

AGENDA ITEM

DATE: May 29, 2012

TO: Members, Operations Committee

FROM: Robert Hawley, Deputy Executive Director
Randall Difuntorum, Director Professional Competence Programs

SUBJECT: Rules of Professional Conduct Proposed New and Amended,
Further Direction to Staff on the Comments to the Rules

EXECUTIVE SUMMARY

This item recommends that the Board of Trustees (“Board”) adopt a resolution providing additional direction to staff concerning the Supreme Court submission of the State Bar’s proposed new and amended Rules of Professional Conduct. The Board previously adopted the proposed rules and those rules include official comments as a key part of the rules. The original Board resolution adopting the proposed rules directs staff to transmit the rules to the Supreme Court with a request that they be “approved by the Court.” While a majority of states have rules which include comments approved by the state supreme court, not all states use this approach. A minority of states have rules that include comments but the comments portion is not approved by the state supreme court. Instead, the comments exist as rule drafters’ guidance published by the bar whenever the rules are published.

This memorandum seeks Board authorization for staff to provide information to the Court concerning the range of options available for handling the comments portion of the proposed rules.

BACKGROUND

The Board has the statutory responsibility for formulating and adopting amendments to the Rules of Professional Conduct.¹ The amendments adopted by the Board are submitted to the Supreme Court for approval and, upon approval, become binding

¹ Business and Professions Code section 6076 provides: "With the approval of the Supreme Court, the Board of Trustees may formulate and enforce rules of professional conduct for all members of the bar of this State."

disciplinary standards for all members of the State Bar.² Upon the recommendation of the Board Committee on Regulation and Admissions, a comprehensive set of proposed new and amended rules were adopted the Board by action taken on July 24, 2010 and September 22, 2010.

Since then, the State Bar has been working with Supreme Court staff to facilitate the most effective way for the Supreme Court and its staff to penetrate the large amount of data in the rules submission and effectively consider and act upon the rules. On July 20, 2011, the State Bar submitted an initial group of proposed Rules of Professional Conduct to the Supreme Court for consideration. This initial filing summarized six proposed rules (proposed Rule 1.0 [purpose and scope of the rules] and proposed Rules 7.1 – 7.5 [information about legal services]), and also provided the full text of all sixty-seven proposed rules. This three volume submission was nearly six hundred pages and the format used was the subject of a meeting with Supreme Court staff. After that meeting, a modified format was requested and on Oct. 28, 2011, the State Bar withdrew the initial submission to implement the requested modified format. The State Bar has continued its exchange with Supreme Court staff to further effectuate the Court's review of the rules. The Board action sought here is part of that process and following this action, staff will be able to proceed with the submission of the proposed rules to the Court in discrete groups, starting with proposed Rule 1.1 [competence].

Like the ABA Model Rules, the proposed rules include extensive comments that are a part of the rules. The current California rules include a comments component, designated as a rule's official "Discussion," but this commentary is not as extensive as the proposed rules or the ABA Model Rules.

In working on the submission of the proposed rules to the Supreme Court, the role of the comments as an integrated part of the rules was identified as an issue that warrants further consideration. Staff now requests Board authorization to provide information to the Court concerning the options available to the Court for handling the comments portion of the proposed rules.

ISSUE

Whether to authorize staff the flexibility to provide information to the Supreme Court concerning a range of options available to it for handling the comments portion of the proposed new and amended Rules of Professional Conduct.

DISCUSSION

While the inclusion of comments in the proposed rules is consistent with the structure of the current rules and the ABA Model Rules, not all states adopt comments. Among the

² Business and Professions Code section 6077, in part, provides: "The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar."

variations, there are states that: (1) do not have any comments at all; (2) include comments that are adopted by the state bar but not promulgated by the state supreme court; and (3) include comments as drafters notes (e.g., from a rule revision committee or staff) that are not adopted by the state bar or promulgated by the state supreme court.³

In adopting the proposed new and amended Rules of Professional Conduct, the Board resolution stated:

RESOLVED, following publication for comment and consideration of comments received, that the Board of Governors of the State Bar of California hereby adopts the proposed new and amended Rules of Professional Conduct of the State Bar of California, in the form attached to these minutes and made a part hereof, and hereby directs that said rules be transmitted by staff to the Supreme Court with a request that they be approved by the Court.

By its terms, this resolution directs staff to seek Supreme Court approval of each and every proposed rule and each comment to each rule as an integrated part of the rules. The modification of the board resolution sought here, maximizes staff's ability to fully advise the Supreme Court of its options regarding approving a proposed rule and rule comments removing the perceived constraint in the original resolution. Staff seeks here the ability to seek Court approval for a rule and its comments, but also explain that if the Court has a concern about one or more of the comments to a rule, the board intends that the Court use its authority to not approve comments or rules in a piece meal fashion.

It may well be that the Court may regard the information in one comment as useful guidance but not appropriate for Court approval as a part of a rule, while another comment may be deemed necessary to the rule's interpretation and appropriate for Court approval. In developing the format for submitting the proposed new rules to the Supreme Court for approval, staff recognizes that such flexibility may be needed to move from the approach of the current California rules that generally do not include lengthy comments to the proposed rules that are patterned on the ABA Model Rules and do have extensive comments.

This memorandum seeks Board authorization for staff to provide information to the Court concerning the range of options available for handling the comments portion of the proposed rules. On a rule-by-rule basis, these options might include a standard recommendation that a comment be approved by the Court as an integrated part of a rule but, in addition, these options might include treatment of a comment as State Bar guidance that accompanies the publication of the rules but which is not approved by the

³ According to the ABA Center for Professional Responsibility Policy Implementation Committee, as of May 23, 2011: forty states have adopted the Model Rules and the comments; six states have adopted the Model Rules with no comments; and four states have adopted the Models Rules and include comments, but the comments were not promulgated by the court as a part of the adopted rules. See ABA list posted at:

<http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>

Court. Having this flexibility enhances the ability of staff to advocate for Supreme Court approval of all of the proposed rules adopted by the Board. The comments to the proposed new rules are important but, as evidenced by the approach taken in a minority of states, the approval of comments by a promulgating court is not the only method for including comments.

FISCAL / PERSONNEL IMPACT:

None.

RULE AMENDMENTS:

This memorandum does not request adoption of any new proposed rule. Instead, it seeks Board authorization for staff to provide information to the Court concerning the range of options available to the Court for handling the comments portion of the Board's previously adopted new and amended Rules of Professional Conduct.

BOARD BOOK IMPACT:

None.

RECOMMENDATION

In accordance with the above discussion, staff recommends that the Board adopt a resolution providing additional direction to staff concerning the Supreme Court submission of the State Bar's proposed new and amended Rules of Professional Conduct. The Board Committee on Operations has the authority to act on behalf of the Board between regular meetings and in order to keep the momentum of the Rules filing moving forward, staff asks for this guidance now rather than wait for the next regular meeting of the Board, which is scheduled for July.

PROPOSED RESOLUTION:

Should the Operations Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Operations Committee, acting on behalf of the Board of Trustees between meetings, directs staff to transmit the previously adopted new and amended Rules of Professional Conduct of the State Bar of California to the Supreme Court with a request that they be approved by the Court but that staff is also authorized to present to the Court a range of options with regard to the comments portion of the proposed rules.