. Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these Rules, or other law.

Narrow exception to duty of confidentiality under this Rule.

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code § 6068(e)(1). Paragraph (b) is based on Business and Professions Code § 6068(e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code § 6068(e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by § 6068(e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

Lawyer not subject to discipline for revealing information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule.

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code § 6068(e)(1) as permitted under this Rule is not subject to discipline.

No duty to reveal information protected by Business and Professions Code § 6068(e)(1).

[5] Neither Business and Professions Code section § 6068(e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code § 6068(e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by § 6068(e)(1) as permitted under this Rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this Rule.

Whether to reveal information protected by Business and Professions Code § 6068(e) as permitted under paragraph (b).

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code § 6068(e)(1) as permitted by paragraph (b), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by § 6068(e)(1) are the following:

- (1) the amount of time that the lawyer has to make a decision about disclosure;
- (2) whether the client or a third party has made similar threats before and whether they have ever acted or attempted to act upon them;
- (3) whether the lawyer believes the lawyer's efforts to persuade the client or a third person not to engage in the criminal conduct have or have not been successful;
- (4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article 1 of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;
- (5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and
- (6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by § 6068(e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by § 6068(e)(1) without waiting until immediately before the harm is likely to occur.

Whether to counsel client or third person not to commit a criminal act reasonably likely to result in death of substantial bodily harm.

[7] Subparagraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code § 6068(e)(1), the lawyer must, if reasonable under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial bodily harm, including persuading the client to take action to prevent a third person from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by § 6068(e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action - such as by ceasing the client's own criminal act or by dissuading a third person from committing or continuing a criminal act before harm is caused - the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable under the circumstances, efforts to persuade the client or third person to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by § 6068(e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

Disclosure of information protected by Business and Professions Code § 6068(e)(1) must be no more than is reasonably necessary to prevent the criminal act.

[8] Paragraph (d) requires that disclosure of information protected by § 6068(e) as permitted by paragraph (b), when made, must be no more extensive than the lawyer reasonably believes necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons who the lawyer reasonably believes can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable

depends on the circumstances known to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

Informing client pursuant to subparagraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1).

[9] A lawyer is required to keep a client reasonably informed about significant developments regarding the employment or representation. Rule 1.4; Business and Professions Code § 6068(m). Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by § 6068(e)(1) as permitted in paragraph (b) only if it is reasonable to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this Rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

- (1) whether the client is an experienced user of legal services;
- (2) the frequency of the lawyer's contact with the client;
- (3) the nature and length of the professional relationship with the client;
- (4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;
- (5) the likelihood that the client's matter will involve information within paragraph (b);
- (6) the lawyer's belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an individual; and
- (7) the lawyer's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

Avoiding a chilling effect on the lawyer-client relationship.

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code § 6068(e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that

chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by § 6068(e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

Informing client that disclosure has been made; termination of the lawyer-client relationship.

[11] When a lawyer has revealed information protected by Business and Professions Code § 6068(e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation (see Rule 1.16(b) [3-700(B)]), unless the the client has given informed consent to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person from the risk of death or substantial bodily harm, the lawyer must withdraw from the representation. (See Rule 1.16 [3-700].)

Other consequences of the lawyer's disclosure.

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code § 6068(e)(1) as permitted by this Rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with Rule 3.7 [5-210]. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See Rules 1.7 [3-310] (Avoiding Representations of Adverse Interests) and 1.1 [3-110] (Failing To Act Competently).)

[13] *Other exceptions to confidentiality under California law.* This Rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code §6068(e)(1) recognized under California law.

**PROPOSED NEW RULE 1.8.2 OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION ON AUGUST 14, 2015**

Rule 1.8.2 Use of Current Client's Information

A lawyer shall not use a client's information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of the client unless the client gives informed consent, except as permitted by these Rules or the State Bar Act.

Comment

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code § 6068(e)(1) to the disadvantage of a current client.