

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

MEETING SUMMARY - OPEN SESSION

Friday, September 1, 2006

(9:15 am - 5:00 pm)

SF–State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105

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

MEMBERS NOT PRESENT: Jerry Sapiro and Sean SeLegue.

ALSO PRESENT: David Bell (Morrison & Foerster); Allen Blumenthal (State Bar staff); Prof. Carole Buckner (Western State/COPRAC Liaison) (L.A.); Randall Difuntorum (State Bar staff); Doug Hendricks (Morrison & Foerster); Diane Karpman (Beverly Hills Bar Association Liaison) (LA); Mimi Lee (State Bar staff); Lauren McCurdy (State Bar staff); Marie Moffat (State Bar General Counsel); Kevin Mohr (Commission Consultant) (LA); Chris Munoz (BASF Liaison); Toby Rothschild (Access to Justice Commission & LACBA Liaison) (LA); Ronald Ryland (Sheppard Mullin); and Becky Stretch (by phone) (ABA Center on Professional Responsibility).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE JUNE 9 & 10, 2006 AND JULY 28, 2006 MEETINGS

The June 9 & 10, 2006 action summary was approved. Consideration of the July 28, 2006 summary was postponed to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reported that Commission member Jerry Sapiro's absence was due to a medical procedure involving an extended recovery period. A card was circulated and staff was asked to send flowers on behalf of the Commission.

The Chair announced that an informal review process has been established with Supreme Court staff that permits the Commission to informally submit its draft rules after revisions, if any, made in response to each public comment batch. Appreciation was expressed to the State Bar General Counsel for arranging the lunch meeting that facilitated the discussion of a new informal review procedure.

The Chair noted that the scheduled December 1, 2006 meeting would be held by video conference or in person at the Los Angeles State Bar office depending on Commission funding. Members were asked to promptly submit expense reports to allow staff to track the Commission's funding.

B. Staff's Report

Staff reported that: (1) the Board of Governors has adopted a permanent disbarment proposal that will be submitted to the Supreme Court for approval of relevant changes to State Bar rules and Rules of Court; and (2) a web-based online form for electronic completion and submission of public comment on the Commission's batch one proposals has been implemented. Regarding the online comment form, staff expressed appreciation to Mimi Lee for her research and implementation of this project.

III. MATTERS FOR ACTION

A. 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 a July 9, 2006 e-mail message from Mr. Sapiro describing the codrafters' recommendation that the Commission consider a new alternate draft of proposed amended rule 2-300 (dated July 6, 2006). It was noted that Mr. Kehr had sent a July 22, 2006 e-mail and an August 22, 2006 e-mail providing comments and suggested changes to the July 6, 2006 alternate draft. Due to Mr. Sapiro's absence, the Chair asked the codrafters to consider Mr. Kehr's comments and to work with him to prepare a revised version of the alternate draft. For the record, Mr. Melchior reaffirmed his opposition to the direction of this rule.

[Intended Hard Page Break]

B. Consideration of Rule 4-300 [no corresponding ABA Model Rule] Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

The Commission considered a July 12, 2006 e-mail message from Mr. Melchior presenting a revised draft of proposed amended rule 4-300 (dated July 12, 2006). Following discussion, there was no objection to deeming the rule and comment tentatively approved. The following drafting decisions were made during the discussion.

(1) The concept of paragraph (c) expressly exempting Probate Code transactions but noting the applicability of RPC 3-300 was adopted as drafted (10 yes, 0 no, 0 abstain).

(2) In paragraph (c), in addition to the RPC 3-300 reference, a reference to RPC 3-310(b) [1.7] was added (7 yes, 2 no, 0 abstain).

(3) In paragraph (a), the phrase "by reason of personal, business, or professional relationship" was deleted (5 yes, 3 no, 2 abstain).

(4) In Cmt.[2], there was no objection to accepting non-substantive changes suggested by Mr. SeLegue, including: replacing "can" with "may"; adding a comma after "courts"; and deleting "in order."

(5) All of Cmt.[1] was deleted and other comments were renumbered (5 yes, 4 no, 1 abstain).

(6) All of Cmt.[3] was deleted, leaving original Cmt.[2] as the sole remaining comment (6 yes, 2 no, 2 abstain).

In addition to the foregoing, the Commission discussed the July 20, 2006 letter from the State Bar Office of the Chief Trial Counsel. The Commission considered but did not pursue the suggested option of using the rule amendment process in this specific instance to recommend that the Supreme Court assert its primary authority over the practice of law and effectively declare that a State Bar rule supercedes any contrary Probate Code sections. At this time, obtaining public comment on a proposed rule that seeks to harmonize the rule with the Probate Code was viewed as a preferred course of action.

The codrafters were asked to finalize the revised rule for submission to staff.

[Intended Hard Page Break]

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

Mr. Lamport presented Draft 3.1 of proposed Rule 1.8.1 (dated July 12, 2006). The Chair called for a discussion of the issues identified by the codrafters' endnotes and in e-mails from Mr. Kehr, Mr. SeLegue and Mr. Tuft. In discussing these issues, the following decisions were made to give guidance to the codrafters.

(1) In Cmt.[1], the first sentence was modified to add the phrase "even unintentionally" after the word "lawyer" (6 yes, 2 no, 3 abstain).

(2) In Cmt.[1], the first sentence was also modified to add the concept of exploitation of client information so that the concerns underlying the rule are both overreaching and exploitation of client information (7 yes, 4 no, 0 abstain).

(3) In Cmt.[1], the second sentence was modified, along the lines of Mr. Kehr's suggestion to read: "In these situations, the lawyer could influence the client for the lawyer's own benefit, could give advice to protect the lawyer's interest rather than the client's, and could use client information for the lawyer's benefit rather than the client's." (5 yes, 4 no, 1 abstain).

(4) In Cmt.[1], the third sentence was modified, along the lines of Mr. Kehr's suggestion to read: "This Rule is intended to afford the client the information needed to fully understand the terms and effect of the transaction or acquisition, including the importance of having independent legal advice. *Beery v. State Bar* (1987) 43 Cal.3d 802 [239 Cal.Rptr. 121]." (9 yes, 2 no, 0 abstain).

(5) In Cmt.[1], the last sentence was revised to read: "This Rule also ~~sets the minimum requirement~~ requires that the transaction or acquisition be fair and reasonable to the client." (6 yes, 4 no, 1 abstain).

(6) Following discussion of all of the changes to Cmt.[1], a motion to delete all of Cmt.[1] was defeated (3 yes, 8 no, 0 abstain).

Due to time constraints, the Chair indicated that any further discussion of this rule would have to continue at the next meeting.

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

Mr. Lamport presented Draft 4 of proposed Rule 1.13 (dated August 7, 2006). The Chair called for a discussion of the issues identified by the codrafters' endnotes and in e-mails from Mr. Kehr, Mr. SeLegue and Mr. Tuft. Following discussion, there was no objection to deeming the rule, but not the comment, tentatively approved. The following drafting decisions were made during the discussion.

(1) The codrafters agreed to revise Cmts. [2] & [3] to respond to the issues raised in the e-mails.

(2) Paragraph (b) was modified to read:

“If a lawyer representing an organization knows that an officer, employee or other person associated with the organization is acting, intends to act or refuses to act in a matter related to the representation that the lawyer knows or reasonably should know is (i) ~~(a) is a violation of a legal obligation to the organization;~~ or ~~(b) is a violation of law reasonably imputable to the organization,~~ and (ii) ~~is~~ likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary”

The codrafters were asked to make conforming changes to Cmt.[4], if needed. Also, the codrafters were asked to add a new comment clarifying the type of scienter contemplated in paragraph (b).

(3) Paragraph (e) was modified to read: “A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall inform the organization's highest authority of the lawyer's discharge, resignation or withdrawal, unless the lawyer reasonably believes that it is not in the best lawful interest of the organization to do so.” (3 yes, 1 no, 5 abstain).

(4) In paragraph (f), there was no objection to adding a cross-reference to MR 4.3 after the first sentence. It was understood that the decision to adopt the concept of MR 4.3 was made in connection with the Commission's work on RPC 2-100 but that the actual drafting of the rule was pending.

(5) In paragraph (f), the phrase “reasonably believes” in the first sentence was replaced with the phrase “is under the mistaken belief that.” (9 yes, 0 no, 2 abstain). Also, the second sentence of paragraph (f) was revised to read:

“The lawyer shall not mislead such a constituent into believing, and ~~shall not allow the constituent to believe~~ make reasonable efforts to correct a mistaken belief that if the constituent communicates confidential information to the lawyer, the lawyer will not disclose the information to the organization or use it for the organization's benefit.” (10 yes, 0 no, 1 abstain).

(6) After the above changes were made, the codrafters did further work during a break in the meeting and upon reconvening, the Commission revised the second sentence of paragraph (f) to read:

“The lawyer shall not mislead such a constituent into believing, and shall make a reasonable efforts to correct ~~a~~ the constituent’s mistaken belief, that the constituent is in a lawyer-client relationship with the lawyer or that the constituent may communicate confidential information to the lawyer that will not be disclosed to the organization or used for the organization’s benefit.”
(8 yes, 1 no, 0 abstain).

The codrafters were asked to the revise the rule in accordance with the discussion and the Chair indicated that the next discussion of this rule would focus only on the draft comments.

[Intended Hard Page Break]

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

Mr. Voogd briefly summarized the status of this matter and deferred to Mr. Kehr to present a Draft 2 of proposed Rule 1.8.5 (dated August 16, 2006). The Chair called for a discussion of the issues identified by the codrafters' endnotes and in an e-mail from Mr. Tuft. The following drafting decisions were made during the discussion.

(1) Regarding the issue of whether both paragraphs (a)(1) and (a)(2) involve a RPC 3-300 situation, a motion was made to make the text of Cmt.[2] a part of the rule rather than merely a comment. Consideration of this motion was tabled to give the codrafters an opportunity to rework paragraph (a)(1).

(2) Paragraph (a)(2) was revised to read: ". . . lend money to the client, after the lawyer is retained by the client, based on the client's promise, in writing, to repay the loan, provided that prior to entering into any such arrangement the lawyer complies with Rule 1.8.1." (8 yes, 1 no, 2 abstain).

(3) In reworking paragraph (a)(1), the codrafters were asked to include the proviso "with the client's consent" at the start of this paragraph (8 yes, 1 no, 2 abstain).

(4) The rule title was changed to include the concept of "gifts" so long as paragraph (b) is a part of the rule and covers the giving of gifts to a client (7 yes, 3 no, 1 abstain).

(5) In paragraph (a)(3), the codrafters agreed to consider clarifying the concept of expenses as it pertains to legal services "other" than litigation.

(6) There was no objection to accepting the codrafters' recommendation (appearing in the draft as strikeout text) to delete the following language from the rule:

~~The lawyer must comply with Rule 1.8.1 before entering into any proposed agreement with a client that is described in paragraph (a)(1) or (a)(2), and the lawyer also must make a disclosure under Rule 1.7(d)(4) concerning the effect the proposed agreement might have on the lawyer's representation of the client.~~

The codrafters were asked to prepare a revised draft and, in particular, to address the issues tabled with respect to paragraph (a)(1).

[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

Mr. Kehr presented an August 16, 2006 memorandum providing the codrafters' report on the issue of "advanced waivers" and "thrust-upon conflicts." The memorandum also included proposed Rule 1.7. The Chair welcomed visitors David Bell, Doug Hendricks, and Ronald Ryland and next called for a discussion of the codrafters report on the issue of "advanced waivers." Among the points raised during the discussion were the following.

(1) Under the RPCs, the concept of informed consent in an advance waiver context, or in any other context, is subject to the self-limiting requirement of adequate disclosure.

(2) Assuming adequate disclosure, the policy question is whether there is any situation or category of situations where advance waivers should be completely prohibited as a prophylactic client protection matter.

(3) Where the unforeseeable nature of an advance waiver context challenges a lawyer's ability to make adequate disclosure, consideration can be given to using a consensual ethics wall to afford additional protection for the client's interest in loyalty and confidentiality.

(4) In retaining a major law firm, a client should have the freedom of choice to hire the firm and sign a waiver that expressly permits the firm to sue that client in any matter and for any other client that is not substantially related to the client's representation. If lawyers and clients have no certainty on the validity of such waivers, then a client's choice of counsel is impaired because major law firms will be reluctant to accept the representation of certain clients.

(5) The codrafters should explore adding a comment to proposed Rule 1.7 stating that the advance waiver concept applies only in the current client context and that substantially related matters are excluded.

(6) Right now, major law firms must deal with the exposure resulting from assertions that California law regards advance waivers as *per se* improper. Progress would be achieved by taking the small step of clarifying the RPCs to say that advance waivers are not *per se* improper.

(7) In the case of most major law firms, there really is no actual threat of diminished loyalty to the clients when an adverse representation arises and is covered by an advance waiver. This is because there are different offices, practice groups and different lawyers involved.

(8) Regarding litigation v. transactional conflicts, the remedy of civil disqualification would require a client to start litigation.

(9) Regarding the issue of a subjective v. objective knowledge standard, the objective reasonableness standard should control with the sophistication of a particular client accounted for as a factor to consider.

(10) Regarding the significance of an independent counsel's participation in, or review of, an advance waiver, one approach would be to require the client's lawyer to make the disclosure of facts and circumstances but impose upon the independent counsel the duty to give the client advice about the consequences of signing the advance waiver.

(11) An in-house counsel of a client organization should be regarded as an independent counsel for purposes of advance waiver review and advice.

After the above discussion, there was a brief discussion of thrust-upon conflicts. It was observed that the entire premise of conflicts protocols in the rules and disqualification remedies is that a lawyer reasonably had a opportunity to do something to detect and avoid a conflict. If there is no opportunity to identify and avoid a conflict, then the basis for holding the lawyer accountable is not present. A straw vote was taken showing a consensus to include a comment addressing thrust-upon conflicts (6 yes, 2 no, 1 abstain).

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

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

Ms. Peck presented Draft 3 of a proposed Rule 1.15 (dated August 21, 2006). The Chair called for a discussion of the issues identified by the codrafters' endnotes. In discussing these issues, the following decisions were made to give guidance to the codrafters.

(1) In paragraph (a), the Commission decided not to follow MR 1.15(a) (that applies only when a lawyer "holds" property) by retaining the current RPC language "receives or" so that the trigger for the rule is anytime a lawyer "receives or holds" entrusted funds (9 yes, 0 no, 1 abstain).

(2) By consensus the codrafters were authorized to continue to use the concept of "beneficiary" rather than "third person" in referring to non-clients to whom trust accounting duties might be owed under the rule.

(3) In paragraph (b), it was agreed that the codrafters would use the phrase "or other fiduciary title" rather than "or words of similar import" in stating the duty to properly label a trust account.

(4) In paragraph (e), it was agreed that the word "except" should be substituted for the word "provided" so that it reads: "(e) The lawyer shall maintain each client trust account established pursuant to this Rule in the State of California, ~~provided~~except that:

(5) Paragraph (e)(1) was deleted based on the view that better client protection is encompassed in paragraph (e)(3) (8 yes, 2 no, 1 abstain) .

(6) For paragraph (e)(3), the codrafters agreed to consult with OCTC staff to ascertain whether the proposed new protective conditions are enough to allow placement of funds someplace other than in California.

(7) In paragraph (g), by consensus the phrase "otherwise commingled with" was retained.

(8) In paragraph (h)(1), the codrafters agreed to delete the phrase "prior disbursement."

(9) In paragraph (h)(3), the word "promptly" was added after the word "steps" (7 yes, 4 no, 0 abstain).

The codrafters were asked to implement the changes in a revised draft and the Chair indicated that discussion of the outstanding issues would continue at a future meeting.

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I. Class Action Subcommittee – Report & Recommendations

Mr. Voogd presented an August 17, 2006 memorandum providing the codrafters' initial report on class action issues raised by the Commission's proposed rule amendments. The memorandum included comments from Mr. Tuft and Diane Karpman. The Chair called for a general discussion about the different approaches to studying class action issues reflected in the memorandum. Among the points raised during the discussion were the following.

(1) The fundamental issue is a legal issue. It is the problem of the disconnect between the normal paradigm of client and lawyer authority and the atypical client-lawyer relationship found in a class action matter. As such, the answer might be to study and reform the statutes governing class relationships rather than amending the RPCs.

(2) Class action regulation is a lawyer professional responsibility policy matter if you accept the fact that representative litigation is a significant tool for societal reform through the changes in the law. If a lawyer's conduct in the class action setting is unprofessional, then that important tool for social change is rendered less effective.

(3) Class action issues are not simply issues of attorney fees.

(4) The immediate issue for the Commission is a process issue. There are various options: (i) deal with it in particular rules; (ii) consider a class action standalone rule: or (iii) do nothing in the rules.

(5) Consideration should be given to reviewing any standalone class action rule developed by the ALI or ABA Ethics 2000.

(6) The specificity of certain RPCs, such as the aggregate settlement rule, necessitate that some class action issues be handled locally.

Following discussion, the Chair asked the codrafters to prepare a recommendation for a preferred approach to dealing with class action issues. In addition, it was suggested that the Commission's webpage include a notation that class action issues are the subject of a pending Commission study.

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

Matter carried over.

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