

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

MEETING SUMMARY - OPEN SESSION

Friday, June 8, 2007
(9:30 am - 5:00 pm)

State Bar Office – LA
1149 South Hill Street, Room 723
Los Angeles, CA 90015

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy (SF); JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo (SF); Jerry Sapiro; Sean SeLegue; Dominique Snyder; Mark Tuft; Paul Vapnek and Tony Voogd.

MEMBERS NOT PRESENT: Kurt Melchior.

ALSO PRESENT: George Cardona (Acting U.S. Attorney, C.D. California); Randall Difuntorum (State Bar Staff); Herschel Elkins (Office of the California Attorney General); Kate Flaherty (San Diego Public Defenders Office, California Public Defenders Association); Michael Judge (Los Angeles Public Defender); Mimi Lee (State Bar Staff); Lauren McCurdy (State Bar staff); Albert Menaster (Los Angeles Public Defenders Office); Prof. Kevin Mohr (Commission Consultant); Jordan Parkhurst (Los Angeles Public Defenders Office); Devallis Rutledge (Special Council to the Los Angeles District Attorney); Justice Charles Vogel (by telephone); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM JANUARY 26-27, 2007 and MARCH 16, 2007 MEETINGS

The January 26-27, 2007 and March 16, 2007 meeting summaries were deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reminded members about the role of the Co-Vice Chairs as mentors for each of the Commission's drafting teams. The Chair reported on an invitation to attend a July 11, 2007 meeting of the California Commission on the Fair Administration of Justice (CCFAJ). It was understood that the Chair would represent the Commission in reporting on the status of the Commission's work but would act only in a personal capacity when expressing views on questions posed by members of the CCFAJ or other attendees.

B. Staff's Report

Staff reported on the action of the Board of Governors' Committee on Planning in accepting the Commission's 2008 work plan. Staff also noted that the State Bar's proposed rules on insurance disclosure have been issued for additional public comment with a deadline of August 8, 2007. Commission members were invited to review the revised proposal and submit personal comments.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES REDRAFTED FOLLOWING PUBLIC COMMENT (BATCH 1)

A. CONSENT - Proposed Rule 5.3 [Rule 1-300]. Nonlawyer Assistants

The Chair indicated that additional consideration of this consent item would be allowed due to a mis-communication; however, no discussion was conducted and the rule was deemed approved on consent when Mr. Martinez agreed to hold his issues until after informal submission of the rule to the Supreme Court.

[Intended Hard Page Break]

**B. CONSENT - Proposed Rule 2.4 [Rule 1-720]. Member as Third Party
Neutral**

The Chair welcomed Justice Charles Vogel who joined the meeting by telephone to monitor the Commission's action on proposed Rule 2.4. The Chair indicated that proposed Rule 2.4 was a consent agenda item and per the Commission's consent agenda procedures, the rule was deemed approved on consent. However, the Chair explained that the Commission had received the June 4, 2007 comment letter submitted by the California Judges Association and that the Commission will reserve consideration of that letter for the next time that the rule is placed on the Commission's agenda. The Chair also noted that the proposed rule would be the subject of at least one more official public comment distribution which is anticipated to occur when the Commission has completed all of its work and is able to present the entirety of the rules as a single public comment item.

[Intended Hard Page Break]

C. CONSENT - Proposed Rule 1.0.1. Law Firm Definition

The Chair deemed this rule approved on consent.

[Intended Hard Page Break]

D. Consideration of Rule 1.2.1 [Rule 3-210] Advising the Violation of Law

This agenda item was circulated for a 10-day ballot with a deadline of February 26, 2007. By the deadline, at least six members of the Commission objected to approval by 10-day ballot and requested that the rule be placed on the agenda. Discussion of the rule was limited to those issues raised in response to the 10-day ballot. Consideration of this item began with a vote to go back to the original public comment version of the rule (8 yes, 2 no, 1 abstain). Working off the original public comment version, the following drafting decisions were made.

(1) Paragraph (a) was revised to use the language of MR 1.2(d) up to the word “fraudulent” (7 yes, 2 no, 1 abstain).

(2) After the MR 1.2(d) language, the phrase “or a violation of any law, rule or ruling of a tribunal” was added in paragraph (a) (8 yes, 4 no, 0 abstain).

(3) A recommendation to add the concept of the second sentence of Cmt.[3] to paragraph (b) of the rule was not adopted (5 yes, 7 no, 0 abstain).

(4) Cmt.[1], as revised by Mr. Kehr (removing the phrase “with the intent of facilitating or encouraging the conduct:), was adopted (7 yes, 2 no, 2 abstain).

(5) The first sentence of Cmt.[2] as revised by Mr. Kehr was adopted (8 yes, 1 no, 2 abstain).

(6) The third sentence of Cmt.[2] as revised by Mr. Kehr was adopted (9 yes, 1 no, 2 abstain).

(7) The fourth sentence of Cmt.[2], as revised by Mr. Kehr (including the grammatical change of the word “appears” to “appear”), was adopted (8 yes, 0 no, 3 abstain).

(8) The second sentence of Cmt.[3] was adopted (9 yes, 1 no, 2 abstain) as revised to read:

“Determining the validity, scope ~~or interpretation~~ meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule or ruling of a tribunal, or of the ~~interpretation-meaning~~ placed upon it by governmental authorities.”

(9) A recommendation to replace the word “require” with the word “include” in the second sentence of Cmt.[3] was not adopted (4 yes, 7 no, 0 abstain).

(10) In Cmt.[4], the phrase “consult with” was replaced with “must explain to the client” (6 yes, 1 no, 1 abstain).

With the above changes, there was no objection to deeming the rule approved. The codrafters were asked to submit final version of the rule.

[Intended Hard Page Break]

E. Proposed Rule 5.2 [Rule 1-310X]. Responsibilities of Subordinate Lawyer

The Commission considered Draft #5.1 of proposed Rule 5.2 (dated 4/30/07). There was no objection to the Chair deeming approved a recommended non-substantive change to delete the phrase "Rules of Professional Conduct" and replace it with the phrase "these Rules." In addition, the Commission decided to use the term "knows" rather than "knew" or "knew or should have known" and to indicate in the request for public comment materials that the term "knows" will be a term defined in the Commission's anticipated terminology section of the rules (7 yes, 0 no, 1 abstain). With these changes, there was no objection to deeming the rule approved.

[Intended Hard Page Break]

F. Proposed Rule 1.8.10 [Rule 3-120]. Sexual Relations With Client

The Chair specially set this matter for discussion at 4:00 pm. The Commission considered Draft #5.1 of proposed Rule 1.8.10 (dated 2/26/07). The following drafting decisions were made:

(1) The Commission adopted the concept of paragraph (a) as drafted (6 yes, 5 no, 0 abstain). It was understood that the prior paragraph (b) had been deleted and that the paragraph designated as "paragraph (c)" in the draft was previously approved and would be renumbered as "paragraph (b)."

(2) There was no objection to deeming Cmt.[1] approved.

(3) Cmt.[2], as revised by the Commission Consultant (removing the reference to the MR conflicts concept of "materially limited" and replacing it with references to proposed Rules 1.7(d), 1.1, and 2.1) , was approved (6 yes, 0 no, 2 abstain).

(4) A recommendation that the issue "re-initiation of a sexual relationship" be addressed in the comments was not adopted (3 yes, 5 no, 0 abstain).

(5) Cmt.[3] was adopted as drafted (4 yes, 1 no, 2 abstain).

(6) Cmt.[4] was adopted as drafted (5 yes, 0 no, 2 abstain).

With the above changes, the rule was deemed completed and approved for informal submission to the Supreme Court. The codrafters were asked to provide staff with a final version of the rule. It was understood that the informal submission to the Supreme Court would note the close votes that initially endorsed the California approach and then later departed from the California approach to track the ABA.

[Intended Hard Page Break]

IV. **MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 2OR BATCH 3 RULES)**

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

The Commission considered Draft #7.2 of proposed Rule 1.8.1 (dated 4/30/07). Mr. Lamport led a discussion of outstanding issues. The following drafting decisions were made.

(1) The first line of paragraph (b) was revised to include the phrase “in the transaction or acquisition” (10 yes, 0 no, 1 abstain).

(2) There was no objection to deeming approved the non-substantive revisions to Cmt. [1] (changing the word “including” to the word “and”).

(3) The first sentence of Cmt.[1] as revised by Mr. Kehr (to state that advice to seek independent counsel is not required where the client already is represented in the transaction by another lawyer) was adopted (7 yes, 0 no, 2 abstain).

(4) Cmt.[11] was adopted as revised by Mr. Kehr (5 yes, 4 no, 1 abstain).

(5) In Cmt.[2], the phrase “Except as set forth in comments [5] and [6], this rule does not apply. . .” was added (9 yes, 0 no, 1 abstain).

(6) A recommendation to add a comment referring to *Fletcher v. Davis* and State Bar Formal Op. No. 2006-170 was not adopted (4 yes, 5 no, 1 abstain). Ms. Peck asked that her dissent be noted due to the concern that the issue raised by *Fletcher* and addressed in the State Bar opinion is an issue that arises on a daily basis and needs to be resolved by the Supreme Court.

(7) Cmt.[5a] was adopted, as revised to use the following as the first sentence: “Even when this rule does not apply to the negotiation or modification of the agreement by which a lawyer is retained by a client, other fiduciary principles might apply.” (4 yes, 1 no, 0 abstain)

The codrafters were asked to revise the draft rule and all members were encouraged to send the codrafters input on the issue of the rule’s application to modifications of fee agreements.

[Intended Hard Page Break]

B. 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]

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

Matter carried over.

[Intended Hard Page Break]

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

The Commission considered Draft #4 of proposed Rule 1.8.5 (dated 12/17/06). Mr. Kehr led a discussion of outstanding issues. The following drafting decisions were made.

(1) In paragraph (a)(3), a recommendation to change “costs” to “reasonable expenses” was not adopted (1 yes, 7 no, 0 abstain).

(2) In paragraph (a)(3), a recommendation to end the language at “. . .all reasonable expenses of litigation or in providing other legal services to the client” was not adopted (3 yes, 4 no, 1 abstain).

(3) In paragraph (a)(4), a recommendation to add the phrase “without expectation of repayment” was not adopted (1 yes, 7 no, 0 abstain).

(4) In paragraph (a)(4), the reference to “costs and expenses” was modified to refer to “costs and reasonable expenses” (5 yes, 4 no, 0 abstain).

(5) A recommendation to delete all of paragraph (a)(3) and (a)(4) was not adopted (2 yes, 4 no, 2 abstain).

(6) A recommendation to delete the last sentence of Cmt.[1] was not adopted (2 yes, 4 no, 2 abstain).

With the above changes, the rule was deemed approved for inclusion in the Commission’s second batch of public comment proposals. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

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

The Commission considered Draft#1 of proposed Rule 1.5 (dated 11/7/06). Mr. Vapnek led a discussion of the proposed rule. The following drafting decisions were made.

(1) The California title of the rule (“Fees for Legal Services”) was adopted (8 yes, 0 no, 1 abstain).

(2) Paragraph (b) was revised to include the bracketed reference to “negotiating or setting” (7 yes, 1 no, 2 abstain).

(3) In paragraph (b) by consensus, in the first line, change “the fee” to “it” (“ . . . if it is so exorbitant. . .”) and, in the next to last line, add a comma and the word “so” after “provides” so that it reads: “provides, so that. . . .”

(4) Paragraph (b) was further revised to end after the word “conscience” (6 yes, 3 no, 1 abstain) and paragraph (c) was moved into (b) (7 yes, 2 no, 2 abstain). Mr. Tuft asked that his dissent to this narrowing of the national standard be noted.

The codrafters were asked to revise the draft rule and all members were encouraged to send the codrafters input on the issue of whether and how to incorporate the concepts of overreaching and procedural unconscionability. The Chair indicated the following possible options: (1) make overreaching separate basis for an improper fee; (2) include it in the rule as one of the express factors to consider; (3) address it only in the comments; or (4) include it in paragraph (b) of the rule.

[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 2-100 [ABA MR 4.2] Communication With a Represented Party

The Chair specially set this matter for discussion at 11:00 am. The Chair welcomed the following visitors who were present for the discussion of this rule: George Cardona; Herschel Elkins; Kate Flaherty; Michael Judge; Albert Menaster; Jordan Parkhurst; and Devallis Rutledge. The Chair led a discussion of the issues raised by the drafters. The following drafting decisions were made.

(1) In response to the codrafters' bracketed language in Cmt.[7c-1] (re reference to either "prosecutors" or "lawyers"), the Commission adopted the following modified version of the alternate language submitted by the Department of Justice (7 yes, 5 no, 0 abstain):

"Paragraph (c)(3) recognizes that ~~government prosecutors and~~ government lawyers representing government entities in civil or administrative enforcement investigations and government prosecutors, as authorized by relevant federal and state constitutional, decisional, and statutory law, may engage in legitimate investigative activities ~~in conducting or supervising criminal and civil law enforcement investigations~~, either directly or through investigating agents and informants. "

(2) In response to the codrafters' bracketed language in Cmt.[7c-2] (re inclusion of a citation to California Attorney General Op. No. 91-1205), the Commission deleted the reference to the Attorney General opinion (9 yes, 1 no, 0 abstain).

(3) The Chair invited a motion to reconsider the change from "party" to "person" in paragraph (a), but there was an insufficient number of members in favor of reconsidering (only 2 of a minimum 6 required votes).

(4) In paragraph (c)(3), the word "otherwise" was deleted and the word "a" was added so that it reads: "Communications authorized by law or a court order." (6 yes, 0 no, 4 abstain)

(5) A recommendation to change paragraph (c)(3) to track the language suggested in the CDAA letter dated 5/23/07 (rule prohibits only communications prohibited by law or court order) was not adopted (3 yes, 7 no, 1 abstain).

(6) Consideration of paragraph (e) was referred back to the drafters to prepare a corresponding recommendation on MR 4.3.

(7) In paragraph (g), the phrase "political subdivision" was replaced with the phrase "political subdivision or other governmental organization" (7 yes, 2 no, 2 abstain).

(8) There was no objection to deeming Cmt.[1] approved as drafted.

(9) There was no objection to deeming Cmt.[2] approved as drafted.

The codrafters were asked to prepare a revised draft rule implementing the drafting decisions. The Chair invited the CDAA representatives to provide suggested language addressing the whistleblower issue.

[Intended Hard Page Break]