



THE STATE BAR OF CALIFORNIA

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OFFICE OF PROFESSIONAL COMPETENCE
PLANNING, AND DEVELOPMENT

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MEMORANDUM

DATE: November 3, 2015

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

FROM: Randall Difuntorum, Director, Professional Competence Programs

SUBJECT: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California – Progress Report

By statute, the Board has the authority to adopt amendments to the Rules of Professional Conduct of the State Bar of California that are binding upon all members of the State Bar once those rules are approved by the California Supreme Court. (Business and Professions Code sections 6076 and 6077.) The Board has assigned the Commission for the Revision of the Rules of Professional Conduct (“Commission”) to conduct a study of the Rules of Professional Conduct and to recommend comprehensive amendments.

This memorandum provides a progress report on the work of the Commission, as of the Commission’s last meeting on October 23, 2015. It is anticipated that Justice Lee Edmon, chair of the Commission, will attend the November meetings of the Regulation and Discipline Committee (“RAD”) and the Board of Trustees (“Board”). Board members with questions may contact Randall Difuntorum at (415) 538-2161.

I. Rules Considered and Ready to be Submitted for Public Comment Authorization

The following twenty rules have been studied by the Commission and proposed new or amended rules have been drafted. These draft rules have been adopted by the Commission and, with one exception, all await the completion of the Commission’s comprehensive report, at which time they will be presented to RAD for public comment authorization. All of these draft rules remain subject to change following the anticipated public comment process.

- 1) Rule 1-100 (Rules of Professional Conduct, in General)
- 2) Rule 1-110 (Disciplinary Authority of the State Bar)
- 3) Rule 1-200 (False Statement Regarding Admission to State Bar)
- 4) Rule 1-300 (Unauthorized Practice of Law)
- 5) Rule 1-311 (Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Members)
- 6) Rule 1-500 (Agreements Restricting a Member’s Practice)
- 7) Rule 1-650 (Limited Legal Services Programs)
- 8) Rule 2-100 (Communication with a Represented Party)
- 9) Rule 2-200 (Financial Arrangements Among Lawyers)

- 10) Rule 3-100 (Confidential Information of a Client)
- 11) Rule 3-110 (Failing to Act Competently)
- 12) Rule 3-500 (Communication)
- 13) Rule 3-510 (Communication of Settlement Offer)
- 14) Rule 4-200 (Fees for Legal Services)
- 15) Rule 5-110 (Performing the Duty of a Member in Government Service)¹
- 16) *New Rule 1.8.2 (Use of Current Client's Information)* [no CA counterpart]
- 17) *New Rule 4.3 (Communication with Unrepresented Party)* [no CA counterpart]
- 18) *New Rule 5.1 (Responsibilities of Supervisory or Managerial Lawyers)* [no California counterpart] (Note: The comments section of this rule is on the Commission's November meeting agenda for a final vote.)
- 19) *New Rule 5.2 (Responsibilities of Subordinate Lawyers)* [no CA counterpart]
- 20) *New Rule 5.3 (Responsibilities regarding Nonlawyer Assistants)* [no CA counterpart]

These completed drafts include the following significant rule revision studies: 2-100; 3-100; 3-110; 2-200; 4-200; and 5-110. A brief summary of each is provided below.

Ex Parte Communication with a Represented Client:

Rule 2-100 is the rule restricting a lawyer's communications with a represented client. The Commission studied the issue of whether the current language referring to a represented "party" should be changed to refer to a represented "person." The latter is the approach used in jurisdictions that have adopted the ABA Model Rule counterpart, Model Rule 4.2. The Commission is recommending the change to "person," as that term best describes the scope of public protection that the rule should afford to an attorney-client relationship.

Duty of Confidentiality:

Rule 3-100 is the rule that implements the statutory exception to a lawyer's duty of confidentiality permitting, but not requiring, a lawyer's disclosure of client information reasonably necessary to prevent a criminal act that is likely to result in death or great bodily harm. The Commission studied the issue of whether this exception should continue to be limited to criminal acts. The Commission also studied whether to recommend additional exceptions to the duty of confidentiality. The ABA counterpart, Model Rule 1.6, omits the criminal act element and includes exceptions that California does not have (e.g., an exception to prevent reasonably certain fraud that would result in substantial injury to a person's financial interests). The Commission is recommending that the criminal act element be retained and the Commission is not recommending any new exceptions to confidentiality. Both decisions place a high value on confidentiality as critical to maintaining a client's trust and confidence in their lawyer.

Competent Representation and the Duty to Supervise:

Rule 3-110 is the rule prohibiting a lawyer's intentional, reckless, or repeated acts of incompetent representation. The existing rule also provides that competent representation includes a lawyer's duty to supervise lawyer and non-lawyer subordinates. The Commission

¹ The Commission is recommending that proposed amended Rule 5-110 rule be prioritized and processed separately from, and ahead of, the Commission's anticipated comprehensive report and recommendation.

studied the issue of whether the rule should be revised to affirmatively state that a lawyer “shall provide competent representation,” without reference to intentional, reckless, or repeated misconduct. This would track the approach in states that have adopted Model Rule 1.1. The Commission also studied whether the duty to supervise should be given standalone rules separate from competence. The Commission is recommending that the existing prohibition be continued, effectively rejecting the ABA approach that does not refer to intentional, reckless or repeated misconduct. However, the Commission does recommend that California’s approach to supervision be changed to implement standalone rules (proposed new Rules 5.1, 5.2 and 5.3) consistent with the series of supervision rules adopted in states that have the Model Rules.

Division of Fees, Including Referral Fees Among Lawyers:

Rule 2-200 is the rule placing requirements on a division of fees between lawyers who are not in the same law firm, including payments of referral fees. The Commission studied the issue of whether the rule should be changed to adopt a requirement that such divisions of fees must be commensurate, in amount, with the division of labor or relative assumption of responsibility between the lawyers, as this is the approach in states that have adopted Model Rule 1.5(e). Based on longstanding case law, the Commission is recommending against this requirement. California case law articulates a policy favoring “pure” referral fees so long as a client consents and the total fee ultimately paid by a client is not improperly increased or unconscionable. This policy acknowledges that a financial incentive will help encourage lawyer referrals when the referring lawyer lacks expertise, time or resources to adequately represent a prospective client.

Fee Arrangements, Including Non-refundable Fees:

Rule 4-200 is the rule governing fee arrangements. This rule prohibits a fee for legal services that is illegal or “unconscionable.” This rule also is silent on the propriety of designating a fee as “non-refundable.” The Commission studied the issue of whether the standard of “unconscionable” should be replaced with “unreasonable,” as that is the term used in states that have adopted Model Rule 1.5(a). The Commission also studied whether new restrictions should be placed on arrangements for a non-refundable fee. The Commission recommends retaining the “unconscionable” standard, in part because California has a robust fee arbitration system and client complaints solely concerning the reasonableness of the amount of a fee should not be funneled out of arbitration and into the discipline system. The Commission also is recommending a new restriction that limits non-refundable fee arrangements to a “true retainer” fee that is paid to secure a lawyer’s future availability to render legal services. This particular revision, however, includes express authorization permitting a lawyer to charge a flat fee paid in advance so long as the lawyer completes the agreed upon services.

Duty of a Prosecutor to Disclose Exculpatory Evidence:

The Commission is recommending that the Board prioritize consideration of proposed amended Rule 5-110 so that it is processed separately from, and ahead of, the Commission’s anticipated comprehensive report and recommendation. This proposed rule responds to concerns that persons accused of crimes are being wrongfully convicted as a result of failures to disclose exculpatory evidence. This is detailed in Board Agenda Item November 122.

II. Rules Considered with Further Study and Drafting Pending

The following ten rules have appeared on at least one agenda and resolution of a proposed new or amended rule remains pending. Seven of these rules are on the Commission's November agenda is indicated by [*].

- 1) Rule 1-120 (Assisting, Soliciting, or Inducing Violations)
- 2) Rule 1-310 (Forming a Partnership with a Non-Lawyer)*
- 3) Rule 1-700 (Member as Candidate for Judicial Office)*
- 4) Rule 2-400 (Prohibited Discriminatory Conduct in a Legal Practice)*
- 5) New Rule 1.14 (Representing Clients with Diminished Capacity) [no California equivalent]
- 6) New Rule 1.3 (Diligence) [currently appears as a part of competence in Rule 3-110]*
- 7) New Rule 6.1 (Voluntary Pro Bono Publico) [no CA counterpart]
- 8) New Rule 6.2 (Accepting Appointments) [no CA counterpart] *
- 9) New Rule 6.3 (Membership in Legal Services Organization) [no CA counterpart] *
- 10) New Rule 6.4 (Law Reform Activities Affecting Client Interests) [no CA counterpart] *

III. Major Rule Revision Topics Not Yet Considered

There are a total of forty-six current California rules. Some of the major rule revision topics that remain for the Commission to tackle in 2016 include: Rule 1-400 (Advertising and Solicitation); Rule 3-120 (Sexual Relations with a Client); Rule 3-300 (Adverse Interests/Business Transactions with a Clients); Rule 3-310 (Current and Former Client Conflicts of Interest); Rule 4-100 (Client Trust Accounting); Rule 5-120 (Trial Publicity); and possible new rules with no California counterparts concerning: reporting misconduct (Model Rule 8.3); conduct prejudicial to the administration of justice (Model Rule 8.4(d)); duties to prospective clients (Model Rule 1.18); and imputation of conflicts/screening (Model Rule 1.10).

IV. Project Dashboard & Timeline

The following list provides selected key indicators for the Commission's work as of the Commission's October 23, 2015 meeting.

- Meetings Held = 6 (with two 2-day meetings)
- Rules Considered = 34
- Rules Approved = 20
- Number of Informal Public Comments Received = 124
- Number of Visitors at Meetings (in person and by telephone) = 69 (aggregate total for all meetings held – this includes visitors who attended more than one meeting)

Including the November meeting, the Commission has five meetings scheduled (each of which is likely to be held as a two-day meeting) to complete its study of all remaining rule revision issues, prior to seeking Board authorization to issue the entire set of proposed rules for public comment. These issues include consideration of the remaining California rules and any other rules for which there are no direct California counterparts. Although the project plan allocating these rule issues across these meeting days evolves with each

meeting that is completed, the Commission is on-track to facilitate the State Bar's completion of this project by the March 2017 deadline.

In addition to Commission meetings, RAD and Board meetings are necessary to complete this project. The table below sets forth the anticipated timeline for RAD and Board action.

Board Action Timeline

May 6 & 7, 2016	Last Commission working meeting for review of initial set of rules, prior to requesting Board action to circulate the proposed rules for public comment
June 23, 2016 (tentative)	Special RAD meeting to authorize circulation of Commission's tentative final report and request for 90-day public comment authorization
June 27 – Sept. 26, 2016	90-day public comment period
August 12, 2016 (tentative)	Public hearing to receive public comment on proposed rule amendments
November 17 & 18, 2016	RAD/BOT: return from 90-day public comment, request for final adoption, and, if necessary, authorization to re-distribute certain proposed rules for additional public comment
November 21, 2016 – January, 9, 2017	Additional 45-day public comment period, for some rules, if needed.
March 9 & 10, 2017	RAD/BOT: return from 45-day public comment, adoption of remaining rules for submission to the Supreme Court for approval
March 31, 2017	Deadline to submit entire set of proposed new and amended rules to the Supreme Court for approval