

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

MEETING SUMMARY - OPEN SESSION

Friday, July 20, 2007
(9:15 am - 5:00 pm)

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

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez (LA); Kurt Melchior; Ellen Peck; Jerry Sapiro; Dominique Snyder (by telephone); Mark Tuft; Paul Vapnek and Tony Voogd (by telephone).

MEMBERS NOT PRESENT: Hon. Ignazio Ruvolo.

ALSO PRESENT: Chis Ames (Office of the California Attorney General); Bill Baughman (COPRAC Liaison); David Bell (Morrison & Foerster); George Cardona (Acting U.S. Attorney, C.D. California); Chris Carpenter (CDAA); Randall Difuntorum (State Bar Staff); John Drexel (State Bar staff); David Goldberg (Latham & Watkins); Heather Kenney (Millstein); Mimi Lee (State Bar Staff); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Devallis Rutledge (Special Council to the Los Angeles District Attorney); and Ronald Smetana (Office of the California Attorney General).

I. APPROVAL OF OPEN SESSION MEETING SUMMARY FROM THE JUNE 8, 2006 MEETING

The June 8, 2006 meeting summary was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

In an oral report on his appearance at a meeting of the California Commission for Criminal Justice, the Chair indicated that only two issues were raised concerning the work of the Commission: (1) the time frame for completion [the Chair provided a response indicating anticipated completion in 2009]; and (2) whether the Commission would be considering Model Rule 3.8 (Special Responsibilities of a Prosecutor) [the Chair responded, yes].

The Chair also reviewed procedures intended to streamline consideration of issues raised in rule drafts. The Chair stressed that members should send comments on open issues to respond to recommendations made by drafting teams, as such recommendations are subject to being deemed approved. In

addition, members who fail to send comments may only get one opportunity to speak on open issues.

B. Staff's Report

Staff reported that Commission representatives were set to meet on August 10, 2007, with representatives of the ABA Task Force on Lawyer Regulation to exchange information on rule amendment issues experience by the Commission and other states. In addition, staff conveyed an invitation from ABA staff to the Commission members to attend a reception, on that same day, hosted by the ABA Center for Professional Responsibility, NOBC and APRL.

Staff also reported that long-time ABA attorney Becky Stretch has left the ABA Center of Professional Responsibility to accept a position in the ABA section on education. ABA Client Protection Counsel John Holtaway will join the ABA Center of Professional Responsibility and replace Becky Stretch as counsel to the ABA Task Force on Lawyer Regulation.

It was announced that the Commission's panelist for the September 29, 2007 public hearing on the Batch 2 rule proposals would be: the Chair; Mrs. Julien; Mr. Kehr; Mr. Melchior; Mr. Tuft; and Mr. Vapnek.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 3 RULES)

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

The Commission considered Draft 8.2 of proposed Rule 1.8.1 (dated 7/8/07). The Chair indicated that the rule was pulled off consent for the limited purpose of addressing those issues that had garnered sufficient member objections. Mr. Lamport led a discussion of the issues and the following drafting decisions were made.

(1) In first sentence of Cmt.[9], adding the word "the" after the phrase "respect to" was deemed approved.

(2) In paragraph (a), the third line was revised to track the ABA language by using the phrase "that reasonably can be understood by the client" (8 yes, 1 no, 2 abstain).

(3) Regarding the issue of whether a modification of a fee agreement constitutes an adverse interest or a business transaction, the Commission considered an option of addressing the issue in the rule rather than the comments but there was no support for exploring this option.

(4) The treatment of modification of fee agreements in Cmt.[5] was approved as drafted (6 yes, 5 no, 1 abstain).

(5) In Cmt.[6], the Commission considered removing any discussion of the issue of fee agreement modifications but there was not a majority of members in favor of that approach (6 yes, 6 no, 0 abstain).

(6) Cmt.[6] was revised to implement the following changes (8 yes, 4 no, 0 abstain):

~~“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. In general, the negotiation of an agreement by which a lawyer is retained by a client is an arms-length transaction. (Setzer v. Robinson (1962) 57 Cal.2d 213 [18 Cal.Rptr. 524].) 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. Once a lawyer-client relationship has been established, a lawyer has a fiduciary relationship with the client that may~~ apply applies when such an agreement is modified. . . .”

Regarding these changes, it was understood that the request for comment materials would note that there were closely divided votes in developing the draft language.

(7) In the first sentence of Cmt.[9], there was no objection to deeming approved the insertion of the word “a” before “transaction” and the replacement of the word “or” for the word “of.” It was understood that the codrafters would prepare a further revision of this comment.

(8) In Cmt.[8], the following sentence was added at the end of the comment: “The burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Felton v. Le Breton* (1891) 92 Cal. 457, 469.” (9 yes, 1 no, 1 abstain)

The codrafters were asked to prepare a revised draft rule implementing the drafting decisions. The Chair indicated that the anticipated revision of Cmt.[9] likely would be the only open issue for the next meeting.

[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

The Commission considered alternative Draft 4 of proposed Rule 1.17 (dated 7/9/07). The Chair indicated that the issues for consideration were footnote numbers 3, 4, 8, 10, 25, 27, 32, and 34. Mr. Kehr led a discussion of the issues and the following drafting decisions were made.

(1) Paragraph (a)(2) was revised to read: “fees charged to clients of the seller’s practice are not increased solely by reason of the sale;” (7 yes, 0 no, 2 abstain). With this change, the codrafters were asked to also add a comment explaining that the fee prohibition applies to both buyer and seller.

(2) Paragraph (a)(3) was deleted (7 yes, 1 no, 2 abstain).

(3) Paragraph (a)(7) was deleted in favor of a new comment referring to the withdrawal rule and to applicable statutory provisions (i.e., B&P 6180 et seq.) (6 yes, 3 no, 0 abstain). Ms. Peck volunteered to provide the citations to Mr. Kehr.

(4) Regarding the concept of paragraph (a)(9), there was consensus that the rule implement a policy that a law practice should be sold only once (6 yes, 3 no, 0 abstain).

(5) Subject to the proviso that paragraph (e) be included, paragraph (a)(9) was deemed approved. Mr. Tuft, Mr. Melchior, and Mrs. Julien dissented from this position.

(6) Paragraph (f)(2) was deleted (6 yes, 3 no, 0 abstain).

(7) Paragraph (f)(4) was deleted (6 yes, 4 no, 0 abstain). It was understood that the deletion of this provision was not intended to be a rejection of the concept or policy of the exception contained in paragraph (f)(4). Instead, the Commission regards this exception as falling under the category of an exception due to “extraordinary circumstances” set forth in paragraph (e).

(8) In the introductory clause of both paragraph (e) and (f), the clarifying phrase “without limitation” was added (6 yes, 1 no, 1 abstain).

(9) Cmt.[1] was approved as drafted (7 yes, 0 no, 1 abstain).

(10) In connection with Cmt.[13], the Commission determined that it was not appropriate to add a requirement that clients be informed about the specific terms of a sale provided that the terms do not include anything that would constitute a significant development triggering the communication rule (10 yes, 0 no, 0 abstain). The codrafters were asked to add a comment clarifying this policy (6 yes, 4 no, 1 abstain).

The codrafters were asked to prepare a revised draft rule implementing the drafting decisions. The Chair indicated that the rule was nearly completed.

[Intended Hard Page Break]

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

The Commission considered a February 23, 2007 memorandum presenting background information and a comprehensive list of issues concerning possible amendments to RPC 3-100. The Chair called for a discussion of the “General Issues” set forth on pages 66 and 67 of the memorandum. Among the points raised during the discussion were the following.

(1) There are different ways to begin a discussion about possible changes to the duty of confidentiality in California. One way would be to start by considering minor clarifying amendments to RPC 3-100, such as clarifying the extent to which an imminence element is included within the rule’s reasonable necessity trigger for the death or substantial bodily harm confidentiality exception. A completely different approach would be to start by considering exceptions to confidentiality not yet found in California’s rule.

(2) As a concept, the doctrine of “implied authority” to disclose client information is too undefined and may abrogate too much confidentiality, so it should be rejected. A vote was taken on this position and the Commission agreed (9 yes, 0 no, 1 abstain).

(3) The ABA threw out the 2-prong test for defining confidential information (which essentially covered only that information regarded as embarrassing or detrimental to the client) and instead made a policy decision to express a broader public protection standard that all information gained in the lawyer-client relationship should be protected under a “no gossip” by lawyers standard. The Commission should not explore the defunct 2-prong test and instead should consider the broader protection of the current ABA approach.

(4) Current RPC 3-100 arguably does not permit disclosure to prevent suicide because the rule’s exception is triggered only by a criminal act and while assisting suicide may be a crime in California, suicide itself is not a crime. However, lawyers likely do not possess the training and skill needed to ascertain a client’s intent to commit suicide and so the rule should not be changed to permit such disclosures. A vote was taken and the Commission agreed with the view that an exception for acts of suicide should not be included as an express, standalone exception (7 yes, 2 no, 1 abstain). In addition, a vote was taken on a recommendation that the codrafters not explore the elimination of the “criminal act” requirement in RPC 3-100 and the Commission agreed with this recommendation (9 yes, 0 no, 1 abstain).

The Chair indicated that discussion would continue at a future meeting. The codrafters volunteered to prepare an informational discussion draft of a version of RPC 3-100 that restructures it along the lines of MR 1.6.

[Intended Hard Page Break]

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

The Commission considered a revised draft comment to proposed rule 1.7 presented by Mr. Kehr in a memorandum dated July 7, 2007. The Chair indicated that the issues for consideration were footnote numbers 14, 17, 18, 21, 23, 24, 26, and 27. Mr. Kehr led a discussion of the issues and the following drafting decisions were made.

(1) There was no objection to the Chair deeming approved the non-substantive and grammatical changes listed in Mr. Sapiro's July 14, 2007 e-mail message as item numbers 2, 3, 4, 5, and 8.

(2) The codrafters agreed to reconsider Cmt.[14], Cmt.[15], and Cmt.[16] and prepare a redraft.

(3) Cmt.[18] was deleted (8 yes, 0 no, 3 abstain).

(4) The last sentence of Cmt.[19] was deleted by consensus and it was understood that this sentence could be considered as a possible addition to proposed Rule 1.16 [3-700].

Following discussion, the Chair stated the discussion would continue at the next meeting and summarized that the following comments would be covered: Cmt.[18] (notes 6 and 7); Cmt.[22] (note 9); and Cmt.[23](note 10). It was also indicated that Cmt.[29a] (note 13) would not be discussed.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

F.1. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

The Chair specially set this matter for discussion at 3:00 pm. The Chair welcomed the following visitors who were present for the discussion of this rule: Chris Ames; Bill Baughman; David Bell; George Cardona; Chris Carpenter; David Goldberg; Heather Kenney; Devallis Rutledge; and Ron Smetana. The Chair led a discussion of the issues raised by the drafters. The following drafting decisions were made.

(1) In response to the input received from the interested persons on the issue of a whistle-blower exception, there was no objection to the codrafters making one last effort to develop compromise language for a comment to the rule. It was understood that this may involve amending Cmt.[3] or drafting an entirely new comment.

(2) The first sentence of Cmt.[4], as proposed in the U.S. Attorney's July 13, 2007 memorandum, was adopted to replace the first sentence in the codrafters' version of that sentence (5 yes, 4 no, 0 abstain). It was understood that the codrafters might decide to move this entire comment to another place in the comments.

(3) Version A of Cmt.[5] was approved with the last line modified to replace "can" with "may" (10 yes, 0 n, 0 abstain).

(4) There was no objection to the Chair deeming Cmt.[5a] approved with the second sentence deleted as it is redundant and unnecessary.

(5) Cmt.[6] was approved retaining the comma after "contract" and before "or" (3 yes, 2 no, 3 abstain).

(6) For Cmt.[7], the following action was taken: Version B was accepted as the starting point for consideration (9 yes, 1 no, 0 abstain); the last sentence of Version A was added as the last sentence with the phrase "federal, state, and local" deleted and adding a reference to paragraph (d) (6 yes, 2 no, 2 abstain); also add a reference to paragraph (e) (8 yes, 0 no, 2 abstain); in the first sentence, a comma was added after "organization" (6 yes, 3 no, 1 abstain); in the second sentence, "decision makers" was replaced with "public officials, boards, committees, and bodies" (7 yes, 2 no, 1 abstain); also in the second sentence, "with respect to" was replaced with "such" and in next line delete the word "such" (9 yes, 0 no, 1 abstain) and the word "client's" (8 yes, 2 no, 1 abstain). With all of these changes, Cmt.[7] would read:

"[7] Paragraph (c)(1) recognizes that when a lawyer communicates on behalf of a client with a governmental organization, special considerations exist as a result of the right conferred under the First Amendment of the United States Constitution and Article I, section 3 of the California Constitution. The exception is intended to allow a lawyer on behalf of a client to communicate with ~~decision-makers in government~~ public officials, boards, committees or bodies with respect to matters in which the governmental organization is represented by legal counsel, including ~~with respect to such~~ legal matters ~~such~~ as a client's grievance, settlement of a lawsuit or claim and the ~~client's~~ view that the government's position with

respect to a dispute is wrong or that government personnel are conducting themselves improperly with respect to aspects of a dispute or other legal matter. A lawyer seeking to communicate on behalf of a client with ~~federal, state and local~~ a governmental organizations must comply with paragraphs (d) and (e) of this Rule [or with Rule 4.3].”

[Intended Hard Page Break]

F.2. Consideration of Rule 2-100 [ABA MR 4.3] Dealing with Unrepresented Person

Matter carried over.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]