

**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, September 25, 2015 (10:00 am – 4:30 pm)
Saturday, September 26, 2015 (9:00 am – 4:30 pm)**

**The LA Hotel Downtown
Pacific Salon I
333 South Figueroa Street
Los Angeles, CA 90071**

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

Advisors Present: Wendy Chang and Hon. Richard Fybel.

Liaisons Present: Greg Fortescue (California Supreme Court).

State Bar Staff Present: Allen Blumenthal (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), and Andrew Tuft (by telephone, Office of Professional Competence).

Others Present: Amy Bomse (COPRAC); Diane Karpman; Stan Lamport, Prof. Laurie Levenson (Innocence Project), Teresa Schmid (LACBA), Suzanne Spencer (by telephone, COPRAC), Mark Zahner (CDAA).

I. CHAIR'S REMARKS

The Chair requested and Mr. Difuntorum provided an update on the Commission's work plan and schedule of meetings. It was announced that the November meeting might be changed from a one-day meeting to a two-day meeting.

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 August 14, 2015 (Open Session).**

All members present voted yes.

III. ACTION

a. **Report and Recommendation on Rule 5-110 (Performing the Duty of Member in Government Service) (including ABA Model Rule 3.8 (Special Responsibilities of a Prosecutor))**

The Chair provided a brief introduction and welcomed visitors interested in this item

The Chair recognized Professor Levenson who spoke in favor of the recommendation of the drafting team for ALT1 of proposed paragraph (d). Professor Levenson identified ALT1 standard as consistent with Model Rule 3.8(d). Professor Levenson responded to questions posed by members of the Commission. The Chair thanked Professor Levenson for her presentation.

The Chair recognized Mark Zahner who spoke on behalf of the California District Attorneys Association (CDAA). Mr. Zahner conveyed CDAA's request that the Commission's consideration of this rule be postponed until the Commission's October 23, 2015 meeting in order to give CDAA an opportunity to study the Commission's proposal and submit comments to aid in the Commission's consideration of the drafting team's recommendation. In particular, Mr. Zahner suggested that input from CDAA and other prosecutors should be helpful to the Commission in deciding which of the drafting team's alternative versions (ALT1 and ALT2) of proposed paragraph (d) to recommend. Mr. Zahner responded to questions posed by members of the Commission. The Chair thanked Mr. Zahner for his presentation.

The Chair recognized Mr. Rothschild who presented the report and recommendation of the drafting team. In response to Mr. Zahner's request, Mr. Eaton indicated that he would be inclined to make a motion to table consideration until the October meeting. The Chair then invited discussion of the drafting team's proposed rule with the exception of the alternative versions of paragraph (d). The following consensus votes were taken with the understanding that consideration of the drafting team's motion to adopt the proposed rule in its entirety would be continued to the October meeting.

Paragraph (a), as modified during the discussion, was adopted (11 yes, 4 no, 0 abstain).

Paragraph (b), as modified during the discussion, was adopted (14 yes, 2 no, 0 abstain).

Paragraph (e)(3). A proposal to change "feasible" to "reasonable" failed (5 yes, 10 no, 0 abstain).

Paragraph (i). A proposal to change the drafting team's Comment [7] into a new paragraph (i) was adopted, with the understanding that the drafting team would propose specific language to be considered at the October meeting. (11 yes, 4 no, 0 abstain).

Comment [1]. A proposal to use the first two sentences of Model Rule 3.8 Comment [1] as the first comment in the Commission's proposed rule was adopted (12 yes, 2 no, 0 abstain).

No other proposals for modifying the drafting team's recommendation were made.

Upon motion made, seconded and adopted, it was

RESOLVED, that consideration of the report of the Rule 5-110 (3.8) drafting team is tabled until the Commission's October 23, 2015 meeting.

All members present voted yes with the exception of Judge Clopton, Mr. Kehr, Ms. Langford, Mr. Rothschild, Judge Stout, and Mr. Tuft, all of whom voted no.

In response to a question by the Chair, Mr. Zahner indicated that the CDAA would submit comments to the Commission by October 2, 2015. Mr. Rothschild indicated that any other interested persons should submit comments by October 9, 2015 to give the drafting team a reasonable amount of time to consider any such comments.

Discussion was tabled.

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

The Chair recognized Mr. Harris 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 3-500 drafting team, the Commission hereby adopts the proposed amendments to Rule 3-500 [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.

c. Report and Recommendation on Rule 3-110 (Failing to Act Competently) (including ABA Model Rules 1.1 (Competence), 1.3 (Diligence), 5.1 (Responsibilities a Partner or Supervisory Lawyer), 5.2 (Responsibilities of a Subordinate Lawyer) & 5.3 (Responsibilities Regarding Nonlawyer Assistance))

The Chair recognized Mr. Kehr who presented the report and recommendation of the drafting team. The recommendation included proposed amendments to the current California rule on lawyer competence (rule 3-110) and the following proposed new rules for which there are no direct California counterparts: proposed new rule 5.1 (re responsibilities of partners/supervisors); proposed new rule 5.2 (re responsibilities of subordinate lawyers); and proposed new rule 5.3 (re supervision of nonlawyer assistants). Following discussion, the proposed rules submitted with the agenda were amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 3-110 drafting team, the Commission hereby adopts the proposed amendments to Rule 3-110 [rule 1.1] 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. Ham and Mr. Tuft, who voted no.

Regarding the Commission's consideration of a lawyer's duty of diligence as a component of current rule 3-110, a consensus vote was taken that favored exploration of the concept of a diligence duty that would be distinct from the duty of competence. As discussed, this concept included both a possible standalone rule and a potential recommendation for a new separate paragraph on diligence within the structure of rule 3-110. The following Commission members volunteered to serve as a new drafting team assigned to prepare a proposal on this concept: Mr. Tuft (L), Mr. Cardona and Ms. Langford. It was understood that if the Commission adopts a separate duty on diligence, then proposed amended rule 3-110 [rule 1.1] may need to be reconsidered.

For proposed rule 5.1, consensus votes were taken on the black letter text that required conforming revisions to the proposed rule comments. The Chair asked the drafting team to make those changes prior to Commission action on the entire rule and the drafting team agreed to do so. Mr. Kehr indicated that he would be unable to attend the October meeting and asked that the continued discussion of rule 5.1 be set for the Commission's November meeting.

Upon motion made, seconded and unanimously adopted, it was

RESOLVED, that upon consideration of the report of the Rule 3-110 drafting team, the Commission hereby adopts the proposed new Rules 5.2 and 5.3 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.

- d. Report and Recommendation on Rule 1-310 (Forming a Partnership With a Non-Lawyer); Rule 1-320 (Financial Arrangements with Non-Lawyers); and Rule 1-600 (Limited Legal Service Programs) (including ABA Model Rule 5.4 (Professional Independence of a Lawyer))**

Matter not called for discussion.

- e. Report and Recommendation on Rule 2-200 (Financial Arrangements Among Lawyers)**

The Chair recognized Mr. Ham 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 2-200 drafting team, the Commission hereby adopts the proposed amendments to Rule 2-200 [rule 1.5.1] 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. Kornberg and Mr. Tuft who voted no, and Mr. Chou and Mr. Harris who abstained.

- f. Report and Recommendation on Rule 2-400 (Prohibited Discriminatory Conduct in a Law Practice)**

The Chair recognized Mr. Kehr who presented the report and recommendation of the drafting team. Judge Clopton presented an alternative proposal based upon the written comment submitted by the Commission on Access and Fairness. Following discussion, the Chair stated that the Commission's consideration of this matter will continue at the Commission's November meeting, with the understanding that the drafting team would study any similar rules in other jurisdictions and their enforcement mechanisms.

- g. Report and Recommendation on Rule 4-200 (Fees for Legal Services)**

The Chair recognized Mr. Martinez 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 unanimously adopted, it was

RESOLVED, that upon consideration of the report of the Rule 4-200 drafting team, the Commission hereby adopts the proposed amendments to Rule 4-200 [rule 1.5] 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.

CLOSED SESSION

*None**

*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 3-500 [1.4] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE SEPTEMBER 25TH & 26TH MEETING**

Rule 3-500 [1.4] Communication with Clients

- (a) A lawyer shall:
- (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent, as defined in [Rule 1.0.1(e),] is required by these Rules or the State Bar Act;
 - (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation; *[PLACEHOLDER for Consideration of Rule 1.2]*
 - (3) keep the client reasonably informed about significant developments relating to the representation; and
 - (4) promptly comply with the clients' reasonable request for information, including requests for documents, that are necessary to keep the client reasonably informed about the client's matter.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes that the client would be likely to react in a way that may cause imminent harm to the client or others.
- (d) A lawyer's obligation under this Rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or statutory limitation.

Comment

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Business and Professions Code § 6068(m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. This Rule does not prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation (see [Rule 1.16(e)(1)]).

[4] This Rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

**PROPOSED RULE 3-110 [1.1] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE SEPTEMBER 25TH & 26TH MEETING**

Rule 3-110 [1.1] Competence

- (a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.
- (b) For purposes of this Rule, “competence” in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.
- (c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.
- (d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances.

Comment

This Rule addresses only a lawyer's responsibility for his or her own professional competence. See Rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

**PROPOSED RULE 3-110 [5.2] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE SEPTEMBER 25TH & 26TH MEETING**

Rule 5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor's proposed resolution of the question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

**PROPOSED RULE 3-110 [5.3] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE SEPTEMBER 25TH & 26TH MEETING**

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules or the State Bar Act if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, whether or not an employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

**PROPOSED RULE 2-200 [1.5.1] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE SEPTEMBER 25TH & 26TH MEETING**

Rule 2-200 [1.5.1] Fee Divisions Among Lawyers

- (a) Lawyers who are not in the same law firm shall not divide a fee for legal services unless:
- (1) the lawyers enter into a written agreement to divide the fee;
 - (2) the client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that a division of fees will be made, (ii) the identity of the lawyers or law firms that are parties to the division, and (iii) the terms of the division; and
 - (3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.
- (b) This Rule does not apply to a division of fees pursuant to court order.
- [(c) Except as permitted in paragraph (a) of this Rule or Rule 1.17 [2-300], a lawyer shall not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client. A lawyer's offering of or giving a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of the lawyer or the lawyer's law firm shall not of itself violate this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.]¹

¹ At the 9/26/15 meeting session, Commission consensus to bracket current rule 2-200(B) pending a decision after study by the 1-400 Drafting Team whether the provision's concept more appropriately belongs in a rule corresponding to Model Rule 7.2, where RRC1 moved the concept.

**PROPOSED RULE 4-200 [1.5] OF THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE SEPTEMBER 25TH & 26TH MEETING**

Rule 4-200 [1.5] Fees for Legal Services

- (a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.
- (b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:
 - (1) whether the lawyer engaged in fraud or overreaching in negotiating or setting the fee;
 - (2) whether the lawyer has failed to disclose material facts;
 - (3) the amount of the fee in proportion to the value of the services performed;
 - (4) the relative sophistication of the lawyer and the client;
 - (5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (7) the amount involved and the results obtained;
 - (8) the time limitations imposed by the client or by the circumstances;
 - (9) the nature and length of the professional relationship with the client;
 - (10) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (11) whether the fee is fixed or contingent;
 - (12) the time and labor required;
 - (13) whether the client gave informed consent to the fee.
- (c) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

- (2) a contingent fee for representing a defendant in a criminal case.
- (d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as “earned on receipt” or “non-refundable,” or in similar terms, only if the fee is a true retainer and the client agrees in writing after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer’s availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.
- (e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services as long as the lawyer performs the agreed upon services. A flat fee is a fee which constitutes complete payment for legal fees to be performed in the future for a fixed sum regardless of the amount of work ultimately involved and which may be paid in whole or in part in advance of the lawyer providing those services.

Comment

Prohibited Contingent Fees

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

Payment of Fees in Advance of Services

[2] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. See Rule [1.16(e)(2)].

Division of Fee

[3] A division of fees among lawyers is governed by Rule 1.5.1 [2-200].