Ready or Not, Here They Come:
New Rules of Professional Conduct

San Diego County Law Library
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Presented by: David Cameron Carr

1. Rules of Professional Conduct: Historical Background

a. American Bar Association: 1908 Canons of Professional Ethics

   i. Intended as aspirational norms

b. 1928 California Rules of Professional Conduct

   i. Intended as discipline rules, similar to statutes.

   ii. Referred to 1908 Canons as guidance

c. American Bar Association: 1969 Model Code of Professional Responsibility

   i. Intended to serve aspirational norm-setting (the "Ethical Considerations") as well as furnish enforceable discipline rules ("Disciplinary Rules").

d. 1975 California Rules of Professional Conduct

   i. Incorporated some parts of ABA Model Code Disciplinary Rules

e. American Bar Association: 1983 Model Rules of Professional Conduct.

   i. Re-wrote rules as enforceable discipline rules with extensive commentary.

   ii. Now adopted in some version by every state but California

f. 1987 California Rules of Professional Conduct

   i. Rejected the Model Rules in favor of fine-tuning 1975 rules with limited commentary.

g. Tension between black letter discipline rules and aspirational norms

2. 2001-2014 Rules Revision Process (RRC1)

a. Rules Revision Commission spent almost ten years writing a California version of Model Rules

b. Rejected by California Supreme Court in August 2014

3. 2014 -2015 Rules Revision Process (RRC2)

a. Instructed by California Supreme Court to concentrate on discipline rules, not aspirational goals. Restricted commentary.

b. Eliminate unnecessary differences between California Rules and Model Rules

c. Time line for completion of project March 2017

d. Status of Project December 2016

i. ABA numbering system adopted.

ii. Initial 90 period for public comment spring 2016

iii. "Fast Track" Consideration of Prosecutorial Misconduct Rule (New Rule 5-110)

iv. On November 17, 2016, the Board adopted thirty-six proposed rules following public comment (see appendix A.)

v. The Board ordered an additional 45-day public comment period on the thirty-four of proposed rules that have been substantively changed in response to the input received in the first round of public input. Deadline for public comment in January 9, 2017 (appendix B.)

4. "Fast Track" Consideration of California version of ABA Model Rule 3.8

a. Scheck and Levinson letter to Supreme Court (late 2014?)

b. Letter from California Supreme Court re: Model Rule 3.8

i. By letter dated March 10, 2015, from the Honorable Tani G. Cantil-Sakauye, Chief Justice of the Supreme Court of California, to State Bar President Craig Holden, the State Bar was informed that the Board "should feel free to consider . . . whether any particular rule or issue might warrant or benefit from fast track consideration and submission to the court." In a reply letter dated March 11, 2015, President Holden indicated that the Commission would adopt "a procedure to entertain requests for expedited consideration of rules, if appropriate, and give priority where needed."

c. ABA Model Rule 3.8: Special Responsibilities of a Prosecutor

i. Thirty-nine jurisdictions have adopted Model Rule 3.8, paragraph (d) essentially verbatim. Nine jurisdictions have a provision that closely tracks the Model Rule language with non-substantive variations Two jurisdictions have provisions that employ different language but contain the same substance, or include only part of Model Rule 3.8(d).

d. Current Rule 5-110: Duty of Attorney in Government Service

i. A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If, after the institution of criminal charges, the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall promptly so advise the court in which the criminal matter is pending

e. Current Rule 5-220: Suppression of Evidence

i. A member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or to produce.

f. New Rule 5-110 (Appendix C) approved by Board of Trustees on 10/06/16 and waiting for Supreme Court approval.

g. Will be renumbered as 3.8 when all new rules approved.

5. Other Significant New Rules Approved by RRC2 November 17, 2016

a. NOT approved by California Supreme Court yet.

b. New Proposed Rule 2.4 Lawyer as Third Party Neutral

i. Provides that lawyer working as third party neutral shall inform unrepresented parties that lawyer does not represent them

c. New Proposed Rule 3.2 Delay of Litigation

i. Provides that lawyer may not use means that have no other substantial purpose but delay.

d. New Proposed Rule 5.2 Duties of Subordinate Lawyers

i. No "Nuremberg" Defense unless acting in accord with a supervisor's "reasonable resolution of an arguable question of professional duty

e. New Proposed Rule 5.3 Responsibility for Non-Lawyer Assistants

i. Must make reasonable efforts to make sure non-lawyer staff comply with ethics rules

f. New Proposed California Rule 1.4 (former Rule 3-500) Communication with Clients

i. Now includes to duty to consult with client re: means for obtaining client objectives.

g. New Proposed California Rule 7.3 (former Rule 1-400) Solicitation of Clients

i. Real time electronic solicitation (chat rooms, social media) now banned.

h. New Proposed California Rule 1.5.1 (former Rule 2-200) Division of Fees Among Lawyers

i. Lawyers must now enter into a written agreement to divide the fee.

ii. Client must now agree to the fee division when the lawyers agree or as soon as "reasonably practical".

6. Significant New Rules Out for Additional Public Comment

   a. Proposed New California Rule 1.3 Diligence

      i. Specifically adds "diligence" to competent performance.

   b. Proposed New California Rule 1.8.10 Sex With Clients

      i. Replaces "competence" based rule with bright line "thou shalt not".

   c. Proposed New California Rule 1.7 Conflicts of Interest Current Clients

      i. Adopts ABA Model Rules "material limitation" test

   d. Proposed New California Rule 8.4.1 Prohibited Discrimination

      i. Extends rule to terminating or refusing to accept representation.

   e. Proposed New California Rule 1.15

      i. Advanced fees must be placed in trust

      ii. Flat fees can by placed in general account with client consent

      iii. Unearned portion of flat fee must be refunded if representation ends prematurely

Appendix A: Rules Approved by Board of Trustees November 17, 2016

Proposed Rule	Current Rule	Title
1.0.1	1-100(B)	Terminology
1.1	3-110	Competence
1.2	3-210	Scope of Representation and Allocation of Authority
1.4	3-500	Communication with Clients
1.4.1	3-510	Communication of Settlement Offers
1.4.2	3-410	Disclosure of Professional Liability Insurance
1.5.1	2-200	Fee Divisions Among Lawyers
1.6	3-100	Confidential Information of a Client
1.8.2		Use of Current Client's Information
1.8.6	3-310	Compensation from One Other Than Client
1.8.8	3-400	Limiting Liability to Client
1.8.9	4-300	Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review
1.8.11		Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9
1.10		Imputation of Conflicts Of Interest: General Rule
2.4		Lawyer as Third-Party Neutral
2.4.1	1-710	Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator
3.2		Delay of Litigation
3.4	5-310	Fairness to Opposing Party and Counsel
3.6	5-120	Trial Publicity
3.7	5-210	Lawyer as Witness
3.8	5-110	Special Responsibilities of a Prosecutor
3.10	5-100	Threatening Criminal, Administrative, or Disciplinary Charges
4.1		Truthfulness in Statements to Others
5.2		Responsibilities of a Subordinate Lawyer
5.3		Responsibilities Regarding Nonlawyer Assistants
5.4	1-320 / 1-310 / 1-600	Financial and Similar Arrangements with Nonlawyers
5.5	1-300	Unauthorized Practice of Law; Multijurisdictional Practice of Law
6.3		Membership in Legal Services Organization
6.5	1-650	Limited Legal Services Programs
7.2	1-400	Advertising
7.3	1-400	Solicitation of Clients
7.4	1-400	Communications of Fields of Practice and Specialization
7.5	1-400	Firm Names and Letterheads
8.1.1	1-110	Compliance with Conditions of Discipline and Agreements in Lieu of Discipline
8.2	1-700	Judicial Officials
8.5	1-100(D)	Disciplinary Authority; Choice of Law

Appendix B: Rules Out for Public Comment (due January 9, 2017)

Proposed Rule	Current Rule	Title
1.0	1-100	Purpose and Function of the Rules of Professional Conduct
1.2.1	3-210	Advising or Assisting the Violation of Law
1.3		Diligence
1.5	4-200	Fees for Legal Services
1.7	3-310	Conflict of Interest: Current Clients
1.8.1	3-300	Business Transactions with a Client and Pecuniary Interests Adverse to a Client
1.8.3	4-400	Gifts from Client
1.8.5	4-210	Payment of Personal or Business Expenses Incurred by or for a Client
1.8.7	3-310	Aggregate Settlements
1.8.10	3-120	Sexual Relations with Current Client
1.9	3-310	Duties To Former Clients
1.11		Special Conflicts of Interest for Former and Current Government Officials and Employees
1.12		Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral
1.13	3-600	Organization as Client
1.14		Client with Diminished Capacity
1.15	4-100	Safekeeping Funds and Property of Clients and Other Persons
1.16	3-700	Declining or Terminating Representation
1.17	2-300	Sale of a Law Practice
1.18		Duties To Prospective Client
2.1		Advisor
3.1	3-200	Meritorious Claims and Contentions
3.3	5-200	Candor Toward The Tribunal
3.5	5-300 / 5-320	Contact With Judges, Officials, Employees and Jurors
3.9		Advocate in Nonadjudicative Proceedings
4.2	2-100	Communication with a Represented Person
4.3		Communicating with an Unrepresented Person
4.4		Duties Concerning Inadvertently Transmitted Writings
5.1		Responsibilities of Managerial and Supervisory Lawyers
5.3.1	1-311	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer
5.6	1-500	Restrictions on a Lawyer's Right to Practice
7.1	1-400	Communications Concerning a Lawyer's Services
8.1	1-200	False Statement Regarding Application for Admission to Practice Law
8.4	1-120	Misconduct
8.4.1	2-400	Prohibited Discrimination, Harassment and Retaliation

Appendix C: New Rule 5-110

Rule 5-110 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:
(A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;
(B) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(C) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused in propria persona;
(D) Make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor that the prosecutor knows or reasonably should know mitigates the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the
tribunal;
(E) Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
(1) The information sought is not protected from disclosure by any applicable privilege or work product protection;
(2) The evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
(3) There is no other feasible alternative to obtain the information;
(F) Exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 5-120.
(G) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
(1) Promptly disclose that evidence to an appropriate court or authority, and
(2) If the conviction was obtained in the prosecutor's jurisdiction,
(a) Promptly disclose that evidence to the defendant unless a court authorizes delay, and
(b) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
(H) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Your Presenter

David Cameron Carr is senior counsel at Klinedinst PC in the Legal Ethics and Law Practice Management Group in San Diego, California.

Since 2001 he has specialized in representing attorneys in matters involving legal ethics and the law of lawyering, including discipline defense, bar admissions, attorney fee disputes, legal malpractice, attorney professional responsibility and ethics advice.

Mr. Carr graduated from Loyola Law School in 1986 and was admitted to the California Bar that year. After practicing in business litigation and commercial law, Mr. Carr spent 12 years as staff attorney, discipline prosecutor and manager at the State Bar of California, before returning to private practice.

He is an active member of the San Diego County Bar Association, where he serves on the Legal Ethics Committee. Mr. Carr is a member and served as president of the Association of Discipline Defense Counsel from 2008 through 2010. He is also a member of the Association of Professional Responsibility Lawyers and the ABA Center for Professional Responsibility. Mr. Carr is adjunct professor of law at Thomas Jefferson Law School where he teaches professional responsibility.

More information is available at www.ethics-lawyer.com.