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**SECOND COMMISSION FOR THE REVISION OF
THE RULES OF PROFESSIONAL CONDUCT
(TENTATIVE)**

2015 SCHEDULE OF MEETINGS

Friday, March 27, 2015 (San Francisco)	
Friday and Saturday, May 29 & 30, 2015 (Los Angeles)	
June 26, 2015 (San Francisco)	
August 14, 2015 (Los Angeles)	
Friday and Saturday, September 25 & 26, 2015 (Los Angeles)	
October 23, 2015 (San Francisco)	
November 13, 2015 (Los Angeles)	
<u>Board of Trustees Meeting Dates</u> May 7-8, 2015 (SF) July 23-24, 2015 (LA) October 8-11, 2015 (Anaheim - Annual Meeting) November 19-20, 2015 (SF)	<u>Ethics Symposium (San Diego)</u> April 25 <u>Solo & Small Firm Summit (Newport Beach, CA)</u> June 18-20 <u>State Bar Annual Meeting (Anaheim, CA)</u> October 8-11

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Orientation Meeting (SF – Friday, 3/27/15)

- Introductions
- Key Administrative Considerations
- Commission’s Work-Plan

Meeting 1 (LA – Friday, 5/29/15) [Day 1 of 2 Day Meeting]

- **Rule 1-100** – **Rules of Professional Conduct, in General (long text)**
[Martinez (L), Kornberg, Chou, Stout]
 - (1) Whether to update existing references to the use of rules in non-disciplinary settings (e.g., to address whether a violation of a rule may be considered as evidence of a breach of a civil standard of care).
 - (2) Whether to revise the long-arm/choice of law language (stating the extraterritorial reach of rules to State Bar member conduct occurring outside of California) to be consistent with language used by other jurisdictions (compare ABA MR 8.5(a) [long arm] and (b) [choice of law]).
 - (3) Whether to recommend a new separate Terminology Rule (similar to the [CA Code of Judicial Ethics](#) terminology section) and, if so, which words and phrases should be included and what should be the respective definitions for each of them.
- **Rule 1-110** – **Disciplinary Authority of the State Bar (short text)**
[Eaton (L), Ham, Tuft]
 - (1) Whether to revise the reference to “conditions” of discipline to more broadly refer to “the terms and conditions” of discipline.
 - (2) Whether the more specific phrase “any agreement made in lieu of discipline, disciplinary probation, and public or private reprovls” should be substituted for the existing language that refers to “public or private reprovls or other discipline administered by the State Bar.”
- **Rule 1-200** – **False Statement Regarding Admission to the State Bar (short text)**
[Clinch (L), Kehr, Peters]
 - (1) Whether the rule should clarify that there are two types of conduct prohibited by the rule:
 - (i) a Bar applicant’s false statements in connection with the applicant’s own admission process; and
 - (ii) a lawyer’s false statements made in connection with another person’s application for admission.
 - (2) Whether the rule should clarify that “admission” includes reinstatement proceedings and applications for special admission (e.g., pro hac vice, registered in-house counsel, etc. . .).

Meeting 2 (LA – Saturday, 5/30/15) [Day 2 of 2 Day Meeting]

- **Rule 1-311** – **Employment of Disbarred, Suspended, Resigned, or Involuntary Inactive Member (long text)**
[Rothschild (L), Brown, Ham]
 - (1) Whether the rule should clarify the confidential or public record status of the notices that are required to be submitted to the State Bar when associating, or terminating an association, with a disbarred, suspended, resigned, or involuntary inactive member.

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- **Rule 1-120 – Assisting, Soliciting, or Inducing Violations (short text)**
[Cardona (L), Langford]
 - (1) Whether a related new rule governing “attempts” to violate the rules should be recommended for adoption by the Board (compare ABA MR 8.4(a)).
 - (2) Whether a related new rule governing a lawyer’s permissive or mandatory duty to report known violations of the rules should be recommended for adoption by the Board (compare ABA MR 8.3).
- **Rule 1-300 – Unauthorized Practice of Law (short text)**
[Tuft (L), Bleich, Clopton]
 - (1) Whether the rule should be revised to add references to case law that addresses conduct constituting the unauthorized practice of law in California (see, *Birbrower Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 [70 Cal.Rptr.2d 304]).
- **Rule 1-310 – Forming a Partnership With a Non-Lawyer (short text)**
[Harris (L), Kehr]
 - (1) Whether the reference to the formation of a “partnership” should be changed to a broader reference to the formation of a “partnership or other organization.”

Meeting 3 (SF – Friday, 6/26/15)

- **Rule 2-100 – Communications With a Represented Party (potential controversy; long text)**
[Zipser (L), Cardona, Chou, Martinez, Peters, Tuft]
 - (1) Whether the protection against ex parte contact provided by the rule should continue to extend to a “party” represented by counsel or be expanded to any “person” represented by counsel (put another way, if a witness in a criminal proceeding has retained counsel in connection with the witness’ participation in the criminal proceeding, then must the prosecutor and public defender obtain the permission of the witness’s counsel before engaging in any communications with the witness?). (See *In the Matter of Dale* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798 and compare MR 4.2.)
 - (2) Whether there should be any change to the current exception that permits a lawyer to contact a represented public officer, board, committee or body without first obtaining the permission of the lawyer representing the public officer or body.
 - (3) Whether the rule should clarify which person(s) in a corporation or other organization setting are entitled to the protection afforded by the rule (e.g., how far does this extend beyond the control group? and what about former officers or employees?).
 - (4) Whether a related new rule governing contact with a party/person who is not represented by counsel should be recommended for adoption by the Board (compare ABA MR 4.3).
- **Rule 3-500 – Communication (short text)**
[Harris (L), Clinch, Kehr]
 - (1) Whether the rule should clarify that the duties imposed by the rule are not intended to affect the work product doctrine.
 - (2) Whether to revise the rule to allow a lawyer to give a client access to documents as a means of responding to a client’s request for copies of documents.

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(3) Whether to revise the rule to clarify that providing the client with electronic copies of documents complies with the rule.

- **Rule 3-510 – Communication of Settlement Offer (short text)**

[Kornberg (L), Brown, Langford]

(1) Whether to revise the rule to require that a lawyer’s communication of a settlement offer be transmitted in writing and that the lawyer retain a copy of that writing to be made available to the State Bar in the event of a disciplinary investigation of the lawyer involving the issue of the lawyer’s communication of the settlement offer.

Meeting 4 (LA – Friday, 8/14/15)

- **Rule 3-100 – Confidential Information of a Client (potential controversy; long text)**

[Tuft (L), Brown, Harris, Stout, Zipser]

(1) Whether to revise the rule to permit, but not require, a lawyer to disclose confidential information when necessary to protect the interests of a client laboring under a diminished capacity due to age, infirmity, or other cause.

(2) Whether to revise the rule to state an exception to the duty of confidentiality that allows a lawyer to secure legal advice about the lawyer’s compliance with professional obligations. (See *Fox Searchlight Pictures, Inc., v. Paladino* (2001) 89 Cal.App.4th 294 [106 Cal.Rptr.2d 906], and compare MR 1.6(b)(4).)

(3) Whether to revise the rule to state an exception to the duty of confidentiality that allows a lawyer to establish a claim or defense in a controversy with a client arising from that client’s representation. (Compare CA Evid. Code § 958.)

(4) Whether to revise the rule to state an exception to the duty of confidentiality allowing a lawyer to comply with a lawful order of a court that would require the lawyer’s revelation of confidential information. (Compare CA Bus. & Prof. Code § 6103.)

(5) Whether a related new rule governing a lawyer’s “use,” as opposed to disclosure, of confidential information should be recommended for adoption by the Board. (Compare ABA MR 1.8(b).)

(6) Whether a related new rule specifically addressing the confidentiality of information provided to a lawyer by a prospective client should be recommended for adoption by the Board. (Compare State Bar Formal Ethics Opn. 2003-161 and ABA MR 1.18.)

(7) Whether to revise the rule to require that when a lawyer seeks a client’s informed consent to reveal confidential information that the consent be in writing and that the lawyer retain a copy of that writing to be made available to the State Bar in the event of a disciplinary investigation of the lawyer involving the issue of that revelation of confidential information.

- **Rule 3-110 – Failing to Act Competently (potential controversy; short text)**

[Kehr (L), Clopton, Kornberg, Peters, Rothschild]

(1) Whether the rule should be revised to delete the longstanding California standard prohibiting intentional, reckless or repeated acts of incompetence and substitute a new standard which states affirmatively that a lawyer must provide competent representation to a client. (See *Lewis v. State Bar* (1981) 28 Cal.3d 683, 688 [170 Cal.Rptr. 634].) (Compare ABA MR 1.1.)

(2) Whether the concept of diligence should be separated from the competence rule and set forth as a new standalone rule. (Compare ABA MR 1.3.)

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(3) Whether to retain a lawyer's duty of supervise as a concept subsumed within competence or recommend adoption of new a standalone rule(s) on supervision. (Compare ABA MR 5.1, 5.2 and 5.3; see rule 3-110, Discussion.)

(4) Whether the rule should be revised to address to what extent, if any, the duty of competence includes a lawyer's knowledge and understanding of modern technology used in the practice of law, such as "cloud computing." (See [State Bar Formal Op. No. 2010-179](#). See also ABA MR 1.1, Comment [8].)

Meeting 5 (LA – Friday, 9/25/15 + Saturday, 9/26/15 [Review Meetings 1-5])

- **Rule 4-200 – Fees for Legal Services (potential controversy; long text)**

[Martinez (L), Brown, Clinch, Eaton]

(1) Whether the rule should be revised to delete the longstanding California standard prohibiting unconscionable fees and substitute a new standard that prohibits unreasonable fees. (See *Herrscher v. State Bar* (1934) 4 Cal.2d 399, 402.) (Compare ABA MR 1.5.)

(2) Whether the scope of the rule should be expanded to cover expenses as well as fees that are billed to a client. (Compare ABA MR 1.5.)

(3) Whether the rule should be revised to impose special requirements for the charging of a fee paid in advance including, for example, arrangements for a flat fee paid in advance or a "true retainer fee."

(4) Whether the rule should be revised to specifically prohibit: a contingent fee for representing a defendant in a criminal matter; and/or any fee in a family law matter where payment is contingent upon the securing of a dissolution/nullity of marriage or upon the amount of support payments.

(5) Whether the rule should be revised to impose requirements on a lawyer's modification of a fee arrangement with an existing client.

- **Rule 1-320 – Financial Arrangements with Non-Lawyers (long text)**

[Tuft (L), Chou, Rothschild]

(1) Whether the reference to a person who is not a lawyer should be revised to include an organization that is not authorized to practice law.

(2) Whether the rule should be revised to address a lawyer's payment of court-awarded fees to a nonprofit organization the employed the lawyer in the matter.

- **Rule 2-200 – Financial Arrangements Among Lawyers (short text)**

[Ham (L), Eaton, Kehr]

(1) Whether the existing requirement for obtaining written client consent should be revised to specify that the consent must be obtained at the time that the lawyers in different firms enter into their agreement to divide a fee. (See *Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 838 [17 Cal.Rptr.3d 486].)

(2) Whether the rule should be revised to require that any fee split agreement among lawyers in different firms must be an agreement in writing.

(3) Whether an exemption for court awarded fees should be added to the rule.

(4) Whether the rule should be revised to require that copies of the written fee split agreement and the written client consent be retained by the lawyers who are parties to the fee split and that the copies be made available to the State Bar in the event of a disciplinary investigation of the lawyer involving the fee split agreement.

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Meeting 6 (SF – Friday, 10/23/15)

- **Rule 1-400 – Advertising and Solicitation (long text)**

[Langford (L), Brown, Kornberg, Tuft]

(1) Whether the rule should retain the existing California definitional approach (e.g., defining a “communication” and a “solicitation” and imposing pertinent prohibitions and requirements for each of these categories of attorney commercial speech) or abandon it in favor of a new concept. (Compare the [New York lawyer advertising rules](#) [<https://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>].) (See also, ABA MR 7.1 through 7.5.)

(2) Regardless of whether the existing approach is changed, should the rule be updated to clarify the rule’s applicability to modern technology concepts by specifically addressing, as examples, the following: “a domain name,” “Internet web page or web site,” “e-mail, other material sent or posted by electronic transmission,” or “real-time electronic communication.”

(3) Whether the rule should be revised to delete (or modify) the existing requirement to retain copies of lawyer advertisements for two years. (Compare CA Bus. & Prof. Code § 6159.1 that states a one year retention requirement.)

(4) Whether the existing provisions governing/prohibiting compensation paid to lawyers and non-lawyers for client referrals should be included in the advertising rule. (See [Rules 1-320\(B\)](#) and [2-200\(B\)](#).)

- **Rule 1-500 – Agreements Restricting a Member’s Practice (short text)**

[Harris (L), Bleich, Cardona, Ham]

(1) Whether the rule should be amended to permit an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm for a limited time in a limited geographical area, consistent with the California Supreme Court’s decision in *Howard v. Babcock* (1993) 6 Cal.4th 409 [25 Cal.Rptr.2d 80].

(2) Whether the rule should be amended to identify agreements that may have the effect of restricting practice but do not violate the rule (e.g., a typical confidential settlement agreement).

- **Rule 2-400 – Prohibited Discriminatory Conduct in a Law Practice (potential controversy; long text)**

[Kehr (L), Chou, Rothschild]

(1) Whether the rule should be amended to clarify that the prohibition on discriminatory conduct applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice.

(2) Whether a related new rule generally governing anti-bias speech/conduct by lawyers should be recommended for adoption by the Board. (See the former prohibition against “offensive personality” that was found to be unconstitutionally vague in *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110.) (See also MR 8.4(d) prohibiting conduct prejudicial to the administration of justice.)

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Meeting 7 (LA – Friday, 11/13/15)

- **Rule 1-600** – Legal Service Programs (short text)
[Rothschild (L), Clinch, Zipser]
 - (1) Whether the rule should be amended to clarify that the concept of a “lawyer *participating* in a nongovernmental program . . .” means that the lawyer “practices with, or in the form of, a nonprofit legal aid, mutual benefit or advocacy group.”
 - (2) Whether the rule should be amended to clarify that aiding, as well as allowing, the unlawful practice of law is prohibited.
 - (3) Whether a related new rule governing a lawyer’s service as a director, officer or member of legal services organization should be recommended for adoption by the Board. (See ABA MR 6.3.)
 - (4) Whether a related new rule(s) governing a lawyer’s service as a director, officer or member of legal services organization should be recommended for adoption by the Board. (See ABA MR 6.3 and 6.4.)
- **Rule 1-650** – Limited Legal Services Programs (long text)
[Martinez (L), Harris, Rothschild]
 - (1) Whether the rule should be amended to state that when a conflict is identified arising from a lawyer’s representation of a legal services client and a client represented by the lawyer’s firm, the lawyer who participated in the legal service program should be screened from the firm’s representation of the firm’s client who has interests adverse to the legal services client.
- **Rule 1-700** – Member as Candidate for Judicial Office (short text)
[Stout (L), Clopton, Tuft]
 - (1) Whether the rule should be amended to prohibit a lawyer’s statement of fact that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
 - (2) Whether the rule should be amended to clarify that a lawyer commences to become an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority and that the duty to comply with the rule ends when the lawyer advises the appointing authority of the withdrawal of the lawyer’s application.
- **Rule 1-710** – Member as Temporary Judge, Referee, or Court-Appointed Arbitrator (short text)
[Clopton (L), Eaton, Stout]
 - (1) Whether the rule should be amended to clarify that a lawyer must comply with applicable portions of the Code of Judicial Ethics while acting in a “quasi-judicial” capacity pursuant to an order or appointment by a court.

Meeting 8 & 9 (Two-Day Meeting to be Scheduled for January 2016)

- **Rule 2-300** – Sale or Purchase of a Law Practice of a Member, Living or Deceased (long text)
[Kehr (L), Brown, Martinez]
 - (1) Whether the rule should be amended to delete the requirement that a lawyer’s entire practice must be sold and instead expressly permit a partial sale of a substantive area of a lawyer’s

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practice (for example, a sale in which a lawyer transfers the lawyer's estate planning practice to a buyer, but retains all civil litigation cases). (See ABA MR 1.17.)

(2) Whether the rule should be amended to delete the requirement that a lawyer's entire practice must be sold and instead expressly permit a partial sale of a geographic area of a lawyer's practice (for example, a sale in which a litigator transfers all of the cases pending or to be filed in a court in northern California but retains cases pending or to be filed in southern California). (See ABA MR 1.17.)

(3) Whether the rule should be amended to require that unless the scope of the work is narrowed or expanded with the clients' informed consent, the purchaser assumes the seller's obligations under existing client agreements regarding fees and the scope of work.

(4) Whether the rule should be amended to clarify that a selling "lawyer" includes the personal representative of the estate of a deceased lawyer, the trustee of a trust of which a law practice is an asset, an attorney in fact under a lawyer's durable power of attorney, a conservator of the estate of a lawyer, or a lawyer appointed to act for the seller pursuant to Business and Professions Code sections 6180, 6185 and 6190.4.

(5) Whether the rule should be amended to clarify that the requirement that the lawyer seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

- **Rule 4-210 – Payment of Personal or Business Expenses Incurred by or for a Client (short text)**

[Rothschild (L), Kornberg, Peters]

(1) Whether the rule should be amended to expressly permit a lawyer to pay court costs and reasonable expenses of litigation on behalf of an indigent or pro bono client in a matter in which the lawyer represents the client.

(2) Whether the rule should be amended to clarify that it is not a violation for a lawyer to offer or give a gift to a current client, provided that anything given is not offered in consideration of any promise, agreement, or understanding that the lawyer would make a gift to the client.

(3) Whether the rule should be amended to clarify that while a lawyer is prohibited from lending money, or offering, promising or agreeing to lend money, to a prospective client, a lawyer is permitted to lend money to a client after the lawyer is retained, so long as there is compliance with other applicable rules, such as the rule governing business transactions with a client.

(4) Whether the rule should be amended to clarify that as used in the rule the term "costs" is not limited to those that are taxable or recoverable under an applicable statute or rule of court.

- **Rule 4-300 – Purchasing Property at a Foreclosure of Sale Subject to Judicial Review (short text)**

[Langford (L), Clinch, Martinez, Stout]

(1) Whether the rule should be amended to state that it is not a violation for a lawyer to participate in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885; but that such transactions remain subject to other applicable rules, such as the rules governing business transactions with a client and the representation of adverse interests.

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- **Rule 4-400 – Gifts From Client (short text)**

[Ham (L), Cardona, Tuft]

- (1) Whether the rule should be amended to prohibit a lawyer from soliciting a gift as well as inducing a gift.
- (2) Whether the rule should be amended to conform to related Probate Code restrictions that prohibit a lawyer from preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. This change would include the Probate Code’s “certificate of independent review” procedure which functions as an exception to the statutory prohibition. (See CA Probate Code sections 21350 et seq.)

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COMMISSION DRAFT ASSIGNMENT TEMPLATE

CURRENT CALIFORNIA RULE 1-110 **“Disciplinary Authority of the State Bar”**

I. Text of Current Rule:

Rule 1-110 Disciplinary Authority of the State Bar

A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.

(There is no Discussion section to this rule.)

II. Background/Purpose:

The predecessor to current rule 1-110 was approved as rule 9-101 in 1983 at the same time as the Supreme Court’s approval of the predecessor to current rule 9.19 of the Rules of Court. Together, these rules provided the State Bar with the “authority to attach conditions to reprovls that would allow the bar to tailor the discipline more closely to the lawyer’s misconduct and provide more protection to the public.” (See State Bar Seeks Comments On New Rule Of Professional Conduct, The State Bar of California News Release (June 27, 1983).)

III. Rule Amendment Issues:

A. Identified Substantive Issues:

1. Expanding scope of rule. By its terms, rule 1-110 applies to conditions attached to “reprovls” or “other discipline administered by the State Bar.” This language does not encompass all situations in which a lawyer might be bound by discipline-related conditions. Examples include situations where the State Bar enters into an agreement in lieu of discipline and where the conditions arise from a disciplinary order issued by the Supreme Court. In both instances, the purpose of rule 1-110 appears applicable but the nature of the conditions appear to fall outside of the scope of rule 1-110. The first RRC concluded that rule 1-110 should be modified to clarify that a lawyer must comply with all discipline-related conditions, even if the conditions are not specifically attached to reprovls or other discipline administered by the State Bar.

Question: Should the Commission recommend this change?

Promoting confidence and public protection: Requiring a lawyer to comply with all discipline-related conditions should promote confidence and public protection by helping to secure a disciplined lawyer’s compliance. A lawyer who disregards a condition arising from an agreement in lieu of

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discipline reflects poorly on the profession and would pose a risk of harm to the public. For example, if a term of a lawyer's agreement in lieu of discipline is to attend client trust accounting school to help the lawyer avoid future trust accounting errors, but the lawyer fails to comply with this condition, then the risk of harmful trust accounting errors would persist.

2. Conforming rule language to case law. Current rule 1-110 refers to "conditions" attached to discipline but does not refer to the "terms" of a disciplinary agreement. To be more precise, the first RRC concluded that the language of the rule should be amended to use the phrase "terms and conditions" rather than simply the word "conditions." Both the Supreme Court and the State Bar Court Review Department have used the phrase "terms and conditions" in describing a lawyer's obligations to comply with disciplinary orders. See, e.g., *In re Brown* (1995) 12 Cal.4th 205, 224 [48 Cal.Rptr.2d 29] (respondent lawyer ordered to "promptly review the **terms and conditions** of his probation with the monitor to establish a manner and schedule of compliance consistent with the **terms of** [respondent's probation]." (Emphasis added.)

Question: Should the Commission recommend this change?

Removing inconsistencies and ambiguities: Changing the rule to state that a lawyer must comply with both "terms" and "conditions" removes an inconsistency with case law and eliminates a possible ambiguity. Decisions of the State Bar Court and the Supreme Court refer to "terms" and "conditions," but the current rule only refers to "conditions."

3. Moving explanatory last clause of current rule to Discussion. The last clause of the current rule is a reference to other related law that similarly requires a lawyer's compliance with disciplinary conditions. It is not essential for this reference to appear in the rule proper. A new rule Discussion section could be used for these references and there are other related laws that are omitted that could be included (See Business and Professions Code sections 6068(k) and (l).) To make the language of the rule concise and to add the omitted references, the first RRC modified and moved the last clause of current rule 1-110 to a new rule Discussion. The addition of this new Discussion is minimal and does not conflict with the rule proper.

Question: Should the Commission recommend this change?

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4. The current rule title refers to the “Disciplinary Authority of the State Bar.”

Question: Should the rule title be changed to specifically address the purpose of the rule to require that lawyers abide by all discipline-related conditions?

B. Non-Substantive Issues:

1. Current Rule 9.19(b) of the Rules of Court includes an outdated reference to former Rule of Professional Conduct 9-101 (the predecessor to current rule 1 110). (See footnote no. 2 for the text of Rule of Court 9.19(b).) The Commission’s final report should identify this discrepancy and include a recommendation that the State Bar suggest an appropriate conforming amendment to Rule 9.19(b). Even if no change is made to current rule 1 110, the outdated reference in the Rules of Court should be addressed in the Commission’s final report.

C. Issues Related to the ABA Model Rules:

1. There is no corresponding ABA Model Rule of Professional Conduct. However, a comparable rule 10(B) in the ABA Model Rules of Disciplinary Enforcement¹ provides that: “Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.” Current rule 1-110 is similar in concept to the ABA disciplinary enforcement rule but it is tailored to California’s lawyer disciplinary system. Arguably, the existence of these similar concepts achieves appropriate uniformity and promotes a national standard.

D. Changes to Rule Discussion:

1. See III.A.3., above. There is no discussion to current rule 1-110. The first RRC concluded that the final clause of current rule 1-110 should be modified and moved to become the rule’s only commentary. This clause in the current rule cites to other related law. Because this information does not describe the conduct governed by the rule but instead explains its scope by providing relevant cross references, the first RRC determined that these references were better suited to the rule discussion rather than

¹ The following states appear to have discipline enforcement rules based, in whole or in part, on the ABA Model Rules of Disciplinary Enforcement: Alabama, Alaska, Delaware, Florida, Idaho, Louisiana, Michigan, Mississippi, Montana, Nevada, North, Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, and West Virginia. In addition, Maine recently proposed a similar rule.

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being retained in the rule proper. The first RRC's modifications deleted references to Business and Professions Code sections 6077 and 6078 because those code sections are not authority for requiring a lawyer to comply with an agreement in lieu of discipline or the terms and conditions of a disciplinary probation or reproof. Instead, those sections state the general authority of the State Bar in a lawyer disciplinary proceeding to impose lower level disciplinary sanctions and to recommend higher sanctions for Supreme Court consideration. In the place of those sections, a reference to Business and Professions Code section 6068 (k) and (l) was added because those subdivisions specifically address the duty of an attorney to comply with disciplinary conditions and agreements in lieu of discipline. The existing reference to rule 9.19² of the Rules of Court was retained by the first Commission as a part of the recommended Discussion. If implemented, this addition would be minimal and would not conflict with the rule proper.

E. Significant Public Comment or Stakeholder Concerns Presented to the First Commission:

1. No significant concerns were conveyed to the first Commission in connection with current rule 1-110. OCTC and the San Diego County Bar Association supported as drafted the first RRC's proposed amended rule.

F. Research Resources:

1. Business and Professions Code §§ 6077 and 6078
2. Business and Professions Code 6068(k) and (l)
3. California Rules of Court, rule 9.19

² Rule 9.19 follows: Rule 9.19. Conditions attached to reproofs

(a) Attachment of conditions to reproofs

The State Bar may attach conditions, effective for a reasonable time, to a public or private reproof administered upon a member of the State Bar. Conditions so attached must be based on a finding by the State Bar that protection of the public and the interests of the member will be served thereby. The State Bar when administering the reproof must give notice to the member that failure to comply with the conditions may be punishable.

(b) Sanctions for failure to comply

A member's failure to comply with conditions attached to a public or private reproof may be cause for a separate proceeding for willful breach of rule 9-101 of the Rules of Professional Conduct.

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4. In the Matter of Meyer (Rev. Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 (violation of rule 1-110 found.)

IV. Discussion Draft:

The following draft in redline/strikeout style implements the amendments discussed above for discussion purposes and to assist the assigned Commission members in preparing a report and recommendation on proposed amendments, if any, to current rule 1-110.

Rule ~~1-110~~ Disciplinary Authority of the State Bar Compliance with Terms and Conditions of Discipline and Agreements in Lieu of Discipline

A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprov~~als~~ ~~or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.~~

Discussion

[1] Other provisions also require a lawyer to comply with conditions of discipline. See, e.g., Business and Professions Code sections 6068(k) and (l) and California Rules of Court, Rule 9.19.

NOTE: The information provided here is tentative and subject to change. The subcommittee assigned to a particular rule, as well as the dates and meetings at which rules are to be considered are all subject to change.

SUBCOMMITTEE REPORT AND RECOMMENDATION: RULE 1-110

Lead Drafter: Eaton
Co-Drafters: Ham, Tuft
Meeting Date: May 29 – 30, 2015

CURRENT CALIFORNIA RULE

CLEAN:

Rule 1-110 Disciplinary Authority of the State Bar

A member shall comply with conditions attached to public or private reprovls or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.

SUBCOMMITTEE VOTE

There was a consensus among the subcommittee members to recommend the proposed rule as amended.

CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

Concepts Accepted (Pros and Cons)

- Implement changes to address each of the known issues.
 - Pros: Improves public protection by securing lawyers' compliance with the terms and conditions of various types of discipline, not being limited to reprovls or discipline administered by the State Bar as in the current rule.
 - Cons: There are no known cons to adopting the proposed rule.

Concepts Rejected (Pros and Cons)

- Reformulate the rule to follow Rule 10(B) of the ABA Model Rules of Disciplinary Enforcement.
 - Pros: Comports with CA's longstanding policy of having a specific duty codified in the Rules of Professional Conduct.
 - Cons: Arguably, would detract from achieving uniformity with states that follow the ABA approach. However, because only a minority of states have adopted the ABA Model Rules of Disciplinary Enforcement,¹ there is at present no uniform standard for

¹ The following states appear to have discipline enforcement rules based, in whole or in part, on the ABA Model Rules of Disciplinary Enforcement: Alabama, Alaska, Delaware, Florida, Idaho, Louisiana, Michigan, Mississippi, Montana, Nevada, North, Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, and West Virginia. In addition, Maine recently proposed a similar rule.

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SUBCOMMITTEE REPORT AND RECOMMENDATION: RULE 1-110

Lead Drafter: Eaton
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addressing this issue. Further, ABA Rule of Disciplinary Enforcement 10(B) is narrower in scope than the proposed rule, being limited to an admonition or reprimand.²

Changes in Duties/Substantive Changes to the Current Rule

- The current rule applies to reprovations and State Bar administered discipline. The proposed rule would expand the scope to encompass the terms and conditions of other types of discipline and arrangements in lieu of discipline.

Non-Substantive Changes to the Current Rule

- The proposed rule would clarify that the existing word “conditions” includes both “terms” and “conditions.” The proposed rule would add a new minimal Discussion section that includes references that are in the black letter of current rule 1-110 and new references to related laws. The rule title would be revised to conform to the broader scope of, and more accurately describe, the content of the proposed rule.

Alternatives Considered

- Keep current rule without any changes (rejected); Adopt ABA Rule 10(B) (rejected)

OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

(1) If a Terminology Rule (similar to the CA Code of Judicial Ethics terminology section) is recommended by the Commission, then whether any of the following terms in proposed rule 1-110 should be defined in the Terminology Rule: “agreement made in lieu of discipline;” “disciplinary probation;” “public reproof;” or “private reproof.” If so, then whether the definition should simply cross reference other State Bar rules that may already provide a suitable definition.

² Rule 10(B) provides:

- B. Conditions. Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.

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SUBCOMMITTEE REPORT AND RECOMMENDATION: RULE 1-110

Lead Drafter: Eaton
Co-Drafters: Ham, Tuft
Meeting Date: May 29 – 30, 2015

COMMENTS FROM THE DRAFTING SUBCOMMITTEE

Eaton

- [Date]: Email Comment
- [Date]: Email Comment

Ham

- [Date]: Email Comment
- [Date]: Email Comment

Tuft

- [Date]: Email Comment
- [Date]: Email Comment

PROPOSED RULE

CLEAN:

Rule 1-110 Compliance with Terms and Conditions of Discipline and Agreements in Lieu of Discipline

A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovais.

Discussion

[1] Other provisions also require a lawyer to comply with conditions of discipline. See, e.g., Business and Professions Code section 6068, subdivisions (k) & (l) and California Rules of Court, Rule 9.19.

REDLINE:

Rule 1-110 Compliance with Terms and Conditions of Discipline and Agreements in Lieu of Discipline ~~Disciplinary Authority of the State Bar~~

A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovais ~~or other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and rule 9.19, California Rules of Court.~~

Discussion

[1] Other provisions also require a lawyer to comply with conditions of discipline. See, e.g., Business and Professions Code section 6068, subdivisions (k) & (l) and California Rules of Court, Rule 9.19.

NOTE: The information provided here is tentative and subject to change. The subcommittee assigned to a particular rule, as well as the dates and meetings at which rules are to be considered are all subject to change.

SUBCOMMITTEE REPORT AND RECOMMENDATION: RULE 1-110

Lead Drafter: Eaton
Co-Drafters: Ham, Tuft
Meeting Date: May 29 – 30, 2015

RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

Adopt proposed amended rule 1-110.

Proposed Resolution:

RESOLVED: That the Commission adopts proposed amended rule 1-110 in the form attached to this action summary.

DISSENTING POSITION(S)

Eaton

- [None or Statement of Dissenting Position]

Ham

- [None or Statement of Dissenting Position]

Tuft

- [None or Statement of Dissenting Position]

FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]