

**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, January 22, 2016 (10:00 am – 4:30 pm)
Saturday, January 23, 2016 (9:00 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), Jeffrey Bleich (Co-Vice-Chair), Dean Zipser (Co- Vice-Chair); George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Tobi Inlender (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Mark Tuft.

Members Absent: Lee Harris and Hon. Dean Stout.

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

Liaisons Present: Greg Fortescue (California Supreme Court) and Jason Lee (Board of Trustees).

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 (Office of Professional Competence).

Others Present: Yvonne Ascher, Chris Carico, Sharon Ngim, Stan Lamport, Teresa Schmid, Peter Stern.

I. CHAIR'S REMARKS

The Chair welcomed Tobi Inlender to her first meeting as a newly appointed public member of the Commission.

The Chair requested and Mr. Difuntorum provided an oral report on the Board of Trustee's meeting on November 19 & 20, 2015 and some administrative matters. Mr. Difuntorum reported that the Chair's presentation to the Board was well-received and that Board members, including the State Bar President, offered complementary and appreciative remarks for the good work of the Commission, especially the leadership of the Commission's Chair. Mr. Difuntorum also reported on the following administrative matters: (1) the meeting date change for the Commission's March meeting that was rescheduled to March 31st (Thursday) and April 1st (Friday); (2) the February 3rd public hearing and written public comment period (deadline February 29th) for the Commission's proposed amendments to Rules 5-110 and 5-220; and (3) the assignments for the February and March meetings.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

a. Approval of Action Summary - Regular Meeting on November 13 and 14, 2015 (Open Session).

The consent agenda was presented to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's November 13 and 14, 2015 meeting.

All members present voted yes.

III. ACTION

a. Report and Recommendation on Rule 1-650 (Limited Legal Services Programs) (ABA Model Rule 6.1 Pro Bono Publico Service)

The Chair recognized Mr. Martinez who, before deferring to Mr. Rothschild to make the presentation of the report and recommendation of the drafting team concerning proposed Rule 6.1, raised the policy issue of whether the Rules of Professional Conduct should include a voluntary pro bono rule that is not intended to be enforced through attorney discipline (hereinafter "aspirational rule").

Following discussion, the Commission considered a recommendation that an aspirational pro bono rule should not be adopted.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-650 drafting team, the Commission hereby adopts the position that an aspirational pro bono rule should not be included as a proposed rule in the Commission's comprehensive set of proposed new and amended Rules of Professional Conduct.

All members present voted yes with the exception of Mr. Rothschild and Mr. Tuft who voted no.

It was understood that the foregoing vote did not foreclose the consideration of other potential drafting team recommendations to respond to the recognized need for voluntary pro bono services in California. Among the options that the drafting team was encouraged to consider were: (1) adding a new comment to proposed amended rule 1-100 [1.0] (re purpose and function of the rules) emphasizing the importance of voluntary pro bono; (2) adding a new preamble to the rules on voluntary pro bono; (3) drafting a mandatory rule to be enforced through attorney discipline; or (4) including the text of an aspirational pro bono rule in the materials submitted to the Board but with a proviso explaining that although the Commission has rejected a Rule of Professional Conduct, the Board might consider other options for "codifying" an aspirational rule, such as a State Bar rule or as a Rule of Court.

b. Report and Recommendation on Rule 1-100(B) (Terminology)

The Chair recognized Mr. Chou who presented the report and recommendation of the drafting team. The Commission separately considered the black letter text and the comments. For the black letter text, the team's proposed definitions of the following three terms were separately considered by vote: "tribunal" (paragraph (m) of the proposed rule in the agenda materials); "informed consent" (paragraph (e) of the proposed rule in the agenda materials); and "firm" or "law firm" (paragraph (c) of the proposed rule in the agenda materials). Consideration of two definitions, "informed written consent" and "screened," and any associated comments, was deferred pending consideration of the conflicts rule, current rule 3-310, at the February Commission meeting. With respect to the comments, each individual proposed comment was separately considered. Following discussion the proposed rule submitted by the drafting team was amended.

Consideration of Black Letter Text:

The Chair welcomed visitor Stan Lamport who addressed the Commission on the proposed definition of the term "tribunal."

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts the definition of "tribunal" in proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr and Mr. Tuft who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts the definition of "informed consent" in proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Eaton, Ms. Inlender and Mr. Rothschild.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts the definition of "firm" and "law firm" in proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Eaton, Ms. Inlender and Mr. Rothschild.

A recommendation to adopt the drafting team's proposed definition of "firm" or "law firm" was considered but failed by a vote of 2 yes, 13 no, and 0 abstain. After this vote, there was no objection to the Chair's finding that there was a consensus to adopt a revised definition that includes the qualification "authorized to practice law" in describing organizations considered as a "firm" or "law firm." Hearing no objection, this was deemed a friendly amendment to the drafting team's recommendation.

After consideration of the foregoing, the Commission considered a recommendation to adopt the entire black letter text of the proposed rule, subject to revisiting the definitions of “informed written consent” and “screened” when the conflict of interest rules are considered.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts the black letter text of proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Mr. Kehr.

Consideration of Comments:

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts Comment [1] to proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Judge Clopton who voted no and Mr. Ham who abstained.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts Comment [2] to proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes with the exception of Judge Clopton who voted no.

There were no recommendations to adopt Comments [3] and [4] and the drafting team accepted the Commission’s rejection of these proposals as a friendly amendment to the team’s recommendation on the comments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts Comment [5] to proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

All members present voted yes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 1-100(B) drafting team, the Commission hereby adopts Comment [6] to proposed new rule 1.0.1 in the form attached to this action summary and made a part hereto.

Eight members present voted yes, with Mr. Cardona, Ms. Clinch, Judge Clopton, Ms. Croker, Mr. Eaton, Ms. Inlender, and Mr. Tuft voting no.

The Commission considered a recommendation to delete Comment [7] that was confirmed by a vote (15 yes, 1 no, 0 abstain).

The Commission considered Comments [8] and [9] and there was no objection to treat these comments as placeholders (marked as bracketed text) pending the Commission's consideration of the conflicts of interest rules.

c. Report and Recommendation on Rule 3-100 (Confidential Information of a Client) (ABA Model Rule 1.14 (Client With Diminished Capacity))

The Chair welcomed visitors Yvonne Ascher (Trust and Estates Section Executive Committee advisor), Chris Carico (Trust and Estates Section Executive Committee member) and Peter Stern (former member of the Trust and Estates Section Executive Committee). Ms. Ascher and Mr. Stern provided comments on the drafting team's proposed rule.

The Chair recognized Mr. Tuft who presented the report and recommendation of the drafting team. Following discussion the proposed rule submitted by the drafting team was amended with some consensus votes taken on alternate text options included by the drafting team in the proposed rule.

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 proposed new Rule 1.14 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. Martinez who voted no.

d. Report and Recommendation on Rule 1-400 (Advertising and Solicitation) (Including ABA Model Rules 7.1 – 7.5 re advertising, communications and direct contact)

The Chair recognized Ms. Langford who presented the report of the drafting team seeking Commission direction and guidance on fundamental options for amending the current rules on lawyer advertising and solicitation (e.g., whether to use Rule 1-400 or the Model Rules as the starting place for rule drafting purposes). Following discussion, there was no objection to the Chair's finding that there was Commission consensus for the drafting team to begin with the Model Rules rather than Rule 1-400. Regarding the lawyer advertising standards adopted by the Board of Trustees pursuant to Rule 1-400(E), it was understood that the Commission would remain open to considering any proposal or alternative proposals when the drafting team submits its recommended rules.

e. Report and Recommendation on Rule 2-300 (Sale or Purchase of a Law Practice of a Member, Living or Deceased) (including ABA Model Rule 1.17 (Sale of Law Practice))

The Chair recognized Mr. Kehr who presented the report and recommendation of the drafting team. Following discussion the proposed rule submitted by the drafting team was amended with separate consensus votes taken to revise paragraph (d) and Comment [1].

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the Rule 2-300 drafting team, the Commission hereby adopts proposed amended Rule 2-300 (1.17) 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 who abstained.

f. Report and Recommendation on Proposed Rule 1-120 (Assisting, Soliciting, or Inducing Violations) (including ABA Model Rule 8.4 (Misconduct)) & 2-400 (Prohibited Discriminatory Conduct in a Law Practice)

The Chair recognized Mr. Cardona who presented the report and recommendation of the drafting team for proposed Rules 8.4 (1-120) and 8.4.1 (2-400).

Consideration of Proposed Rule 8.4 (1-120):

Following discussion the proposed rule submitted by the drafting team was amended with paragraph (c) and Comments [5], [7], and [8] the subject of separate consensus votes.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team on Rules 1-120 and 2-400, the Commission hereby adopts proposed amended Rule 1-120 (8.4) 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. Martinez who voted no.

Consideration of Proposed Rule 8.4.1 (2-400):

Following discussion the proposed rule submitted by the drafting team was amended with paragraph (a), (b)(2), (c)(2), and (c)(4) the subject of separate consensus votes. Although consideration of paragraph (d) and the comments were carried forward to the Commission's next meeting, a vote to adopt paragraphs (a), (b), and (c) was taken.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team on Rules 1-120 and 2-400, the Commission hereby adopts paragraphs (a), (b) and (c) of proposed amended Rule 2-400 (8.4.1) 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. Ham who voted no.

Mr. Ham asked that the record reflect that his "no" vote was based on the considerations identified in the written comment from the State Bar Court and not because he is opposed to public protection against unlawful discrimination by lawyers.

g. Report and Recommendation on Rule 3-120 (Sexual Relations With Client) (including ABA Model Rule 1.8(j) re sexual relations with client)

Matter not called for discussion.

**h. Report and Recommendation on Rule 3-200 (Prohibited Objectives of Employment)
(including ABA Model Rule 3.1 (Meritorious Claims and Contentions))**

Matter not called for discussion.

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 1-100(B) [1.0.1] OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE JANUARY 22ND – 23RD MEETING

Rule 1.0.1 Terminology

- (a) “Belief” or “believes” means that the person involved actually supposes the fact in question to be true. A person’s belief may be inferred from circumstances.
- (b) [Reserved]
- (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) “Fraud” or “fraudulent” means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) “Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.
- [(e-1) “Informed written consent” means that the disclosures and the consent required by paragraph (e) must be in writing.]
- (f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
- (g) “Partner” means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) “Person” means a natural person or an organization.
- (h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- [(k) “Screened” means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate

under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.]

- [(l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.]
- (m) “Tribunal” means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code section 250. A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comment

Firm or Law Firm

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term “of counsel” implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as “of counsel” or by a similar term should be deemed a member of a law firm for purposes of these Rules will also depend on the specific facts. Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].

Fraud

[3] When the terms “fraud” or “fraudulent” are used in these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud would impede the purpose of certain rules to prevent fraud or avoid a lawyer assisting in the perpetration of a fraud, or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent conduct. The term “fraud” or “fraudulent” when used in these Rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

Informed Consent and Informed Written Consent

[4] The communication necessary to obtain informed consent or informed written consent will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

[Screened]

[[5] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.]

[[6] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.]

**PROPOSED RULE 1-120 [8.4] OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE JANUARY 22ND – 23RD MEETING

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate these Rules or the State Bar Act, knowingly assist, solicit or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that involves moral turpitude or that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving moral turpitude, dishonesty, fraud, deceit or reckless or intentional misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules, the State Bar Act, or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] A violation of this Rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code §§ 6101 et seq., or if the criminal act constitutes “other misconduct warranting discipline” as defined by California Supreme Court case law. See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].

[4] A lawyer may be disciplined under Business and Professions Code § 6106 for acts of gross negligence involving moral turpitude.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules and the State Bar Act.

[6] Paragraph (d) does not prohibit activities of a lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

**PROPOSED RULE 2-300 [1.17] OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA
ADOPTED BY THE COMMISSION AT THE JANUARY 22ND – 23RD MEETING**

Rule 1.17 Sale of a Law Practice

All or substantially all of the law practice of a lawyer, living or deceased, including goodwill, may be sold to another lawyer or law firm subject to all the following conditions:

- (a) Fees charged to clients shall not be increased solely by reason of the sale.
- (b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code § 6068(e)(1), then;
 - (1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code § 6180.5, then prior to the transfer;
 - (i) the purchaser shall cause a written notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by [Rule 1.16(d)]; and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and
 - (ii) the purchaser shall obtain the written consent of the client. If reasonable efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.
 - (2) in all other circumstances, not less than 90 days prior to the transfer;
 - (i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall cause a written notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by [Rule 1.16(d)]; and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the

purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

- (ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code § 6180.5, shall obtain the written consent of the client prior to the transfer. If reasonable efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.
- (c) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.
- (d) The purchaser shall comply with the applicable requirements of Rules 1.7 and 1.9.
- (e) Confidential information shall not be disclosed to a non-lawyer in connection with a sale under this Rule.
- (f) This Rule does not apply to the admission to or retirement from a law firm, retirement plans and similar arrangements, or sale of tangible assets of a law practice.

Comment

[1] The requirement that the sale be of “all or substantially all of the law practice of a lawyer” prohibits the sale of only a field or area of practice or the seller’s practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially all of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters sold in the transaction, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[2] The sale may not be financed by increases in fees charged to the client of the law practice. Existing arrangements between the seller and the client as to fees and scope of work must be honored by the purchaser. Any modifications of existing fee arrangements between the purchaser and the client after the sale must comply with these Rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by Rule 1.5.1. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by Rule 5.4(a).

**PROPOSED RULE 1.14 OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**
ADOPTED BY THE COMMISSION AT THE JANUARY 22ND – 23RD MEETING

Rule 1.14 Client with Diminished Capacity

- (a) Duties Owed Client with Diminished Capacity. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer-client relationship with the client.
- (b) Taking Protective Action on Behalf of a Client With Significantly Diminished Capacity.
 - (1) Except where the lawyer represents a minor, a client in a criminal matter, or a client who is the subject of a conservatorship proceeding or who has a guardian ad litem or other person legally entitled to act for the client, the lawyer may, but is not required to take protective action, provided the lawyer has obtained the client's consent as provided in paragraph (c) or (d), and the lawyer reasonably believes that:
 - (i) there is a significant risk that the client will suffer substantial physical, psychological, or financial harm unless protective action is taken,
 - (ii) the client has significantly diminished capacity such that the client is unable to understand and make adequately considered decisions regarding the potential harm, and
 - (iii) the client cannot adequately act in the client's own interest.
 - (2) Information relating to the client's diminished capacity is protected by Business and Professions Code § 6068(e)(1) and Rule 1.6. In taking protective action as authorized by this paragraph, the lawyer must:
 - (i) act in the client's best interest, and
 - (ii) disclose no more information than is reasonably necessary to protect the client from substantial physical, psychological, or financial harm, given the information known to the lawyer at the time of disclosure.
- (c) Obtaining Consent To Take Protective Action.
 - (1) Before taking protective action as authorized by paragraph (b), a lawyer must take all steps reasonably necessary to preserve client confidentiality and decision-making authority, which includes:

- (i) explaining to the client the need to take protective action, and
 - (ii) obtaining the client's consent to take the protective action.
- (2) In seeking the consent of a client to take protective action under paragraph (b), the lawyer may obtain the assistance of an appropriate person to assist the lawyer in communicating with the client. In obtaining such assistance, the lawyer must:
 - (i) act in the client's best interest;
 - (ii) disclose no more information than is reasonably necessary to protect the client from substantial physical, psychological, or financial harm, given the information known to the lawyer at the time of disclosure; and
 - (iii) take all reasonable steps to ensure that the information disclosed remains confidential.
- (d) Obtaining Advance Informed Written Consent to Take Protective Action. A lawyer may obtain a client's advance informed written consent to take protective action in the event the circumstances set forth in paragraphs (b)(1)(i) – (iii) should later occur. The advance consent must include the following written disclosures:
 - (1) the authorization to take protective action is valid only when the lawyer reasonably believes that the circumstances set forth in (b)(1)(i) – (iii) are present; and
 - (2) the client retains the right to revoke or modify the advance consent at any time.
- (e) Restrictions on Lawyer's Actions. This Rule does not authorize the lawyer to take:
 - (1) any action that is adverse to the client, including the filing of a conservatorship petition or other similar action;
 - (2) any action on behalf of a person other than the client that the lawyer would not be permitted to take under Rule 1.7 or 1.9; or
 - (3) any action that would violate the client's right to due process of law under the United States or California Constitutions, or the California Probate Code.
- (f) Definitions. For purposes of this Rule:
 - (1) "Protective action" means to take action to protect the client's interests by:

- (i) notifying an individual or organization that has the ability to take action to protect the client, or
 - (ii) seeking to have a guardian ad litem appointed.
- (g) Discipline. Neither a lawyer who takes protective action as authorized by this Rule, nor a lawyer who chooses not to take such action, is subject to discipline.

Comments

[1] The purpose of this Rule is to allow a lawyer to act competently on behalf of a client with significantly diminished capacity, to further the client's goals in the representation, and to protect the client's interests.

[2] A client with significantly diminished capacity, such that the client cannot make adequately considered decisions regarding potential harm, often has the ability to understand, deliberate upon, express preferences concerning, and reach conclusions about matters affecting the client's own well-being, including the ability to provide consent. (See Probate Code §§ 810 – 813.)

[3] In determining whether a client has significantly diminished capacity such that the client is unable to make adequately considered decisions, a lawyer may seek information or guidance from an appropriate diagnostician or other qualified medical service provider. In doing so, the lawyer may not reveal client confidential information without the client's authorization or except as otherwise permitted by these Rules. See Rule 1.6(b) and Business and Professions Code § 6068(e)(2).

[4] Where it is reasonably foreseeable that a client may suffer from significantly diminished capacity in the future such that the client will likely be unable to make adequately considered decisions, the lawyer may have an obligation to explain to the client the need to take measures to protect the client's interests, including using voluntary surrogate decision-making tools such as durable powers of attorney and seeking assistance from family members, support groups and professional services with the client's informed written consent. See Rule 1.4.

[5] In obtaining the assistance another person such as a trained professional to assist in communicating with and furthering the interests of the client pursuant to paragraph (c), the lawyer must look to the client, and not the other person, for authorization to take protective measures on the client's behalf. See Evidence Code §952. The lawyer must advise the person who assists the lawyer that the person is not authorized to disclose information protected by Business and Professions Code § 6068(e)(1) to any third person.

[6] This Rule does not apply in the case of a client who is (1) a minor, (2) involved in a criminal matter, (3) is the subject of a conservatorship; or (4) has a guardian or other person legally entitled to act for the client. The rights of such persons are regulated under other statutory schemes. See Family Code §3150; Welfare and Institutions Code §1368 et seq.; Lanterman-Petris-Short Act, Welfare and Institutions

Code Division 5, Part 1, §5000-5579; Probate Code, Division 4, Parts 1-8, §1400-3803; [Code Civ. Pro. §§ 372-376].