

AGENDA ITEM

123 November 7 2014

DATE: November 3, 2014

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

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

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

EXECUTIVE SUMMARY

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

BACKGROUND

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

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

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

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

DISCUSSION

Charter of Second Commission

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

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

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

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

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

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

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

Appointments to the Second Commission

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

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

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

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

ISSUE

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

FISCAL / PERSONNEL IMPACT:

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

RULE AMENDMENTS:

N/A

BOARD BOOK IMPACT:

N/A

RECOMMENDATION

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

PROPOSED REGULATION AND DISCIPLINE COMMITTEE RESOLUTION:

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

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

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

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

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

PROPOSED BOARD OF TRUSTEES RESOLUTION:

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

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

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

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

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



THE STATE BAR OF CALIFORNIA

SENATOR JOSEPH L. DUNN (RET.)
Executive Director/CEO

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1617

Tel: (415) 538-2275 Fax: (415) 538-2305
E-mail: joseph.dunn@calbar.ca.gov

ATTACHMENT - 1

August 11, 2014

Honorable Tani G. Cantil-Sakauye
Chief Justice
California Supreme Court
350 McAllister, 5th Floor
San Francisco, CA 94105

Dear Chief Justice:

As you know, since 2012 staff from the Supreme Court and the State Bar have worked together to develop a useful format for presentation of the proposed Rules of Professional Conduct submitted to the Supreme Court in 2011. Since 2013, bar staff have invested significant time and hard work in providing memoranda and support for the revised rules to the court. We also understand that court staff, and ultimately the court itself, have expended substantial time in reviewing the seventeen Rule analyses forwarded to the court thus far. The bar has an additional 50 rule presentations to submit to the court.

Continuing discussions among the court's representatives and bar staff over the past several years have made it apparent that under the current approach we cannot avoid a lengthy and unwieldy process going forward. Among the fundamental problems is the lack of information bar staff has at its disposal that would allow it to fully advise the court of the reasoning underlying the State Bar Board's approval of the rules, prepared by a special committee appointed more than 10 years ago, and of the rules themselves. Bar and court staff believe that the process could be expedited, the burden on the court and on court and bar staff lessened, and the ultimate product enhanced if the State Bar were to undertake a comprehensive reconsideration of the draft rules to be completed within a set time frame. Therefore, on behalf of the State Bar and with approval of our President, Luis J. Rodriguez, we request that the draft of the Rules of Professional Conduct pending at the Supreme Court be returned to the State Bar for further action. We believe that a renewed and targeted process would benefit from an early meeting of our respective staff representatives to discuss lessons learned to date and to determine how the rule revision process can best be restructured.

The State Bar is grateful to the Supreme Court for its guidance and cooperation in this important project and looks forward to working with the Court to create a new revision of the rules as needed, complete with adequate justification and information for the Board's consideration and to assist the court in its review.

Yours truly,

A handwritten signature in cursive script that reads "Joseph L. Dunn".

Senator Joseph L. Dunn, Ret.
CEO

COPY

SUPREME COURT
FILED

SEP 19 2014

S206125
No. ADMIN. 2014-8-20-2

Frank A. McGuire Clerk

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

ORDER GRANTING THE STATE BAR OF CALIFORNIA'S
REQUEST TO RETURN PROPOSED AMENDMENTS AND ADDITIONS
TO THE CALIFORNIA RULES OF PROFESSIONAL CONDUCT PREVIOUSLY
SUBMITTED BY THE STATE BAR

From October 2012 to July 2014, the State Bar of California filed 17 petitions before this court seeking approval of various amendments or additions to the California Rules of Professional Conduct. Each petition pertains to a single rule and remains pending before this court pursuant to the court's intention to review all the proposed rules before acting on them. On August 11, 2014, the State Bar requested that all 17 of the submitted rules be returned to the State Bar for further consideration and revision.¹ The State Bar's request is approved.

CANTIL-SAKAUYE

Chief Justice

¹ The State Bar filed all of these petitions under Supreme Court case number S206125. The following is a complete list of each proposed rule submitted and the filing date of each corresponding petition: (1) proposed rule 1.1 (Competence), filed October 22, 2012; (2) proposed rule 1.8.10 (Sexual Relations with Clients), filed October 22, 2012; (3) proposed rule 1.0 (Purpose and Scope of the Rules of Professional Conduct), filed August 13, 2013; (4) proposed rule 1.0.1 (Terminology), filed August 1, 2013; (5) proposed rule 1.4 (Communication), filed August 27, 2013; (6) proposed rule 1.4.1 (Disclosure of Professional Liability Insurance), filed September 5, 2013; (7) proposed rule 2.1 (Advisor), filed September 11, 2013; (8) proposed rule 6.1 (Voluntary Pro Bono Publico Service), filed September 18, 2013; (9) proposed rule 3.1 (Meritorious Claims and Contentions), filed October 3, 2013; (10) proposed rule 1.5.1 (Fee Divisions Among Lawyers), filed October 18, 2013; (11) proposed rule 8.1.1 (Compliance with Conditions of Discipline and Agreements in Lieu of Discipline), filed October 30, 2013; (12) proposed rule 6.2 (Accepting Appointments), filed November 21, 2013; (13) proposed rule 1.17 (Purchase and Sale of a Law Practice), filed November 26, 2013; (14) proposed rule 1.8.1 (Business Transactions with a Client and Acquiring Interests Adverse to the Client), filed December 27, 2013; (15) proposed rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers), filed June 16, 2014; (16) proposed rule 5.2 (Responsibilities of a Subordinate Lawyer), filed July 11, 2014; (17) proposed rule 5.3 (Responsibilities Regarding Nonlawyer Assistants), filed July 25, 2014.



FRANK A. MCGUIRE
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

Supreme Court of California
350 McALLISTER STREET
SAN FRANCISCO, CA 94102-4797

RECEIVED

SEP 23 2014

Executive Office
The State Bar of California

(415) 865-7015
frank.mcguire@jud.ca.gov

September 19, 2014

Senator Joseph L. Dunn (Ret.)
Executive Director and Chief Executive Officer
State Bar of California
180 Howard Street
San Francisco, California 94105

Dear Senator Dunn:

I have been asked to respond to your August 11, 2014, letter sent on behalf of the State Bar of California requesting that the Supreme Court return the 17 proposed amendments or additions to the California Rules of Professional Conduct previously filed with the court. You stated that the bar wishes to engage in a comprehensive reconsideration of all of the proposed rules drafted by the Commission for the Revision of the Rules of Professional Conduct (first Commission) from 2001 to 2009 and approved by the State Bar Board of Trustees in 2010. The court has granted the State Bar's request and has issued an order returning the proposed rules for further consideration. The court anticipates that no further rule petitions will be filed until additional action has been taken by the bar.

The court also internally approved a set of recommendations from court staff intended to guide the State Bar in its task of revising the California Rules of Professional Conduct (CRPC). Specifically, the court requests that the State Bar establish a second Commission for Revision of the Rules of Professional Conduct (second Commission). Members of the second Commission should be appointed no later than November 26, 2014. The court asks that bar staff consult with court staff to establish the size and composition of the second Commission, and to discuss some of the issues that have arisen in the review process to help focus the second Commission's work. The court would like to review recommendations and a proposed charge for the second Commission at an upcoming administrative conference. To assist in the ongoing work of the second Commission, the court will appoint a non-voting member from court staff familiar with the review to date to sit on the second Commission, in order to consult with the court, as necessary.

The second Commission should be directed to complete its work and submit all proposed rules for final consideration by the court no later than March 31, 2017. In developing the charge for the second Commission, the drafters should be guided by the four policy considerations provided in the first Commission's Charter.¹ The court strongly urges that the second

¹ Its Charter stated "[t]he Commission is to develop proposed amendments . . . that:

Commission begin with the current CRPC and focus on revisions that are necessary to address developments in the law, and that eliminate, where possible, any unnecessary differences between California's rules and those used by a preponderance of the states. The second Commission should also be guided in its task by the principle that the CRPC's historical purpose is to regulate the professional conduct of members of the bar, and that as such, the proposed rules should remain a set of minimum disciplinary standards. While the second Commission may be guided by and refer to the American Bar Association's Model Rules of Professional Conduct when appropriate, it should avoid incorporating the purely aspirational or ethical considerations that are present in the Model Rules and Comments. Comments to the proposed rules should be used sparingly and only to elucidate and not to expand upon the rules themselves. California's Code of Judicial Ethics provides one model for the use of commentary in the adoption of a set of rules.

Finally, the court wishes to express its deep appreciation and gratitude to the State Bar Board of Trustees, staff, and members of the first Commission for the years of hard work they dedicated to this difficult project. The second Commission is expected to build upon the strong foundation they have laid.

Sincerely,



FRANK A. McGUIRE
Court Administrator
and Clerk of the Supreme Court

cc: Beth Jay
Emily Graham
Greg Fortescue

“1) Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules;

“2) Assure adequate protection to the public in light of developments [that] have occurred since the rules were last reviewed and amended in 1989 and 1992;

“3) Promote confidence in the legal profession and the administration of justice; and

“4) Eliminate and avoid unnecessary difference between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.” (See Petition Request that the Supreme Court of California Approve New and Revised Rules of Professional Conduct to Replace the Existing Rules Of Professional Conduct (Oct. 2012) [“2012 Req.”], pp. 3-4.)

Attachment 2

The Commission is charged with conducting a comprehensive review of the existing California Rules of Professional Conduct and preparing a new set of proposed rules and comments for approval by the Board of Trustees and submission to the Supreme Court no later than March 31, 2017.

In conducting its review of the existing Rules and developing proposed amendments to the Rules, the Commission should be guided by the following principles:

1. The Commission's work should promote confidence in the legal profession and the administration of justice, and ensure adequate protection to the public.
2. The Commission should consider the historical purpose of the Rules of Professional Conduct in California, and ensure that the proposed rules set forth a clear and enforceable articulation of disciplinary standards, as opposed to purely aspirational objectives.
3. The Commission should begin with the current Rules and focus on revisions that (a) are necessary to address changes in law and (b) eliminate, when and if appropriate, unnecessary differences between California's rules and the rules used by a preponderance of the states (in some cases in reliance on the American Bar Association's Model Rules) in order to help promote a national standard with respect to professional responsibility issues whenever possible.
4. The Commission's work should facilitate compliance with and enforcement of the Rules by eliminating ambiguities and uncertainties
5. Substantive information about the conduct governed by the rule should be included in the rule itself. Official commentary to the proposed rules should not conflict with the language of the rules, and should be used sparingly to elucidate, and not to expand upon, the rules themselves.

The proposed amendments developed by the Commission should be accompanied by a report setting forth the Commission's rationale for retaining or changing any rule and related commentary language.