

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

DRAFT MEETING SUMMARY - OPEN SESSION

Friday, July 25, 2008
(9:15 am - 5:00 pm)

SF–State Bar Office
180 Howard Street
San Francisco, CA 94105

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; Robert Kehr; Stan Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Ignazio Ruvolo; Jerry Sapiro; Dominique Snyder (by telephone); Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: JoElla Julien and Mark Tuft.

ALSO PRESENT: Allen Blumenthal (State Bar Office of Enforcement); George Cardona (U.S. Attorney, C.D. Cal.); Randall Difuntorum (State Bar staff); John Drexel (State Bar staff); Mimi Lee (State Bar staff); Marie Moffat (State Bar General Counsel) (by telephone); Prof. Kevin Mohr (Commission Consultant); Ann Ravel (COPRAC Liaison); Toby Rothschild (Access to Justice Commission and LACBA Liaison); and Mary Yen (State Bar Office of General Counsel).

I. APPROVAL OF A REVISED OPEN SESSION ACTION SUMMARY FOR APRIL 25, 2008 MEETING AND THE OPEN SESSION ACTION SUMMARY FOR THE JUNE 13, 2008 MEETING

The open session action summaries for the April 25, 2008 meeting and the June 13, 2008 meeting were deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair addressed two administrative matters: (1) regarding post-meeting drafts prepared by the Consultant, the Chair noted that an agenda item should be reviewed and adopted by the drafters before placement on a meeting agenda; and (2) regarding the Commission's September meeting in connection with the State Bar Annual Meeting in Monterey, the Chair polled the members and then scheduled the ½ -day meeting on Saturday (9/27/08) for 8:00 am to 12:30 pm.

B. Staff's Report

Regarding activity by the Board of Governors, staff reported that a Career Transition Task Force has been created and that this new task force may be referring potential rule amendment issues to the Commission for consideration. Regarding activity by COPRAC, staff reported that COPRAC's proposed formal opinion Interim No. 05-0001 (re application of Rule 3-300 to a modification of a lawyer-client fee agreement) has been the subject of polarized public comment and that at least one of the public comments has indicated that the Commission should consider the views expressed concerning the opinion in connection with proposed Rule 1.8.1. Staff indicated that the written public comment on proposed formal opinion Interim No. 05-0001 will be shared with the Commission's Rule 1.8.1 drafting team.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 4 RULES)

A. Consideration of Rule 5-110 [including all of ABA MR 3.8] Performing the Duty of Member in Government Service

The Commission considered Draft 4 of proposed Rule 3.8 [5-110] (dated June 16, 2008). The Commission Consultant led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), the addition of a comma after the word "commencing" was deemed approved.

(2) Regarding paragraph (b), the Chair took a straw vote to ascertain the sense of the Commission on a proposal to reconsider the prior action to approve this paragraph. The straw vote (5 yes, 2 no) indicated sufficient interest and the Chair called for discussion of any changes. The Commission considered but rejected a recommendation to delete the phrase "make reasonable efforts to" and the phrase "and the procedure for obtaining" (1 yes, 7 no, 1 abstain). The Commission then directed the codrafters to replace paragraph (b) with the comparable language used in MR 3.8 (b) (9 yes, 0 no, 1 abstain).

(3) In paragraph (c), there was no objection to the Chair deeming approved the replacement of the term "pro per" with the more complete phrase "in propria persona."

(4) In paragraph (f), the second line, the first "or" was changed to "and" (7 yes, 2 no, 0 abstain). The rationale for this change was stated as a need to conform the language to the meaning that the ABA presumably intended.

(5) In paragraph (g)(1), there was no objection to the Chair deeming approved the slight modification of moving the word "promptly" after the word "delay."

(6) In Cmt.[1], the third sentence, there was no objection to the Chair deeming approved the replacement of the phrase "applicable California or Federal Law" with the phrase "applicable law." It was understood that the codrafters would review the other comments to ascertain whether any conforming changes are needed. In addition, there was no

objection to the Chair deeming approved the restructuring of this one sentence into two sentences: the first sentence ending after the word “prosecutor;” and the next sentence starting with the word “Knowing.” This change included the deletion of the word “and” between “prosecutor” and “knowing.”

(7) The entire last sentence of Cmt. [1] was deleted (9 yes, 0 no, 0 abstain).

(8) In Cmt. [3], all of the language was replaced with the following language recommended by Mr. Tuft: “The obligations in paragraph (d) apply only with respect to controlling case law existing at the time of the obligation and not subsequent case law that is determined to apply retroactively.” (9 yes, 0 no, 0 abstain).

(9) In Cmt. [4], the Commission considered but rejected a recommendation to delete the phrase “or other privileged” relationship (3 yes, 4 no, 2 abstain). (Mr. Melchior asked that the record of this vote indicate that his vote was based on an understanding that the rule protects information protected by other privileges (such as the spousal privilege, clergy privilege, etc..)).

(10) In Cmt. [5], the second and third sentences were deleted out of a concern that they were not sufficiently clear so as to give any reasonable guidance (7 yes, 1 no, 0 abstain).

(11) Regarding the DOJ’s recommended revisions to the ABA concerning MR 3.8 (g), the Chair took a straw vote to ascertain the Commission’s interest in considering language like the DOJ’s draft that distinguishes between prosecutors who are presently employed and those who were previously employed in a particular prosecutor’s office. The straw vote was 7 yes, 0 no, 0 abstain and the Chair asked the codrafters to include this concept in the next draft. Regarding the DOJ’s recommendation to the ABA to delete MR 3.8 (h), the codrafters were asked to consider a possible revision that limits the requirements in paragraph (h) to only those circumstances where a prosecutor has complied with paragraph (g) and, after a certain amount of time has passed, that prosecutor comes to know that no action on the behalf of the affected defendant has been taken by the court or any defense counsel.

Following discussion, the codrafters were asked to implement the above action in a revised draft.

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B. Consideration of Rule 3-310(D) [ABA MR 1.8(g)] Avoiding the Representation of Adverse Interest (aggregate settlements)

The Commission considered Draft 3.1 of proposed Rule 1.8.7 [3-310(D)] (dated July 7, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) The Commission considered whether to delete “written” as a part of the “informed consent” policy in the rule. Initially two votes rejected proposals to make this change (5 yes, 7 no, 0 abstain) (3 yes, 9 no, 0 abstain) but after further discussion, the Commission decided to delete “written” (7 yes, 4 no, 0 abstain).

(2) Although paragraph (b) was deleted at the Commission’s June 13, 2008 meeting, the Chair was asked to take a straw vote to ascertain the sense of the Commission on a proposal to reconsider that deletion. The straw vote (6 yes) indicated sufficient interest and the Chair permitted discussion of proposals to restore paragraph (b) to the rule. Following discussion, the Commission decided to restore the concept of paragraph (b) (re advance consent) to the rule (8 yes, 4 no, 0 abstain). The codrafters were asked to make this change in the next draft.

(3) In Cmt. [1], the fifth sentence, there was no objection to the Chair deeming approved the slight modification of deleting the phrase “and under Rule 1.7” from the end of the sentence and adding it back towards the beginning of the sentence just before the reference to Rule 1.2(a).

(4) In Cmt. [1], the last sentence, there was no objection to the Chair deeming approved the restructuring of the language into two separate sentences

“This Rule applies whether or not litigation is pending, ~~but~~ However, it does not apply to class action settlements subject to court approval.”

(5) In Cmt. [1], the second sentence, there was no objection to the Chair deeming approved the slight modification of moving the word “together” after the word “pleas.”

(6) In Cmt. [2], the references to “this Rule” were deleted and replaced with references to “paragraph (a)” (10 yes, 1 no, 1 abstain). It was understood that the codrafters would also delete the first sentence in this comment from Cmt. [1]. It also was understood that the codrafters would review all of the comments after they have revised the rule to restore paragraph (b) in order to assure that there are no erroneous references to “this Rule.”

Following discussion, the codrafters were asked to implement the above action in a revised draft.

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C. Consideration of Rule 5-120 [ABA MR 3.6] Trial Publicity

The Commission considered Draft 2.1 of proposed Rule 3.6 [5-120] (dated July 7, 2008). Mr. Lampert led a discussion of the open issues and the following drafting decisions were made.

(1) In Cmt. [1], the third sentence, there was no objection to the Chair deeming approved the following revision: “On one hand, publicity should not be allowed to ~~deprive the parties of~~ affect adversely the fair administration of justice.” It was noted that this change reflects a more accurate statement of the law.

(2) In Cmt. [1], the fifth sentence, there was no objection to the Chair deeming approved the deletion of the phrase “of a party” in order to make the parameters of the comment coextensive with the provisions of the rule.

(3) In Cmt. [1], the Commission considered but rejected a proposal to revise the first sentence to eliminate any self-laudatory tone (6 yes, 6 no, 0 abstain).

(4) In Cmt. [1], the last sentence, there was no objection to the Chair deeming approved the deletion of the entire sentence as surplusage and repetitive.

(5) In Cmt. [6], the first sentence, the Commission considered but rejected a proposal to replace the word “will” with “may” (3 yes, 9 no, 0 abstain). It was noted that there was not a compelling reason to depart from the ABA language.

(6) In Cmt. [7], the last sentence, there was no objection to the Chair deeming approved the following revision to make the language more succinct: “Such responsive statements must be limited to ~~contain only such information as is necessary~~ to mitigate undue prejudice created by statements of others.”

(7) There was no objection to the Chair deeming approved a revision of the first sentence of the last comment (which in Draft 2.1 was numbered as Cmt. [2] but would be renumbered after all of the comments are finalized) to read: “Special rules of confidentiality may ~~validly~~ govern proceedings in juvenile, family law and mental disability proceedings, and perhaps other ~~types of litigation matters~~.”

With these changes, there was no objection to the Chair deeming the rule approved for inclusion in the next public comment batch. The codrafters were asked to submit a final draft of the rule.

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D. Consideration of Rule 3-310 [ABA MR 6.5] Avoiding the Representation of Adverse Interest (Nonprofit and Court-Annexed Limited Legal Services Programs)

The Commission considered a July 7, 2008 report and recommendation on MR 6.5. Ms. Snyder summarized the codrafters' recommendations and emphasized the issue of whether there should be a rule in California that is similar to MR 6.5. Following discussion, there was no objection to the Chair deeming approved the codrafters' recommendation that the Commission adopt the concept of MR 6.5 and develop a draft rule. It was noted that the overarching policy in favor of promoting pro bono presently is reflected in the Board of Governors pro bono resolution.

The Chair indicated that further discussion of this matter will be set for the Commission's September meeting as this will allow the Commission to focus on conflicts imputation and ethical walls at the Commission's August meeting. The codrafters indicated that a degree of resolution of conflicts imputation and ethical walls issues would be necessary before the Commission could address the specific elements of MR 6.5.

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E. Consideration of Rule 5-200 [including all of ABA MR 3.3] Trial Conduct

The Commission considered Draft 6.2 of proposed Rule 3.3 [5-200] (dated May 21, 2008). Justice Ruvolo led a discussion of the open issues and the following drafting decisions were made.

(1) In Cmt. [4], the language used in the draft was retained and not changed to track the comparable language in New York's version of MR 3.3 (7 yes, 1 no, 2 abstain).

(2) In Cmt. [4], the fourth sentence, the "geographic" and the examples used were deleted (9 yes, 0 no, 3 abstain). In addition, the deletion of the introductory phrase: "Depending upon the circumstances" was deemed approved.

(3) In Cmt. [4], the last sentence was retained but the phrase "as to the substance of the controlling legal authority" was deleted (11 yes 0 no, 0 abstain).

(4) In Cmt. [5], the second sentence, the codrafters were asked to revise the language to track the language used in comments to MR 3.3 (8 yes, 3 no, 0 abstain). Subsequently, the Commission determined to delete the entire second sentence (8 yes, 3 no, 0 abstain), in favor of using language similar to Cmt. [2] to MR 3.3 (see entry below).

(5) In Cmt. [5], the discussion of a lawyer's role as an "officer of the court" was deleted with the proviso that the concept would be added to another place in the rule's comments (7 yes, 4 no, 0 abstain). In addition, the codrafters were asked to adapt Cmt. [2] to MR 3.3 and include the ABA's explanation of the "officer of the court" rationale (6 yes, 4 no, 1 abstain). However, it was understood that the third sentence of the ABA comment (re confidentiality) would not be included.

(6) In Cmt. [7], the last two sentences were revised, as set forth below, to delete the reference to "ethical" rules and to condense the overlapping concepts into a succinct statement (4 yes, 0 no, 6 abstain).

~~"The lawyer's ethical duty may be qualified by judicial decisions interpreting constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the lawyer under these Rules and the State Bar Act are subordinate to such requirements. See also Comment [9]. The obligations of a lawyer under these Rules and the State Bar Act are subordinate to applicable judicial decisions interpreting constitutional provisions for due process and the right to counsel in criminal cases. See also Comment [9]."~~

(7) In Cmt. [8], the second sentence, a recommendation to change "is" to "may" was considered but rejected (2 yes, 9 no, 1 abstain).

(8) In Cmt. [10], the second sentence, the phrase at the end: ", either during the lawyer's direct examination or in response to cross examination by the opposing lawyer" was deleted (12 yes 0 no, 0).

(9) In Cmt. [10], the penultimate sentence, the phrase: ", and may be required to seek permission from the tribunal to withdraw," was added, and in the language addressing

“remedial action,” the word “may” was replaced with “must” to track the comparable ABA language (10 yes, 2 no, 0 abstain).

(10) In Cmt. [11A], the following new third sentence was added (10 yes, 1 no, 1 abstain): “Remedial measures also include explaining to the client the lawyer’s obligations under this Rule and, where applicable, the reasons for 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.”

(11) A recommendation to delete all of Cmt. [12] was considered and rejected (4 yes, 8 no, 0 abstain).

(12) The codrafters were asked to consider the placement of Cmt. [12A] when they finalize the rule.

(13) In Cmt. [13], the fourth sentence was deleted and the following two sentences replaced the last sentence of Cmt. [12A] (12 yes, 0 no, 0 abstain): “There may be other obligations that go beyond this Rule. See, e.g., Rule 3.8.”

(14) In Cmt. [13], the last two sentences were deleted (7 yes, 2 no, 1 abstain).

(15) All of Cmt. [14] was deleted as unnecessary and possibly inaccurate (6 yes, 5 no, 0 abstain).

(16) For Cmt. [15], possible revisions were discussed but there was no consensus for making any changes and the comment was deemed approved as drafted.

(17) All of Cmt. [16] was deleted (9 yes, 1 no, 0 abstain).

With these changes, there was no objection to the Chair deeming the rule approved for inclusion in the next public comment batch. The codrafters were asked to submit a final draft of the rule.

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F. Consideration of Rule 1.8.6 [3-310(F)] Payments Not From Clients

The Commission considered Draft 3.2 of proposed Rule 1.8.6 [3-310(F)] (dated July 8, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

- (1) A recommendation to delete completely the concept of “costs” throughout the rule was considered but rejected (6 yes, 6 no, 0 abstain).
- (2) There was no objection to the Chair deeming approved the addition of a new comment providing the definition of costs used in Cmt. [3] to the Commission’s proposed Rule 1.8.5 [4-210]. Thus, instead of deleting “costs” or changing it to “expenses,” the following definition would be provided in the comments: ‘Costs’ are not limited to those that are taxable or recoverable under any applicable statute or rule of court.”
- (3) In Cmt. [1], a recommendation to split the comment into two separate comments was considered but rejected (2 yes, 7 no, 1 abstain).

With these changes, there was no objection to the Chair deeming the rule approved for inclusion in the next public comment batch. The codrafters were asked to submit a final draft of the rule. Mr. Melchior noted that he disagreed with the proposition, suggested during the discussion of the rule, that a dual or multiple client situation triggers the purpose and function of current Rule 3-310(F). Mr. Melchior indicated that he regarded the rule as an “anti-outsider” policy.

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G. Consideration of Rule 4-100 [ABA MR 1.15] Preserving Identity of Funds and Property of a Client

The Commission considered Draft 12.4 of proposed Rule 1.15 [4-100] (dated July 10, 2008). Ms. Peck led a discussion of the open issues and the following drafting decisions were made.

- (1) In paragraph (d)(2), a recommendation to define the term “fixed” was considered but rejected (1 yes, 5 no, 5 abstain).
- (2) In paragraph (h), there was no objection to the Chair deeming approved the replacement of the term “distribute” with the phrase “make a distribution.”
- (3) In paragraph (m)(4), a recommendation to move this text to the comments was made but the Chair indicated that the language had already been approved as a part of the rule.
- (4) In Cmt. [7(a)], it was understood that this language would be further revised by the codrafters and possibly approved through a 10-day ballot procedure. The concept would be something along the lines of the following:

A member of the State Bar of California residing and practicing law in a state other than California who (i) receives from a person who is not a resident of California funds or property from a person who is not a resident of California, arising from or related to a dispute or legal matter not in California, and (ii) is otherwise handling the funds or property in accordance with the law of the appropriate jurisdiction. See [Rule 8.5(b)].

- (5) The definition of a “true retainer” fee was deleted from the rule text in Rule 1.5(f) and moved to a comment to be added to Rule 1.5(f) and, similarly in Rule 1.15, the definition was deleted from the rule text of Rule 1.15(e)(2) in favor of a new comment to be added that would cross reference the definition in the comments to Rule 1.5 (5 yes, 0 no, 4 abstain). It was understood that Rule 1.16 would also include a cross reference to the definition in the comments to Rule 1.5. It was also understood that the possible option of placing the definition of “true retainer” in a global terminology rule remained an open issue.
- (6) In Cmt. [13], the last sentence, there was no objection to the Chair deeming approved non-substantive edits to capitalize the “c” in “comments” and to add the word “and” after the last comma.
- (7) In Cmt. [21], a recommendation to delete the entire comment was considered but rejected (1 yes, 9 no, 0 abstain).
- (8) Cmt. [21] and Cmt. 21A] were combined into a single comment with the citation to *In re Fonte* was placed at the end of the combined comments (8 yes, 0 no, 3 abstain)
- (9) In Cmt. [27] and Cmt. [28], a recommendation to delete both comments was considered but rejected (5 yes, 5 no, 0 abstain). Subsequently, Cmt. [28] was deleted based on a recommendation that it was simply non-essential practice guidance (6 yes, 3 no, 0 abstain).
- (10) All of Cmt. [30] was deleted (6 yes, 3 no, 0 abstain).

With these changes, there was no objection to the Chair deeming the rule approved subject to a limited 10-day ballot to approve those provisions that were referred to the codrafters for final drafting.