

AGENDA ITEM

123 November 7 2014

DATE: November 3, 2014

TO: Members, Board of Trustees
Members, Board Committee on Regulation and Discipline

FROM: Thomas Miller, General Counsel
Dina E. Goldman, Supervising Sr. Asst. General Counsel
Miriam Krinsky, Vice Chair, Committee on Regulation and Discipline

SUBJECT: Establishment and Appointments to Second Commission for the Revision of the Rules of Professional Conduct

EXECUTIVE SUMMARY

At the State Bar's request, the Supreme Court returned to the Bar for further consideration and revision proposed amendments and additions to the California Rules of Professional Conduct drafted by the Commission for the Revision of the Rules of Professional Conduct and submitted to the Court in 2012. With its order, the Clerk of the Court included recommendations to assist the Bar in its task of revising the Rules of Professional Conduct, including a request that the Bar establish a second Commission and appoint its members no later than November 26, 2014. This item requests Board approval to establish the commission, approve its charter, and delegate authority to the President to appoint members of the commission.

BACKGROUND

The Commission for the Revision of the Rules of Professional Conduct conducted a thorough study of the California Rules of Professional Conduct ("CRPC") and in 2010 submitted to the State Bar's Board of Trustees for approval a comprehensive set of amendments and additions to the Rules and Comments. State Bar and Supreme Court staff have worked together since 2012 to develop a useful format for presentation of the proposed CRPC amendments to the Court. This has included significant investments of Bar staff time in providing memoranda and support for the revised rules and comments and substantial investment of Court and Court staff time in reviewing the proposed new and amended provisions. After reviewing some of the proposed amended rules and comments, the Supreme Court, at the Bar's request,¹ returned the proposed CRPC to

¹ Feedback from Supreme Court staff to State Bar staff during the years of briefing rule change submissions identified numerous issues affecting multiple rules that could not be resolved with the

the Bar to create a new revision of the rules through a new and refocused process. Both the Bar and the Court agreed that the rule revision process could be improved and the ultimate product could be enhanced if the State Bar were to undertake a renewed consideration of amendments and revisions to the CRPC within a set time frame.

With the return of the proposed CRPC, the Supreme Court communicated a set of recommendations to guide the Bar in its task of revising the CRPC. Specifically, in a letter dated September 19, 2014 from the Clerk of the Court (“the Court’s letter” which is attached as Attachment 1)², it was recommended that the Bar establish a second Commission for Revision of the Rules of Professional Conduct (“second Commission”) and appoint its members no later than November 26, 2014. The Court’s letter requested that the Bar consult with Court staff regarding the recommended size and composition of the second Commission, and indicated that the Court plans to appoint a non-voting member from Court staff to assist the Commission. The Court’s letter also recommended parameters for a new charter for the second Commission. Finally, the Court’s letter stated that the second Commission should complete its work and submit the revised CRPC to the Court for final consideration no later than March 31, 2017.

DISCUSSION

Charter of Second Commission

The Court’s letter suggested that, in developing the charge for the second Commission, the Bar should be guided by its mission of public protection and the four policy considerations that appeared in the first Commission’s Charter. These policy considerations are as follows:

- “1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;
- 2) Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;
- 3) Promote confidence in the legal profession and the administration of justice; and
- 4) Eliminate and avoid unnecessary difference between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.”

The Court’s letter “strongly urge[d] that the second Commission begin with the current CRPC and focus on revisions that are necessary to address developments in the law, and that eliminate, where possible, any unnecessary differences between California’s

available information. The State Bar was encouraged to revisit the project before filing further rule changes for consideration, and President Luis Rodriguez agreed.

² The letter documenting the Bar’s request and the Supreme Court’s order are also attached as part of Attachment 1.

rules and those used by a preponderance of the states.” The letter also stressed that the proposed rules should adhere to the historical purpose of the CRPC to regulate the professional conduct of members of the Bar and thus should remain a set of minimum discipline standards. The letter also stated that while the second Commission may be “guided by” the ABA’s Model Rules of Professional Conduct where appropriate, it should “avoid incorporating the purely aspirational or ethical considerations that are present in the Model Rules and Comments.” Lastly, the letter stated that the CRPC should stand on their own and “[c]omments to the proposed rules should be used sparingly and only to elucidate and not to expand upon the rules themselves.”

A proposed charter for the second Commission is attached as Attachment 2.

Appointments to the Second Commission

The Supreme Court has requested that the second Commission be created and appointments to it made by November 26, 2014. In order to meet this deadline, the President has requested that the Board delegate appointment authority to him within specified parameters set by the Board.

Appointment authority to special committees and commissions of the State Bar lies with the Board of Trustees. The State Bar Act gives the Board of Trustees authority to “appoint such committees ... as it deems necessary or proper” to carry out its work. (Cal. Bus. & Prof. Code § 6029.) All State Bar officers, agents, committees, commissions, and other entities have only the powers, duties, and authority delegated by the Board and are subject to its supervision and control. (Cal. Bus. & Prof. Code § 6024; State Bar Rule 6.20.) For committees of the Board other than the standing committees, the Board in May 2010 delegated authority to the President to appoint any ad hoc committee, special committee, task force or other working group of the board, subject to approval by the Board. (Board Agenda Item and Minutes, 144 May 15 2010; Board Book tab 9, art. 1 sec. 3(b).) The policy specifies that such ad hoc committees, task forces, or working groups have a short term, not to exceed one board year (i.e., the period between creation and the next annual meeting of the State Bar). The second Commission is not subject to this Board policy since it is not a committee of the Board and will have a term that exceeds one Board year.

The Board generally makes appointments to State Bar committees and commissions, subject to criteria established under board resolutions. (See Board Book tab 15, arts. 1-4.) The Board’s appointments are based on a review of appointment applications that are vetted through the Nomination and Appointments Committee. (See Board Book tab 15, art. 1, §§ 7-8.) Since by necessity the appointments to the second Commission will require an expedited process, the President has requested that the Board suspend and waive its general procedure and delegate authority to the President to appoint members of the second Commission, subject to parameters set forth by the Board, e.g., that the appointments be made generally subject to the criteria that appear in the Board’s appointment policies (See Board Book tab 15, art. 2.), and that the President discuss the list of potential candidates with Court staff before making appointments.

It is recommended that the second Commission have a membership not to exceed 12 and be comprised of members with diverse and also useful applicable professional expertise; the President may wish to consider, for example, practitioners, current or former judicial officers, academicians, former COPRAC members, and public members.

ISSUE

Should the Board establish a second Commission for Revision of the Rules of Professional Conduct, adopt a charter for the Commission, and delegate appointment authority to the President to appoint the membership of the Commission?

FISCAL / PERSONNEL IMPACT:

Staff time, administrative costs and expense reimbursements related to meetings will result in some fiscal impact, the exact amount of which is unknown at this time.

RULE AMENDMENTS:

N/A

BOARD BOOK IMPACT:

N/A

RECOMMENDATION

It is recommended that the Regulation and Discipline Committee recommend that the Board establish a second Commission for Revision of the Rules of Professional Conduct and adopt a charter for the Commission. In addition, the President has requested that the Board delegate appointment authority to the President to appoint the membership of the Commission within specified parameters established by the Board.

PROPOSED REGULATION AND DISCIPLINE COMMITTEE RESOLUTION:

Should the Regulation and Discipline Committee agree with the recommendation, the following resolutions would be in order:

RESOLVED, that the Regulation and Discipline Committee hereby recommends that the Board of Trustees establish a second Commission for Revision of the Rules of Professional Conduct; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby recommends that the Board of Trustees adopt a charter for the Commission in the form attached hereto as Attachment 2; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby recommends that the Board of Trustees suspend and waive the procedures for appointment of State Bar committees and commissions and delegate authority to the President to appoint the membership of the Committee, not to exceed 12 members; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee hereby recommends that the Board of Trustees set the following parameters for the President's appointments: that the appointments be made generally subject to the criteria that appear in the Board's appointment policies; that the President appoint members with diverse but applicable professional expertise and consider, for example, practitioners, current or former judicial officers, academicians, former COPRAC members, and public members; and that the President discuss the list of potential candidates with Court staff prior to finalizing the appointments.

PROPOSED BOARD OF TRUSTEES RESOLUTION:

Should the Board concur with the recommendations of the Committee on Regulation and Discipline, the following resolutions would be in order:

RESOLVED, that upon recommendation of the Committee on Regulation and Discipline, the Board of Trustees hereby establishes a second Commission for Revision of the Rules of Professional Conduct; and it is

FURTHER RESOLVED, that upon recommendation of the Committee on Regulation and Discipline, the Board of Trustees hereby adopts a charter for the Commission in the form attached hereto as Attachment 2; and it is

FURTHER RESOLVED, that upon recommendation of the Committee on Regulation and Discipline, the Board of Trustees hereby suspends and waives the procedures for appointment of State Bar committees and commissions and delegates authority to the President to appoint the membership of the Committee, not to exceed 12 members; and it is

FURTHER RESOLVED, that upon recommendation of the Committee on Regulation and Discipline, the Board of Trustees hereby sets the following parameters for the President's appointments: that the appointments be made generally subject to the criteria that appear in the Board's appointment policies; that the President appoint members with diverse but applicable professional expertise, and consider, for example, practitioners, current or former judicial officers, academicians, former COPRAC members, and public members; and that the President discuss the list of potential candidates with Court staff prior to finalizing the appointments.