

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

MEETING SUMMARY – OPEN SESSION

Friday, May 7, 2004
(9:30 am - 12:30 and 1:30 - 4:45 pm)
Saturday, May 8, 2004
(9:00 am - 4:30 pm)

San Francisco–State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105
(415) 538-2167

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

MEMBERS NOT PRESENT: Ed George.

ALSO PRESENT: Jonathan Arons (BASF Liaison); Myles Berman; Jim Biernat (BASF Liaison); Jonathan Bishop (State Bar staff); Bill Calderelli (Litigation Section Liaison); Randall Difuntorum (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Lauren McCurdy (State Bar Staff); Kevin Mohr (Commission Consultant); Chris Munoz (BASF Liaison); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Rob Sall (COPRAC Liaison); Ira Spiro (State Bar ADR Committee Liaison); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE DECEMBER 12, 2003 and FEBRUARY 20, 2004 MEETINGS

The December 12, 2003 open session action summary was approved. At the request of staff, consideration of a February 20, 2004 summary was postponed.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reported on the Commission's participation at the 2004 Annual Statewide Ethics Symposium. The Chair also reported that the Los Angeles County Bar Association has formed a subcommittee to monitor the work of the Commission and to submit comments.

For the next agenda, the Chair indicated that the issue of a rule numbering system would be assigned with Ms. Betzner as lead and that rule 1-100 would be assigned with Mr. Lamport as lead. Regarding administrative matters, the Chair encouraged

members to continue to exchange e-mailed comments and reminded members to make a good faith effort to be present at the scheduled starting time of each meeting. The Chair indicated that members who are running late should try to contact staff or the meeting room by telephone to help the Chair ascertain when a quorum might be achieved.

B. Staff's Report

Staff reported on the following pending bills: AB 2371 (legal consumers protection act); AB 2689 (lawyer advertisements for construction defect claims); AB 2713 (government attorney whistle-blower); AB 2336 (attorney liens). Staff encouraged members to use the Commission's e-list distribution group for most messages sent in order to give interested parties an early opportunity to consider member comments.

C. Report on Proposed New Rule 3-100 (Confidential Information of a Client) Developed by the State Bar AB 1101 Advisory Task Force

The Commission received a status report on proposed new rule 3-100 from Mr. Mohr, Mr. Tuft, and staff. Mr. Hawley also appeared and addressed the Commission. Following discussion, it was determined that Commission members could provide comments, as individuals, and that some members may decide to sign on to a single comment. A motion to have the Commission submit a comment as a State Bar sub-entity was considered but withdrawn.

III. MATTERS FOR ACTION

A. Consideration of Rule 1-400. Advertising and Solicitation

The Commission considered a March 25, 2004 e-mail message from Mr. Mohr attaching a proposal for draft rules 7.0 through 7.6. The Commission referred to Mr. Mohr's explanatory endnotes in discussing the proposed rules. For the next redraft, there was consensus on the following points.

1. Do not have a separate definition rule.
2. Defer resolution of "lawyer" vs. "member" until rule 1-100 is revisited and use "member" for the time being.
3. Depart from the ABA by not using the modifier "material."

The co-drafters were assigned to redraft 7.1(a) with the discussion to continue at the next meeting by starting at note 11. Mr. Mohr volunteered to do research on the issue of "material" as a qualifier in other states rules.

Among the points raised during the discussion were the following.

- (1) RPC 1-400(D) includes a prohibition against intrusive conduct that needs to be covered.
- (2) Intrusive conduct can be covered in proposed rule 7.3 as the this type of conduct likely is a "direct contact" issue.

- (3) The attorney advertising provisions in the State Bar Act are not limited to “material” misrepresentations and the same holds for some other statutory advertising regulations.
- (4) Practically speaking, “materiality” as a factor is considered. Even if not expressly discussed, the weighing of public/client harm caused by misleading advertising reflects due consideration of whether content at issue is “material.”
- (5) Consideration should be given to modifying the definitional limitation in the present draft that appears to restrict communications to only content that concerns “the member or the member’s services”. Often, an advertisement will accurately describe the member and the services that are available but will mislead as to the relevant facts and/or law in order to inspire an erroneous belief that such services are necessary or beneficial. Lawyers should not be permitted to overstate or understate the consequences of failing to hire the lawyer.

[Intended Hard Page Break]

B. Consideration of a “Practice of Law” Definition

The Commission considered a November 30, 2003 memorandum presented by Ms. Peck and Mr. Mohr, including a redraft of a proposed RPC counterpart to MR 5.3. The following consensus votes for drafting direction were taken.

1. Keep the phrase “reasonable assurance.” (9 yes, 0 no, 0 abstain)
2. Add language (re type of supervision) in note 6 of the drafters’ comments but not in a separate Discussion ¶ to the rule. (8 yes, 1 no, 1 abstain)
3. Add RPC’s and State Bar Act in (A) and (B) of MR 5.3 in place of “Professional obligations of the lawyer.” (4 yes, 6 no, 0 abstain)
4. Move to have a draft of MR 5.5 without the additional items in ABA 5.5 (2002/MJP), with a Discussion section that refers to Rules of Court 964-967. However, consider post-2002, without (c) and (d), to see if it works. Also consider whether cross references should be included in para. [5] of MR 5.5. (7 yes, 1 no, 1 abstain)

Among the points raised during the discussion were the following.

- (1) The use of the MR phrase “reasonable assurance” may have the unintentional consequence of imposing a strict liability standard.
- (2) In this rule or in RPC 1-100, the rules should be expressly described as “rules of reason.”
- (3) Consideration should be given to covering the issue of “outsourcing” in the rule discussion section.
- (4) The proposed rule discussion should clarify that the duty to supervise is not dependent on whether the person supervised is subject to discipline.
- (5) The explanation of this rule should memorialize that the Commission intended to establish an obligation to have “internal policies” but that it rejected a requirement for “written policies” (that is, the fact of actual internal policies must be provable but a written policy is not necessary to meet that burden of proof).
- (6) Simultaneous use of the phrase “conform to RPCs” and the phrase “compatible with the professional obligations of a lawyer” is a source of possible confusion and misinterpretation.
- (7) Consideration should be given to modifying the discussion section language concerning the preemptive control of *pro hac vice* to include the new MJP Rules of Court, or if not, elsewhere accounting for the new MJP rules.
- (8) The next redraft should explore including MR 5.5 language as it was prior to the 2003 in response to the ABA MJP Task Force. This entails adapting MR 5.5 paragraphs (a) & (b) but leaving out paragraphs (c) & (d).
- (9) Consideration should be given to modifying the proposed rule title to reflect the actual subject matter which is broader than the “practice of law.”

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C. Consideration of Rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)

The Commission considered a March 23, 2004 draft of proposed amended rule 1-710 presented by Mr. Ruvolo.

By vote of 6 yes, 2 no, 1 abstain, the Commission determined to split the current draft into two rules, one only on temporary judges and the other addressing other categories of third party neutrals. By a vote of 10 yes, 0 no, 0 abstain, the Commission determined to start with MR 2.4, as modified by 1-710(3), and that the first sentence of Discussion paragraph 1 will become the discussion for a separate rule on temporary judges.

In addition, there was consensus to: change the second “member’s” to “lawyer’s”; delete paragraphs 2 and 3 of the Discussion; delete citation to the *Kelly* case in paragraph 2 of the rule; and delete the phrase “in any mediation or any settlement conference.”

The co-drafters were assigned a redraft and asked to review MR 2.4 further to determine whether any other aspects should be considered.

Among the points raised during the discussion were the following.

- (1) The inclusion of a requirement that a third party neutral (“TPN”) must disclaim an attorney-client representation of the parties may imply that absent such disclaimers the services of a TPN generally constitute a “practice of law.”
- (2) Because the mediation standards were not conceived as State Bar disciplinary rules, concepts that are aspirational should not be incorporated by proposed amended rule 1-710 and concepts that do represent core conduct standards should be modified, to the extent necessary to serve as disciplinary rules.
- (3) As different standards apply, for ease of reading, the proposed rule should be split into two separate rules: one on temporary judges; and another on other TPN’s.
- (4) Consideration should be given to including conduct as an “arbitrator” and tracking MR 2.4.
- (5) In the proposed separate rule for TPN’s, consideration should be given to including explicit discussion language clarifying that temporary judges are not covered by the rule but are covered by 1-710.

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D. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs)

The Commission considered a Draft No. 4 of Rule 5.4(1-310X) dated March 25, 2004. It was recommended that the Estate Planning Section liaison be invited to assist the co-drafters on the issue of lawyers holding law corporation shares in trust. Mr. Mohr volunteered to assist the co-drafters in developing a revised rule title. Mr. Rothschild volunteered to assist the co-drafters on the issue of sharing fee awards with client organizations. A redraft was assigned.

Among the points raised during the discussion were the following.

- (1) Consideration should be given to a rule that prohibits both lawyers and non-lawyers from interfering with a lawyer's professional independent judgment. In the alternative, consideration should be given to a rule that permits fee sharing with non-lawyers on terms comparable to lawyer fee splits.
- (2) The Commission previously voted down specific proposed rule language that seeking to regulate fee sharing with non-lawyers but leave was given to revisit the issue with new language.
- (3) Consideration should be given to warning lawyers in the Discussion section about the dangers of fee-sharing compensation programs that reward or punish lawyers financially without due regard for how those programs may interfere with the professional judgment of the lawyer.
- (4) The issue of a lawyer holding law corporation shares in a revocable trust should be addressed here as this issue involves possible control of a law firm by non-lawyers who have an equity interest in the law practice.
- (5) Due to the unknown variety of estate planning mechanisms for a lawyer's interest in a law practice, the assistance of the State Bar Estate Planning section should be solicited.
- (6) Unless the "state action" exemption is applicable, there may be concerns about the anti-competitive nature of the proposed new rule.
- (7) Clarification is needed on whether sharing of fees is permitted with all non-profit entities or only with those that "public benefit" non-profit entities.
- (8) The description of the fees payable in lawyer referral services should be changed to reflect fees that are actually paid (i.e., registration and participation fees).

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E. Consideration of Rule 3-600. Organization as Client

The Commission considered a February 23, 2004 draft of proposed amended rule 3-600 prepared by Mr. Lamport.

The following consensus votes were taken.

1. Perpetuate the status quo approach of the current rule: 2 yes, 5 no, 5 abstain.
2. Move to ABA approach but without outside reporting: 1 yes, 5 no, 1 abstain.
3. Explore a new two-tiered approach along the lines of the February 23, 2004 draft: 5 yes, 2 no, 1 abstain.
4. Replace the "actual or apparent agent" phrase with the comparable ABA language: 5 yes, 1 no, 2 abstain.
5. Use phrase "member representing an organization": 6 yes, 1 no, 0 abstain.

Discussion to continue at next meeting. Among the points raised in the course of the discussion were the following.

- (1) Under MR 1.13, a lawyer's discretion to take action is triggered by either: a violation of law + substantial injury; or a breach of fiduciary duty + substantial injury. Under RPC 3-600, the trigger is either: a violation of law; or substantial injury. For internal reporting up the ladder, consideration should be given to exploring a two-tier approach that broadens the triggers so that a lawyer *may* take action when faced with a situation where there is no substantial injury but *must* (unless it is not in the best interest of the client) take action when there is substantial injury.
- (2) A two-tier approach would be responsive to the concerns asserted by the ABA Task Force on Corporate Responsibility by extending and emphasizing a lawyer's obligation to act when faced with differing degrees of potentially harmful activities occurring within the corporate client and which the corporate control group may prevent or remedy if properly informed.
- (3) A two-tier approach may be unduly complex without adding much to the ABA internal reporting standard. Both MR 1.13 and the current version of RPC 3-600 can be construed as representing a two tier approach if you accept that a lawyer always has a duty to consider communicating and informing a client of significant developments even if not directed to do so under the limited terms of MR 1.13(b) and RPC 3-600(B). In California, RPC 3-600(A) is the umbrella provision that makes this clear.
- (4) In terms of rule language, the missing piece in both RPC 3-600 and MR 1.13 that can be added by a two-tier approach is the trigger of a violation of a duty to the corporation, as distinguished from a violation of law, that may not be a substantial injury. To enhance lawyer accountability, this base should be covered expressly and not left to a lawyer's general duties.
- (5) There is an underlying concern with the basic goal of making a lawyer's internal reporting discretion "more prescriptive" and that is the problem of third party liability driving lawyers to make unnecessary internal reports and damaging the attorney client relationship. It may not be as damaging as an outside reporting reform but it remains a substantial concern. Current RPC 3-600 relies fully on a lawyer's sound discretion and this works best for maintaining the lawyer's ability to develop and cultivate the desired role of a trusted counselor.
- (6) External forces on the legal profession make it necessary for a change in this area of lawyer conduct.

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F. Consideration of Rule 1-500. Agreements Restricting a Member's Practice

The Commission considered the draft previously submitted for the February 20, 2004 meeting and the subsequent e-mail messages exchanged about that draft.

There was a consensus to move paragraph (B) out of rule 1-500 and add it to another rule such as 1-110, 1-120, or 3-400. There also was a consensus to use the MR 5.6 approach (8 yes, 1 no, 0 abstain). In addition, the Commission directed the co-drafters to: retain the prohibition against an "offer" to enter into a restrictive agreement; and to add the first sentence of the MR 5.6 Cmt. 1 to the rule discussion.

Among the points raised in the course of the discussion were the following.

- (1) Like the advertising rules, this rule involves a subject matter that demands national uniformity. Multi-state law firms should not have to sort out different rules on restrictive covenants.
- (2) The issue of using either "member" or "lawyer" in this rule is an important one but is probably best deferred until there is a global discussion.
- (3) Consideration should be given to not imbedding the *Howard v. Babcock* standard in this rule. That standard is a minority rule among the states and in California, the Supreme Court may modify or reverse the standard in a subsequent decision.
- (4) RPC 1-500(A) addresses the subject of restrictive covenants and this is quite different from the prohibition in RPC 1-500(B). Consideration should be given to moving RPC 1-500(b) to another rule (i.e., RPC 1-120, 1-110, or 3-400) or to its own independent rule.
- (5) Consideration should be given to deleting the prohibition against a lawyer "offering" an impermissible agreement. The true harm is in an agreement realized, not in the making of an offer.
- (6) Deleting the "offering" aspect of the prohibition would be a departure from the similar concept in MR 5.6.
- (7) Assuming that the amended rule will be RPC 1-500(A) without (B), then consideration should be given to closely tracking the language and format of MR 5.6

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G. Consideration of Proposed New Rule re “Recording Time”

The Commission considered a March 25, 2004 memorandum by Mr. Voogd presenting a revised draft new rule. The Commission discussed possible options for variations on the concept Mr. Voogd's proposal. On a proposal to explore a new rule or rule amendment addressing honesty in billing practices (patterned on current rule 2-400 that requires a civil finding before any disciplinary sanction), the Commission voted 8 yes, 1 no, and 1 abstain.

Among the points raised in the course of the discussion were the following.

- (1) The report from the ABA Solo Practice Section includes findings indicating public concerns that lawyers charge too much and are unwilling to account for fees and billing practices.
- (2) Feedback offered at the 2004 State Bar Annual Ethics Symposium suggests a level of interest in self-regulating this area.
- (3) It may be possible to address the asserted concerns under RPC 4-200 rather than in a new rule.
- (4) The Commission should seek to establish necessary public protection standards but should not pander to public approbation of lawyers.
- (5) Maintaining public confidence is a valid purpose of the RPCs.
- (6) Micro-managing billing is not an appropriate function of the RPCs. The rocky relations between insurance defense lawyers and insurance companies would likely be exacerbated by billing standards under penalty of State Bar discipline.
- (7) Billing fraud is difficult to prove in a civil matter. A new rule would be helpful.
- (8) Billing fraud is already covered by B&P Code sec. 6106.
- (9) Many excessive and double-billing claims are dependent upon the actual terms of the specific fee agreement at issue and the conduct of the lawyer and client in abiding (or not abiding) by those terms. A one size fits all standard that is successful in imposing certainty in these situations may be difficult to construct.
- (10) Law firm culture could be positively impacted by the State Bar's leadership role in cleaning-up billing practices that are tantamount to fraud. The Legislature has demonstrated an interest in reforming consumer protection in the hiring of lawyers.

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H. Consideration of Rule 2-100. Communication With a Represented Party

The Commission considered an April 19, 2004 memorandum presented by Mr. Martinez reporting on rule amendment issues for rule 2-100. The Commission considered a proposal to move toward the approach used in MR 4.2. By a vote of 8 yes, 3 no, 0 abstain, the Commission determined to retain the California approach of current rule 2-100. A first draft of a proposed amended rule was assigned.

Among the points raised in the course of the discussion were the following.

- (1) Consideration should be given to tracking MR 4.2 and covering peculiar California aspects in the rule discussion.
- (2) Before deciding what rule to have, there should be discussion of whether to have any rule at all.
- (3) There are a variety of sound public policy interests that are covered by having a rule in this area. They include: preservation of confidential information; protection of the attorney-client relationship; and the fair administration of justice (including the constitutional rights of criminal defendants).
- (4) The need for a rule also can be based on the historical compromise between the plaintiffs and defense bar as to communications with represented parties.
- (5) The rule can be manipulated to thwart some of those same public interests. Consider the mafia case of a defendant who wants to plead out but is constrained by a mafia controlled lawyer who is keeping the prosecution at bay.
- (6) Case law on both RPC 2-100 and MR 4.2 have demonstrated the need for a rule.
- (7) RPC 2-100 is materially different from MR 4.2 and California cases and ethics opinions interpreting RPC 2-100 have gone far in making RPC 2-100 a useful rule for the profession.
- (8) The Commission originally considered rule language closer to the ABA but when that draft was issued for public comment it was greatly questioned and the Commission's redraft in response to the adverse comment led to the rule that is now on the books.
- (9) The McDade amendment represents a degree of Congressional respect for, and deference to, state independence on this issue and if California has valid substantive differences, they should not be treated lightly.
- (10) Among the asserted differences between RPC 2-100 and MR 4.2 are: the knowledge standard; the corporate client control group treatment (including the former employee issue); the pre/post-indictment contact issue; and the public officer exception.

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I. Consideration of Rule 2-200. Financial Arrangements Among Lawyers

The Commission considered a May 5, 2004 memorandum presented by Mr. Lamport reporting on rule amendment issues for rule 2-200 and setting forth an initial discussion draft of a proposed amended rule. The Commission provided input on the various issues raised but did not direct the co-drafters in assigning a redraft.

Among the points raised in the course of the discussion were the following.

- (1) On the issue of bare referral fees, California and the ABA continue to have a different policy.
- (2) If staying with the RPC 2-200 policy on referral fees, then consideration should be given to clarifying that both the referring and referred lawyer have duties and are both subject to discipline. One approach is to use language like RPC 1-500 "not be a party to or participate in. . . ."
- (3) The meaning of "of counsel" and "associate" also should be addressed, however, it could be handled in a definition of the phrase "law firm."
- (4) Consideration should be given to addressing the differing terminology used in similar rules, "split," "sharing," and "dividing."
- (5) The quantum meruit issue in *Huskinson* should be covered in the rule discussion.
- (6) There should be a recommendation on whether RPC 2-200(B) should be retained in the rule or covered in the new advertising rule proposals.

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J. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions

At the October 24-25, 2003 meeting, the Commission tentatively approved the text of proposed new rule 1-120X subject to a 10-day mail ballot process on the proposed rule Discussion section. The 10-day mail ballot on the rule Discussion section resulted in the rule being placed on the agenda for reconsideration. Upon reconsideration, a redraft was assigned. Ms. Betzner was added as a co-drafter.