

**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, May 6, 2016 (10:00 am – 4:30 pm)
Saturday, May 7, 2016 (9:00 am – 4:30 pm)**

State Bar of California
180 Howard Street
Rooms 4A-C
San Francisco, CA 94105

Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlander (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout, Mark Tuft and Dean Zipser.

Members Absent: Hon. Lee Edmon (Saturday)¹ and Lee Harris (Saturday).

Advisors Present: Wendy Chang and Edith Matthai.

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

State Bar Staff Present: Allen Blumenthal (Office of Chief Trial Counsel), Richard Chen (IT), Michael Williams (IT), 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: Elliot Bien, Stan Lamport and Diane Karpman.

I. CHAIR'S REMARKS

The Chair requested and Mr. Difuntorum provided an oral report on the Commission's planned presentations at the Board of Trustees' May 13, 2016 meeting of: (1) executive summaries of selected rules (1.7, 1.8.10, 8.4, 8.4.1 and 7.1 - 75); and (2) the Commission's request for an additional 45-day public comment on proposed amended rules 5-110 and 5-220. Mr. Difuntorum also indicated that assignments would be forthcoming to conform a drafting team's initial report and recommendation to the action subsequently taken by the Commission.

The Chair informed the Commission that the Commission's June meeting would be the last meeting prior to the anticipated submission of all of the Commission's proposed rules to the Board for public comment authorization. The Chair encouraged Commission members to send emails to staff with input on the agenda items once the June agenda is posted. By sending

¹ On Saturday, May 7, 2016, the Commission vice-chairs presided over the meeting with the meeting chaired by Mr. Bleich in morning session and Mr. Zipser in the afternoon session.

emails that are collected and posted as supplemental agenda materials, drafting teams are well-equipped to prepare for the meeting and optimize the Commission's deliberations.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

Approval of Action Summary - Regular Meeting on March 31 & April 1, 2016 (Open Session).

The Chair granted Mr. Eaton's request that the draft action summary be discussed rather than approved on consent. Mr. Eaton recommended that a revision be considered to correct the reporting of one of the Commission's votes (the consideration of item III.A proposed amended rule 5-110). Staff revised the action summary, presented it to the Commission and upon motion made, seconded and adopted, it was

RESOLVED, that the Commission approves the action summary of the Commission's March 31 & April 1, 2016 meeting.

All members present voted yes. (A copy of the action summary as revised at the meeting is attached.)

III. ACTION

a. Report and Recommendation on Rule 3-310 (Avoiding the Representation of Adverse Interests) (ABA Model Rule 1.9 (Duties to Former Clients))

The Chair recognized Mr. Martinez who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts the text of proposed new rule 1.9 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 Ms. Langford and Mr. Tuft who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team, the Commission hereby adopts the Comments to proposed new rule 1.9 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 Ms. Langford and Mr. Tuft who voted no.

b. Report and Recommendation on Rule 3-300 (Avoiding Interests Adverse to a Client) (including ABA Model Rules 1.8(d) & 1.8(i) (Conflict of Interest: Current Clients: Specific Rules))

The Chair recognized Mr. Kehr who provided the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 3-300 (1.8.1) 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 Tuft who voted no.

The consideration of Model Rule 1.8(d) and 1.8(i) was not called for discussion.

c. Report and Recommendation on Rule 4-100 (Preserving Identify of Funds and Property of a Client) (including ABA Model Rule 1.15 (Safekeeping Property))

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. A vote was taken on the text of the revised rule (including the recordkeeping standards) subject to consideration of proposed comments postponed until the next meeting and without prejudice to consideration of further amendments on the issue of fees paid in advance. Consideration of comments was postponed to give the drafting team an opportunity to prepare comments that conform to the revised text of the proposed rule.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 4-100 (1.15) 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.

Regarding the drafting team's policy recommendation on the regulation of fees paid in advance, a recommendation was made that the Commission direct the drafting team to prepare amendments to the proposed rule that would generally require that fees paid in advance be held in trust.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby directs the drafting team to prepare further amendments to proposed amended rule 4-100 (1.15) of the Rules of Professional Conduct of the State Bar of California that would generally require a lawyer to hold advance fees in trust.

The resolution passed with eight members present voting yes (Mr. Cardona, Ms. Clinch, Ms. Croker, Mr. Eaton, Ms. Inlender, Mr. Rothschild, Judge Stout and Mr. Tuft), and seven members voting no (Mr. Zipser, Mr. Chou, Mr. Ham, Mr. Kehr, Mr. Kornberg, Ms. Langford and Mr. Martinez)..

d. Report and Recommendation on Rule 5-100 (Threatening Criminal, Administrative, or Disciplinary Charges) (including ABA Model Rule 3.10 (Practice of Law))

The Chair recognized Mr. Zipser who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 5-100 (3.10) 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, Ms. Croker, Mr. Kehr, Ms. Langford and Mr. Tuft who voted no.

e. Report and Recommendation on Rule 5-120 (Trial Publicity) (including ABA Model Rule 3.6 (Trial Publicity))

The Chair recognized Judge Clopton who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts the text of proposed amended rule 5-120 (3.6) 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 Ms. Croker and Mr. Rothschild who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team, the Commission hereby adopts the Comments to proposed amended rule 5-120 (3.6) 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.

f. Report and Recommendation on Rule 5-210 (Member as Witness) (including ABA Model Rule 3.7 (Lawyer as Witness))

The Chair recognized Mr. Cardona who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 5-210 (3.7) 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.

g. Report and Recommendation on Rule 5-200(A-D) (Trial Conduct) (including ABA Model Rule 3.3 (Candor Toward the Tribunal))

The Chair recognized Elliot Bien who presented a request that the Commission include amendments to the proposed candor or misconduct rules that would prohibit plagiarism by lawyers. Mr. Bien referred to previously submitted draft rule amendment language that was posted with the Commission's online agenda materials. The Commission discussed the issues presented and the Chair thanked Mr. Bien for his presentation.

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.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed amended rule 5-200 (3.3) 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. Chou, Judge Clopton, Mr. Kehr, Mr. Kornberg, Ms. Langford and Mr. Martinez who voted no.

h. Report and Recommendation on Rules 5-200(E) (Trial Conduct), 5-220 (Suppression of Evidence), and 5-310 (Prohibited Contact With Witnesses) (including ABA Model Rule 3.4 (Fairness to Opposing Party and Counsel))

The Chair recognized Ms. Croker who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 3.4 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. Kehr who voted no.

i. Report and Recommendation on Rules 5-300 (Contact With Officials) and 5-320 (Contact With Jurors) (including ABA Model Rule 3.5 (Impartiality And Decorum Of The Tribunal))

The Chair recognized Judge Stout who presented the report and recommendation of the drafting team. Following discussion, the proposed rule submitted by the drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts the text of proposed new rule 3.5 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. Kehr who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the joint drafting team, the Commission hereby adopts the Comments to proposed new rule 3.5 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.

j. Discussion of ABA Model Rules 1.10 (Imputation of Conflicts of Interest: General Rule), 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), and 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral)

The Chair recognized Stanley Lamport who presented his views on whether disciplinary rules ought to permit unconsented screens to rebut imputation. The Commission discussed the issues presented and the Chair thanked Mr. Lamport for his comments.

The Chair recognized Mr. Martinez who presented the report and recommendation of the drafting team and Prof. Mohr who provided background on the ABA's consideration of imputation and screening.

Following discussion, a recommendation was made that the Chair take consensus votes on the essential issues of imputation and screening to give direction to the drafting team. The Chair agreed and a vote of 15 yes, 0 no and 0 abstentions indicated a strong consensus in favor of a disciplinary rule on imputation. A vote of 8 yes (Mr. Zipser, Mr. Cardona, Mr. Chou, Ms. Clinch, Judge Clopton, Ms. Croker, Mr. Ham and Mr. Martinez), 7 no (Mr. Eaton, Ms. Inlender, Mr. Kehr, Mr. Kornberg, Ms. Langford, Mr. Rothschild and Mr. Tuft) and 1 abstention (Judge Stout) indicated a majority of the members present in favor of a disciplinary rule permitting broad screening. The drafting team was asked to prepare draft rules in accordance with the sense of the Commission for consideration at the June meeting.

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.

**Rule 1.8.1 Business Transactions with a Client and
Pecuniary Interests Adverse to a Client
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING**

A lawyer shall not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

- (a) The transaction or acquisition and its terms are fair and reasonable to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing to the client in a manner that would reasonably have been understood by the client;
- (b) The client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing to seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and
- (c) The client thereafter provides informed written consent to the terms of the transaction or the terms of the acquisition, and the lawyer's role.

Comment

[1] This Rule does not apply to the provisions of an agreement between a lawyer and client relating to the lawyer's hiring or compensation unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this Rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. See *Fletcher v. Davis* (2004) 33 Cal. 4th 61, 68 [14 Cal.Rptr.3d 58]. See also Business and Professions Code § 6175.3 (Sale of financial products to elder or dependent adult clients; Disclosure) and Family Code §§ 2033-2034 (Attorney lien on community real property). However, this Rule does not apply to a charging lien given to secure payment of a contingency fee. See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal. App.4th 38.

[2] For purposes of this Rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition, and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] This Rule does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by Rules 1.5 and 1.15.

[5] This Rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person to the general public or a significant portion thereof, or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

Rule 1.9 Duties To Former Clients
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Business and Professions Code § 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter;unless the former client gives informed written consent.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these Rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;
 - (2) reveal information protected by Business and Professions Code § 6068(e) and Rule 1.6 acquired by virtue of the representation of the former client except as these Rules or the State Bar Act permit with respect to a current client; or
 - (3) without the informed written consent of the former client, accept representation adverse to the former client where, by virtue of the representation of the former client, the lawyer has acquired information protected by Business and Professions Code § 6068(e) and Rule 1.6 that is material to the representation.

Comment

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship. See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256] and *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505]. For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person could not represent the accused in a subsequent civil action against the government concerning the same matter. See also Business and Professions Code § 6131. These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Rules 1.6, 1.9(c), and Business and

Professions Code § 6068(e). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm would violate this Rule by representing another client in the same or a related matter even though the interests of the two clients conflict. [See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.]

[3] The fact that information can be discovered in a public record does not, by itself, render that information generally known under paragraph (c). See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.

[4] With regard to the effectiveness of an advance consent, see Comment [8] to Rule 1.7. [With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.] [Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.]

Rule 3.3 Candor Toward The Tribunal
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or misquote to a tribunal the language of a book, statute, decision or other authority; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Rule 1.6 and Business and Professions Code § 6068(e). A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e).
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.
- (d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer in proceedings of a tribunal, including ancillary proceedings such as a deposition conducted pursuant to a tribunal's authority. See Rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant

insists on testifying, and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by Rule 1.16. See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(b)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Rule 1.6 and Business and Professions Code § 6068(e).

Duration of Obligation

[6] A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. This Rule does not apply when a lawyer comes to know of a violation of paragraph (b) after the lawyer's representation has concluded. There may be obligations that go beyond this Rule. See, e.g., Rule 3.8(g) and (h).

Withdrawal

[7] A lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these Rules. A lawyer must comply with Rule 1.6 and Business and Professions Code § 6068(e) with respect to a request to withdraw that is premised on a client's misconduct.

Rule 3.4 Fairness to Opposing Party and Counsel
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;
- (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:
 - (1) expenses reasonably incurred by a witness in attending or testifying;
 - (2) reasonable compensation to a witness for loss of time in attending or testifying; or
 - (3) a reasonable fee for the professional services of an expert witness;
- (e) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein;
- (f) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or
- (g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

Comment

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. See, e.g., Penal Code § 135; 18 United States Code §§ 1501-1520. Falsifying evidence is also generally a criminal offense. See, e.g., Penal Code § 132; 18 United States Code § 1519. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this Rule.

Rule 3.5 Contact With Judges, Officials, Employees and Jurors
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) Except as permitted by an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal. This Rule does not prohibit a lawyer from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions.
- (b) Unless authorized to do so by law, an applicable code of judicial ethics or code of judicial conduct, a ruling of a tribunal, or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:
 - (1) in open court; or
 - (2) with the consent of all other counsel in the matter; or
 - (3) in the presence of all other counsel in the matter; or
 - (4) in writing with a copy thereof furnished to all other counsel in the matter; or
 - (5) in ex parte matters.
- (c) As used in this Rule, “judge” and “judicial officer” shall also include (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; and (iv) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons 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.
- (d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows to be a member of the venire from which the jury will be selected for trial of that case.
- (e) During trial a lawyer connected with the case shall not communicate directly or indirectly with any juror.
- (f) During trial a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows is a juror in the case.
- (g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate;
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
 - (4) the communication is intended to influence the juror’s actions in future jury service.

- (h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
- (i) All restrictions imposed by this Rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
- (j) A lawyer shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.
- (k) This Rule does not prohibit a lawyer from communicating with persons who are members of a venire or jurors as a part of the official proceedings.
- (l) For purposes of this Rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this Rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 U.S.C. § 7353 (Gifts to Federal employees).

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure § 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Rule 3.6 Trial Publicity
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will (i) be disseminated by means of public communication and (ii) have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), but only to the extent permitted by Rule 1.6 and Business and Professions Code § 6068(e), lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter is in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto;
 - (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably necessary to protect the individual or the public; and
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - [(i) the identity, general area of residence, and occupation of the accused;]
 - (ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;
 - (iii) the fact, time, and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a law firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] Whether an extrajudicial statement violates this Rule depends on many factors, including: (1) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (2)

whether the extrajudicial statement presents information the lawyer knows is false, deceptive, or the use of which would violate Business and Professions Code § 6068(d) or Rule 3.3; (3) whether the extrajudicial statement violates a lawful “gag” order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Rule 3.4(f) and Business and Professions Code § 6068(a), which require compliance with such obligations); and (4) the timing of the statement.

[2] This Rule applies to prosecutors and criminal defense counsel. See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7 Lawyer as Witness
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:
- (1) the lawyer's testimony relates to an uncontested issue or matter;
 - (2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or
 - (3) the lawyer has obtained informed written consent from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Comment

[1] This Rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This Rule does not apply to other adversarial proceedings. This Rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent, on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in Rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent, courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. See, e.g., *Lyle v. Superior Court*, 122 Cal.App.3d 470 (1981).

Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges
ADOPTED BY THE COMMISSION AT THE MAY 6TH – 7TH MEETING

- (a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.
- (b) As used in paragraph (a) of this Rule, the term “administrative charges” means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.
- (c) As used in this Rule, the term “civil dispute” means a controversy or potential controversy over the rights and duties of two or more persons under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

Comment

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This Rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this Rule depends on the specific facts. See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670]. A statement that the lawyer will pursue “all available legal remedies,” or words of similar import, does not by itself violate this Rule.

[3] This Rule does not apply to (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code §§ 1377-78.

[4] This Rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. See Rule 3.8.

[5] As used in paragraph (b), “governmental organizations” includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

**STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF
PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA**

REVISED OPEN SESSION ACTION SUMMARY

Thursday, March 31, 2016 (10:00 am – 4:30 pm)

Friday, April 1, 2016 (9:00 am – 4:30 pm)

State Bar of California
845 So. Figueroa Street
Room 2C-G, 2nd Floor
Los Angeles, CA 90017

Members Present: Hon. Lee Edmon (Chair), Jeffrey Bleich (Co-Vice-Chair), George Cardona, Danny Chou, Nanci Clinch, Hon. Karen Clopton, Joan Croker, Daniel Eaton, James Ham, Lee Harris, Tobi Inlander (Public Member), Robert Kehr, Howard Kornberg, Carol Langford, Raul Martinez, Toby Rothschild, Hon. Dean Stout and Mark Tuft.

Members Absent: Dean Zipser (Co-Vice-Chair).

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) and Kevin Mohr (Consultant/Reporter).

Others Present: James Blume, Jose Castaneda, Stan Lamport, Laurie Levenson and Teresa Schmid.

I. CHAIR'S REMARKS

a. Oral Report

The Chair requested and Mr. Difuntorum provided an oral report on the Commission's presentation of executive summaries of selected rules the Commission has considered (1.5, 1.5.1, 1.8.9, 1.14, 4.2, 4.3 and 6.1) to the Board of Trustees Committee on Regulation and Discipline at the Board Committee's March 10, 2016 meeting. Appreciation was expressed for the participation of the following Commission representatives: Mr. Ham; Ms. Langford; Prof. Mohr; Mr. Rothschild; and Mr. Tuft. Mr. Eaton requested that staff distribute copies of the executive summaries to the Commission members.

b. Bagley-Keene Training

The Chair requested and Ms. Leighton summarized the open meeting requirements of the Bagley-Keene Act. It was emphasized that compliance with these requirements would be mandatory as of April 1, 2016 and, in particular, that telephone participation in meetings by a Commission member would only be permissible if all of the Bagley-Keene requirements were met.

II. CONSENT AGENDA – APPROVAL OF ACTION SUMMARY

Approval of Action Summary - Regular Meeting on February 19 & 20, 2016 (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 February 19 & 20, 2016 meeting.

All members present voted yes with the exception of Ms. Inlander and Judge Stout who abstained.

III. ACTION

a. Post Public Comment Consideration of Rules 5-110 (Performing the Duty of Member in Government Service) and 5-220 (Suppression of Evidence) (including ABA Model Rule 3.8)

The Chair recognized Mr. Difuntorum who summarized the status of this proposal and the anticipated next steps should the Commission continue to recommend that this matter be handled by the Board on an expedited basis.

The Chair recognized Mr. Rothschild who presented the report and recommendation of the drafting team. Following discussion, the version of proposed rule 5-110 submitted by the joint drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rules 5-110 and 5-220, the Commission hereby adopts proposed amended rule 5-110 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. Bleich, Mr. Cardona, and Mr. Eaton.

It was understood that the above vote would not preclude subsequent action to modify the safe harbor comment, Comment [9], to encompass a prosecutor's obligation under paragraph (d). Later, upon motion made and seconded, a vote was taken to make this modification to the safe harbor comment, but the motion failed (4 yes, 11 no, 0 abstain).

Mr. Rothschild presented proposed rule 5-220 clarifying that no changes were recommended to the version that was originally authorized for public comment.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rules 5-110 and 5-220, the Commission hereby adopts proposed amended rule 5-220 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.

The Chair requested and Mr. Rothschild presented the issue of whether the Commission should continue to recommend that the Board handle this proposal on an expedited basis.

Upon motion made, seconded and adopted, it was

RESOLVED, that the Commission recommends that the Board prioritize consideration of proposed amended rules 5-110 and 5-220, and expedite the processing of these rules on a time-table independent of the Commission's anticipated comprehensive report and recommendation.

All members present voted yes except Mr. Bleich, Mr. Eaton and Mr. Cardona.

b. 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 provided an overview of the report of the drafting team and explained that designated members of the team would separately present individual proposed rules. Ms. Langford then presented the drafting team's proposed new rule 7.1. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.1 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 and Mr. Kehr who voted no.

Mr. Tuft presented the drafting team's proposed new rule 7.2. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.2 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.

Prof. Mohr presented the drafting team's proposed new rule 7.3. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.3 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. Chou and Mr. Ham who abstained.

Mr. Kornberg presented the drafting team's proposed new rule 7.4. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.4 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.

Ms. Langford presented the drafting team's proposed new rule 7.5. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 7.5 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.

Ms. Inlander reported on the drafting team's consideration of ABA Model Rule 7.6 indicating that this model rule was not adopted by a preponderance of United States jurisdictions and that the drafting team did not recommend adoption of this rule in California.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby recommends that no version of ABA Model Rule 7.6 be recommended for adoption in California.

All members present voted yes.

**c. Report and Recommendation on Rule 3-210 (Advising the Violation of Law)
(including ABA Model Rules 1.2 (Scope of Representation and Allocation of Authority
Between Client and Lawyer) and 1.2.1 (Counseling or Assisting the Violation of Law))**

The Chair recognized Ms. Langford who presented the report and recommendation of the drafting team with proposals for new rules 1.2 and 1.2.1. Following discussion, the version of proposed rule 1.2 submitted by the joint drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on Rule 3-210, the Commission hereby adopts proposed new rule 1.2 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.

Ms. Langford next presented the drafting team's proposal for new rule 1.2.1. Following discussion, the version of proposed rule 1.2.1 submitted by the joint drafting team was amended. Separate votes were taken on the text and the comments after consideration of amendments.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-210, the Commission hereby adopts the text of proposed new rule 1.2.1 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. Martinez and Mr. Tuft who voted no.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team on rule 3-210, the Commission hereby adopts the Comments to proposed rule 1.2.1 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. Tuft who voted no and Mr. Martinez who abstained.

d. Recommendation for Possible Reconsideration of Proposed Rule 1.4 [3-500] (Communication with Clients) Adopted by the Commission at the September 25 & 26, 2015 Meeting

The Chair recognized Mr. Difuntorum who presented a staff report and recommendation on possible revisions to the Commission's proposed rule 1.4 intended to conform proposed rule 1.4 to proposed rule 1.2.1. Following discussion, the proposed revisions submitted by staff were amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of staff's report on possible conforming revisions to proposed rule 1.4, the Commission reconsiders previously adopted proposed rule 1.4 and hereby adopts revised proposed rule 1.4 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.

e. Report and Recommendation on Rule 3-310 (Avoiding the Representation of Adverse Interests) (including ABA Model Rules 1.7, 1.8.6, 1.8.7 & 1.9)

The Chair recognized Mr. Martinez who provided an overview of the report of the drafting team and noted that Mr. Cardona would present proposed new rule 1.9. Mr. Martinez then presented the drafting team's proposed new rule 1.7. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.7 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. Kehr, Ms. Langford and Mr. Tuft who voted no.

Mr. Martinez presented the drafting team's proposed new rule 1.8.6. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.8.6 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.

Mr. Martinez presented the drafting team's proposed new rule 1.8.7. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.8.7 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.

Mr. Martinez presented the drafting team's proposed new rule 1.8.7. Following discussion, the proposed rule submitted by the drafting team was amended.

Upon motion made, seconded and adopted, it was

RESOLVED, that upon consideration of the report of the drafting team, the Commission hereby adopts proposed new rule 1.8.7 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.

Mr. Cardona presented the drafting team's proposed new rule 1.9. Following discussion, the proposed rule submitted by the drafting team was amended. As listed below, votes were taken on the text of the rule with consideration of the comments postponed until the next meeting to give the drafting team an opportunity to conform the comments to the revised text. (It was understood that the votes taken on the text of the rule were tentative consensus votes pending the consideration of the comments at the Commission's next meeting.)

Revised paragraph (a)¹: All members present voted yes.

Paragraph (b) as submitted: All members present voted yes.

Paragraph (c)(1) as submitted: All members present voted yes with the exception of Ms. Langford who voted no.

¹ The tentatively adopted revision to paragraph (a) states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client."

Paragraph (c)(2) as submitted: All members present voted yes with the exception of Ms. Langford who voted no.

Revised paragraph (c)(3)²: All members present voted yes with the exception of Ms. Langford and Mr. Tuft.

f. Report and Recommendation on Rule 3-300 (Avoiding Interests Adverse to a Client) (including ABA Model Rule 1.8 (Conflict of Interest: Current Clients: Specific Rules))

Matter not called for discussion.

g. Report and Recommendation on Rule 3-400 (Limiting Liability to Client) (including ABA Model Rule 1.8 Conflict of Interest: Current Clients: Specific Rules))

Matter not called for discussion.

Report and Recommendation on Rule 3-410 (Disclosure of Professional Liability Insurance) (including ABA Model Rule 1.4(a))

Matter not called for discussion.

Report and Recommendation on Rule 3-700 (Termination of Employment) (including ABA Model Rule 1.16 (Declining or Terminating Representation))

Matter not called for discussion.

Report and Recommendation on Rule 4-100 (Preserving Identify of Funds and Property of a Client) (including ABA Model Rule 1.15 (Safekeeping Property))

Matter not called for discussion.

Discussion of ABA Model Rules 1.10, 1.11, 1.12 & 1.18 and Guidance on Advance Consent/Waivers of Future Conflicts

Matter not called for discussion.

² The tentatively adopted revision to paragraph (c)(3) states: "without the informed written consent of the former client, accept representation adverse to the former client where, by reason of the representation of the former client, the lawyer has obtained confidential information material to the representation."

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.