

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

MEETING SUMMARY - OPEN SESSION

Friday, October 6, 2006
(9:15 am - 5:00 pm)

State Bar Annual Meeting
Portola Plaza Hotel, Redwood Room
2 Portola Plaza, Monterey, CA 93940
(831) 649-4511

MEMBERS PRESENT: Harry Sondheim (Chair); JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Sean SeLegue; Mark Tuft; Paul Vapnek; and Tony Voogd (LA)

MEMBERS NOT PRESENT: Linda Foy; and Jerry Sapiro.

ALSO PRESENT: Katie Allen (State Bar staff); Chris Ames (Office of the California Attorney General); Joseph J. Bell (former member, Board of Governors); Doreen Boxer (Public Defender, San Bernardino County); David Boyd (Sacramento County Bar Association); Prof. Carole Buckner (COPRAC/Western State); Susan Carson (AG Office, Health, Education & Welfare); Timothy Chandler (Alternate Public Defender, San Diego); Linda Compton (CEB); Randall Difuntorum (State Bar Staff); Karen L. Hawkins (Law Firm of Taggart & Hawkins); Tony Heider (Kern County Public Defender's Office); Paul Hokokian (Board of Governors); Audrey Hollins (State Bar staff); Michael Judge (Public Defender, L.A. and Cal. PD Association); Diane Karpman (Beverly Hills Bar Association Liaison); Mimi Lee (State Bar Staff); Meg Lodise (Trust & Estates Section Executive Committee Liaison); Lauren McCurdy (State Bar staff); Suzanne Mellard (COPRAC Liaison); Marie Moffat (State Bar General Counsel); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Ron Smetana (Office of the California Attorney General); Peter Stern (Trust & Estates Section Executive Committee Liaison); and Gary Windom (Public Defender, Riverside County).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE JULY 28, 2006 AND SEPTEMBER 1, 2006 MEETINGS

The July 28, 2006 action summary was approved subject to non-substantive edits to be provided by Mr. Mohr. Consideration of the September 1, 2006 summary was postponed to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair announced new locations for the Commission's June 1, 2007 and July 20, 2007 meetings. The June 1st meeting will be held in Los Angeles and the July 20th meeting will be held in San Francisco.

For the benefit of interested persons who print Commission agenda materials from the State Bar website, the Chair requested that when members refer to meeting materials during Commission deliberations that both the agenda page numbers and the individual memo or e-mail pagination be identified.

B. Staff's Report

Staff summarized the plans for the Commission's October 7, 2006 public hearing. Staff also reported on the public comment deadline, the comments that have been received and a methodology for starting the Commission's consideration of public comment at its December 1, 2006 meeting.

III. MATTERS FOR ACTION

A. Consideration of Rule 4-200 [ABA MR 1.5] Fees for Legal Services

Mr. Vapnek presented an August 16, 2006 codrafters' memorandum setting forth a unanimous codrafter recommendation that the Commission reconsider its prior decision to reject the ABA Model Rule standard that prohibits an "unreasonable fee." The Chair called for a vote and the recommendation to reconsider failed (4 yes, 7 no, 0 abstain). Mr. Vapnek next led a discussion of the codrafters' proposed amendments to MR 1.5 that would adapt that rule to the Commission's decision to retain the RPC 4-200 standard prohibiting an "unconscionable fee." The following drafting decisions were made during the discussion.

(1) Regarding the inclusion of additional factors that appear in RPC 4-200 but are not in MR 1.5, the Commission decided to include the additional factors (7 yes, 4 no, 0 abstain).

(2) There was no objection to deeming approved the retention of the language in the first sentence of RPC 4-200(B). Also, the codrafters were authorized to add the longstanding California case law definition describing an unconscionable fee as one that shocks the conscience of lawyers of ordinary prudence.

(3) Regarding the desired format for the list of factors, the Commission decided to use the RPC 4-200 format rather than the MR 1.5 format (6 yes, 1 no, 3 abstain).

(4) In response to a recommendation that the codrafters address the propriety of "non-refundable fees," the Chair asked the codrafters to meet via teleconference with the codrafter teams assigned to rules 3-700 (withdrawal) and 4-100 (trust accounts) and collaboratively develop a proposal for comprehensively addressing the proper handling

of “non-refundable fees.” Ms. Karpman volunteered to assist this ad hoc group in developing its proposal.

(5) Regarding the OCTC recommendation to extend the prohibition of the rule to cover excessive charges for expenses (similar to the prohibition in MR 1.5(a) against unreasonable charges for expenses), the codrafters were directed not to include this topic in the rule. However, it was understood that the codrafters were free to explore adding a comment addressing fraudulent billing practices with a possible cross reference to the Bus. & Prof. Code sec. 6106 prohibition against any act constituting moral turpitude (5 yes, 2 no, 1 abstain).

(6) The Commission considered, and agreed with, that part of Mr. Sapiro’s June 5, 2006 e-mail recommending against any adoption of the proposals submitted by Common Good concerning limits on contingent fees (5 yes, 0 no, 3 abstain).

The codrafters were asked to implement the above drafting decisions in a revised draft.

[Intended Hard Page Break]

B. Consideration of Rule 3-700 [ABA MR 1.16] Termination of Employment

The Commission considered a revised draft of proposed amended rule 3-700 (Draft #2, submitted 8/16/06). Mr. Kehr presented the draft rule that had been submitted for the Commission's September 1, 2006 meeting but was carried over until the October meeting. Mr. Kehr led a discussion of the codrafters' issues identified in the footnotes to the draft rule. The following drafting decisions were made during the discussion.

(1) In paragraph (a)(1), there was no objection to deeming approved the deletion of the word "of" in the last line so that it reads: ". . . violation of these rules or of the State Bar Act."

(2) Paragraph (b)(2) was deleted with the understanding that the codrafters could add some of the concepts covered by (b)(2) to the comments or other parts of the rule (10 yes, 0 no, 0 abstain).

(3) There was no objection to authorizing the drafters to clarify that paragraph (b)(1) applies in both non-litigation and litigation settings.

(4) In paragraph (d), a motion to add the concept of "written notice" of withdrawal as part of a lawyer's reasonable steps to avoid foreseeable prejudice to the client failed (3 yes, 4 no, 2 abstain).

(5) In paragraph (b)(5), a motion to add the concept of "written notice" to a client of a breach of an agreement as to expenses or fees failed (3 yes, 6 no, 0 abstain).

(6) In paragraph (b)(5), a motion to add the concept of "reasonable time" to cure a breach of an agreement as to expenses or fees failed (5 yes, 5 no, 1 abstain).

The codrafters were asked to implement the above drafting decisions in a revised draft. In addition, the Chair left open the possibility of addressing the client perjury issue, covered by the now deleted paragraph (b)(2), in the Commission's work on MR 3.3 which will be assigned to the codrafter team that handles RPC 5-200.

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C. Consideration of Rule 1.8.1 [Rule 3-300]. Avoiding Interests Adverse to a Client

The Commission considered a revised draft of proposed amended rule 3-300 (Draft #4.1, dated 9/28/06). Mr. Lamport led a discussion of the issues raised on the proposed comments to the rule. The following drafting decisions were made during the discussion.

(1) All of Cmt.[2] was deleted as drafted but with the understanding that the drafters could present a new approach to an introductory comment on the nature and type of business transactions that implicate the public protection afforded by the rule (4 yes, 3 no, 3 abstain). After this vote, the Commission determined to add back the second and third sentence of Cmt.[2] (8 yes, 0 no, 2 abstain).

(2) In Cmt.[3], the first sentence and the second sentence (citation to *Beery v. State Bar*) was deleted (7 yes, 2 no, 1 abstain).

(3) There was no objection to deeming Cmt.[6] approved as drafted.

(4) Regarding Cmt.[7], there were two failed motions: a motion to conform the rule text to the substantive interpretation in the comment (3 yes, 6 no, 1 abstain); and a motion to delete the entire comment (3 yes, 7 no, 1 abstain).

(5) In Cmt.[8], the cross reference to rule 3-310(B) was changed to rule 1.7(d) (7 yes, 1 no, 1 abstain). Also in Cmt.[8], the first sentence was changed to use the phrase "may be a risk" instead of the phrase "greatest risk" (7 yes, 0 no, 3 abstain).

(6) Regarding Cmt.[11], there was no objection to allowing the codrafters to depart from the MR 1.8 Cmt.[4] and explore implementing the concept that full disclosure to a client is required even in transactions where a client is independently represented by another lawyer.

The codrafters were asked to implement the above drafting decisions in a revised draft.

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D. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

The Commission considered a revised draft of proposed amended rule 3-600 (Draft #5, dated 9/5/06). Mr. Lamport led a discussion of the issues raised on the proposed comments to the rule. The following drafting decisions, including some minor changes to the rule text, were made during the discussion.

(1) In paragraph (b), there was no objection to deleting the phrase "to be" in line no. 7.

(2) In paragraph (d), there was no objection to deleting the unnecessary comma in line no. 7.

(3) In paragraph (f), there was no objection to deleting the unnecessary comma in line no. 7.

(4) Regarding cross references to RPC 3-310, the codrafters agreed to revise those references to the appropriate proposed new rule numbers (i.e., rule 1.8.2 [3-310(E)], rule 1.8.6 [3-310(F)], and rule 1.8.7 [3-310(D)]).

(5) In Cmt.[1], the following grammatical changes were deemed approved: changing "that" to "who"; and changing "or" to "and."

(6) Regarding Cmt.[2], the codrafters agreed to consider the concerns submitted by Mr. Tuft and Mr. Kehr and to prepare responsive revisions.

(7) Regarding Cmt.[3], the codrafters agreed to consider the concerns submitted by Mr. SeLegue, Mr. Kehr and Mr. Tuft and to prepare responsive revisions.

(8) In Cmt.[4], the codrafters agreed to revise the first two sentences to use the active voice and there was no objection to changing "action" to "conduct" in the 4th sentence. In addition, there was no objection to allowing the codrafters to include a modified version of the last sentence of the comparable MR 1.13 comment clarifying rule's standard of knowledge (scienter). It was understood that this comment might be added as a new separate comment.

(9) In Cmt.[5], a motion to delete the second sentence failed (4 yes, 6 no, 1 abstain). In addition, Mr. Melchior submitted the following written objection to the second sentence of Cmt.[5]:

"Please note my formal dissent to the decision to require a lawyer "ordinarily" to go up the ladder where there appears to be a violation which triggers 1.13(b) [3-600]. Not only does this decision disrupt the hoped-for close relationship between the constituent involved and the lawyer, but it can create unintended and unforeseen problems within the organization's management. For one example, to expand on the hypothetical I mentioned during the debate, if the Vice President of Sales proposes to circulate a proposed price increase among competitors, not only is the logical step for the lawyer to tell that person not to do so, and why; but an immediate report of this episode to the senior person, presumably the President, may create or exacerbate tensions between

such senior officers of which the lawyer may be aware, and which can very detrimentally affect the well-being of the organization." The codrafters were asked to implement the above drafting decisions concerning Comments [1] - [5] in a revised draft.

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E. Consideration of Rule 4-210 [ABA MR 1.8(e)] Payment of Personal or Business Expenses Incurred by or for a Client

Matter carried over.

[Intended Hard Page Break]

F. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

Matter carried over.

[Intended Hard Page Break]

G. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

Matter carried over.

[Intended Hard Page Break]

H. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].

Consideration of this agenda item was specially set for 9:30 a.m. to accommodate the attendance of interested persons. The Commission considered a revised draft of proposed amended new rule 1.14 (Draft #8, submitted 9/25/06). The Chair welcomed Peter Stern and Meg Lodise of the Trust and Estates Section Executive Committee. Ms. Peck led a discussion of the codrafters' proposed comments. The following drafting decisions were made during the discussion.

(1) In Cmt.[1], a motion to delete the first sentence failed (4 yes, 6 no, 0 abstain). Also, a motion to delete the fourth sentence failed (4 yes, 5 no, 1 abstain).

(2) In Cmt.[1], the first sentence was revised to add the phrase "with diminished capacity" after the word "client" (9 yes, 0 no, 1 abstain). Also in the first sentence, there was no objection to adding a comma after the phrase "goals in the representation."

(3) In Cmt.[2], first sentence, a recommendation to change "diminished capacity" to "significantly diminished capacity" was withdrawn once the codrafters' explained that the use of "diminished capacity" was an intended reference to a broader class of clients that includes clients with "significantly diminished capacity."

(4) In Cmt.[5], the following revision of the first sentence was deemed approved: "The client may be materially assisted by the presence of family members or ~~other trusted~~ persons trusted by the client in discussions with the lawyer."

(5) In Cmt.[5], the third sentence was revised to delete the phrase "except for protective action authorized under paragraph (b)," (7 yes, 3 no, 1 abstain).

(6) In Cmt.[6], the codrafters agreed to replace the reference to rule 3-310 with an appropriate reference to Rule 1.7.

(7) In Cmt.[6], there was no objection to deleting everything after the phrase "position adverse to the client."

(8) A recommendation to reverse the order of Cmt.[6] and [7] was deemed approved.

(9) In Cmt.[8], there was no objection to adding the phrase "but not limited to" before the enumerated points (1) - (3).

(10) A motion to delete Cmt.[9] failed (3 yes, 7 no, 1 abstain). The codrafters agreed to consider revising Cmt.[9] to address the concerns raised by Mr. Melchior and Mr. Lamport.

(11) Cmt.[10] was deleted in its entirety (9 yes, 0 no, 2 abstain).

After the above action to address the codrafters' proposed comments, the Commission voted to tentatively approve the rule and the comments (7 yes, 2 no, 2 abstain). In taking this vote it was understood that: (1) Cmt.[9] would be revised and brought back; and (2) the language addressing the duty of confidentiality would be subject to the action

to be taken by the Commission on RPC 3-100. Mr. Melchior asked the meeting notes reflect that he voted to approve the rule but does not favor the long comments to the rule. Ms. Peck thanked the Trust and Estate Section Executive Committee liaisons for their invaluable assistance on the rule. The Chair asked that the rewrite of Cmt.[9] be prepared for the Commission's next meeting.

[Intended Hard Page Break]

I. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client

Matter carried over.

[Intended Hard Page Break]

J. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

Consideration of this agenda item was specially set for 2:00 p.m. to accommodate the attendance of interested persons. The Commission considered a revised draft of proposed amended rule 2-100 (Draft #10.1, dated 9/21/06). The Chair welcomed the following visitors who indicated an interest in addressing the Commission on paragraph (c) of the rule: Susan Carson; Chris Ames; Ron Smetana; and Gary Windom.

The Chair called for discussion of paragraph (c)(1). One point raised during the discussion was that the League of Cities and the County Counsel Association have concerns that the current draft of paragraph (c)(1) may be exploited by plaintiff's lawyers who sue a governmental agency and use the pretext of a person's right to petition government as a means for taking unfair advantage of public officials by obtaining admissions or other damaging statements. An alternative to the current draft would be a standard comparable to the approach taken in ABA ethics opinions that permit ex parte contact with a represented agency so long as a notice/warning is given to the lawyer representing the agency. A motion to reconsider paragraph (c)(1) failed (2 yes, 7 no, 2 abstain).

Next, the Chair called for discussion of paragraph (c)(3). Among the points raised were the following.

(1) The change from "party" to "person" is inadvisable given the impact on law enforcement investigations but if the change will be made then Mr. Kehr's 9/17/06 version of (c)(3) is acceptable and may ameliorate some of the detrimental impact on investigations.

(2) Mr. Kehr's 9/17/06 version of (c)(3) is an overbroad exception that effectively renders the rule inapplicable to the law enforcement context. As drafted, it might apply to allow State Bar trial counsel to have ex parte communications with represented respondents in State Bar disciplinary matters.

(3) If there is to be a descriptive exception, then it should be narrow and focused on specific areas of concern, such as the "crime A v crime B" scenario addressed in ABA ethics opinions.

(4) Consideration should be given to simply using the "authorized by law or court order" exception and couple it with commentary indicating that "authorized" includes conduct validated by cases and ethics opinions.

(5) Consideration should be given to including a comment stating that the change from "party" to "person" is not intended to change the status quo of the law governing the authority of law enforcement to conduct investigations.

(6) As indicated by Cmt.[5] to MR 4.2, the limits on the exception are not intended to be coextensive with the limits imposed by violations of Constitutional rights.

(7) The choice between "authorized by law" and "not otherwise prohibited by law" is a determination of whether to place the burden on the prosecution or the defendant to

prove what is contained in the law. However, it would be inappropriate to resolve this through a lawyer conduct rule.

(8) The provision for authorization via "court order" is an invitation to tax an already overburdened court system and limited prosecutor resources. It is important to note that state criminal proceedings in California are generally not initiated through a grand jury.

Following discussion, a straw vote was taken on pursuing the concept of Mr, Kehr's 9/17/06 version of (c)(3) but this did not reveal a strong consensus (5 yes, 5 no, 2 abstain). In view of the straw vote, the Chair ask the codrafters to consider the points made in the discussion and make a recommendation on options for proceeding. The interested persons were invited to continue to provide input to the codrafters. Mr. Windom agreed to be a defense counsel contact person. In addition, staffed was asked to provide the codrafters with materials on the State Bar's prior consideration of amendments to RPC 2-100 in response to the Thornburgh Memo.

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