

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

***MEETING SUMMARY - OPEN SESSION***

**Friday, February 29, 2008**  
(9:15 am - 5:00 pm)

**Saturday, March 1, 2008**  
(9:00 am - 5:00 pm)

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

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

**MEMBERS NOT PRESENT:** Stanley Lamport.

**ALSO PRESENT:** Carole Buckner (COPRAC liaison, by telephone); George Cardona (U.S. Attorney, C.D. Cal.); Randall Difuntorum (State Bar staff); William Herbert (Board Liaison); Mimi Lee (State Bar staff); Meg Lodise (Executive Committee, Trusts & Estates Section); and Kevin Mohr (Commission Consultant).

**I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE JANUARY 18, 2008 MEETING**

The action summary for the January 18, 2008 meeting was deemed approved.

**II. REMARKS OF CHAIR**

**A. Chair's Report**

The Chair reported that representatives of the Commission would be appearing at the March 6, 2008 meeting of the Board Committee on Regulation, Admissions and Discipline to present the Commission's request for authorization to circulate a third batch of draft rules for a 90-day public comment period. The Chair also reported unfortunate news that Mr. Lamport would not be attending the meeting as his mother had just passed away. A sympathy card was circulated for the members to sign.

## **B. Staff's Report**

Staff reported that the latest draft of the Batch 1 interim report to the Supreme Court was posted to the RRC Collaboration page. Staff was asked to redistribute the log-in instructions for the page. Regarding the anticipated transmittal letter for submitting the report to Court staff, interest was expressed in highlighting the following issues contained in the report: conformance to the ABA Model Rules; the proposed change in policy re sex with client; and possibly confidentiality issues.

Mr. Tuft reported on plans for a Commission panel at the May 3, 2008 Statewide Ethics Symposium. Mr. Vapnek will be on the panel which will be moderated by COPRAC Vice-Chair Suzanne Mellard. Ms. Peck reported that she will serve on a symposium panel concerning inadvertent disclosure.

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

### **A. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness**

The Commission considered Draft 2.1 of proposed Rule 3.7 [5-210] (dated February 13, 2008). Ms. Snyder led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), the word "necessary" was added in the last line before the word "witness" (11 yes, 1 no, 0 abstain). In taking this action it was understood that the codrafters would also add related new comments, in particular a new comment defining the concept of "a necessary witness."

(2) Regarding the bracketed phrase "informed written consent" in paragraph (a)(3), the codrafters were asked to consider the addition of a comment addressing hardship situations where the obligation to obtain consent might be viewed as unduly burdensome.

(3) In paragraph (a), the word "called" was deleted from the last line (8 yes, 1 no, 3 abstain). In connection with this action, the following Commission members asked that their dissent be noted as to the inclusion of bench trials within the scope of the rule: Mr. Kehr; Mr. Melchior; Ms. Peck; Mr. Sapiro; and Mr. Vapnek. In addition, the Chair asked the codrafters to consider adding a comment explaining that a court's power to control a proceeding extends beyond the parameters set by the rules.

(4) In Cmt. [1], there was no objection to the Chair deeming approved a proposed revision to change the first sentence from the passive voice to the active voice so that it is a declarative statement. Subsequently, the first sentence of Cmt. [1] was deleted (6 yes, 5 no, 2 abstain). This action included a conforming deletion of the word "also" in the second sentence.

(5) A motion to add a comment stating that “tribunal” is intended to include trials and also arbitration and other adversarial adjudicative proceedings was made but failed (4 yes, 8 no, 1 abstain).

(6) In Cmt. [2], to track the language of the rule text, the first sentence of the comment was revised to use the phrase “knows or reasonably should know will be a necessary witness” (8 yes, 0 no, 2 abstain).

(7) In Cmt. [2], everything in the first sentence after the phrase “informed written consent of the client” was deleted and the codrafters were asked to add a cross-reference to the anticipated global definition of “informed consent” (10 yes, 0 no, 2 abstain). In addition, in the second sentence the word “also” was added by consensus so that it starts: “The lawyer shall also. . . .” Mr. Melchior asked that it be noted in the record that he dissents to the inclusion of the informed consent requirement.

(8) For Cmt. [3], the codrafters agreed that the entire comment should be placed in brackets to indicate that Commission action is pending on MR 1.10.

(9) By consensus, the codrafters were asked to adapt MR 3.7 Cmt. [5] & [6] in a new comment that would be inserted before Cmt. [3].

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

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

The Commission considered Draft 11.4 of proposed Rule 1.15 [4-100] (dated February 22, 2008). Ms. Peck led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (d), the codrafters agreed to address Mr. Tuft's concerns regarding the accounting obligation for advance fees by revising the language to: (1) add a statement of the relevant accounting obligation by citing Bus. & Prof. Code section 6148(b); and (2) clarify the obligation to properly respond to a dispute concerning advanced fees by indicating that the disputed funds must be then deposited into a trust account and handled in the same manner as disputed trust funds.

(2) Regarding the rule title, by consensus the term "entrusted" was deleted and the phrase "of Client's and Other Persons" was added to conform to the precise language used in paragraph (a).

(3) In paragraph (h)(1), the Chair suggested that the codrafters explore language to clarify the distinct concepts of "fixed" and "earned" as they pertain to advanced fees and, in particular, disputes concerning advanced fees.

(4) In Cmt. [1], the codrafters agreed to clarify paragraph (c)'s "property" definition so that it excludes documents that have intrinsic or pecuniary value. Property with intrinsic or pecuniary value would necessitate record-keeping along the lines of section 46 of the Restatement 3d, The Law Governing Lawyers. In addition, it was suggested that the codrafters provide an example of intangible rights by using a specific example, such as a document that contains a confidential proprietary recipe for a popular soft drink.

(5) For Cmt. [2], [2a], [2b], and [2c], the codrafters agreed to clarify the distinct policies applicable to funds or property that come into a lawyer's possession while performing a dual occupation and funds or property that come into a lawyer's possession as a result of a completely non-law related activity for a non-client. Per Mr. Tuft's suggestion, the codrafters agreed to add language stating the trust account rule applies to dual occupation funds but does not apply to non-client funds from a non-law related activity. Per the suggestion of the Consultant, the codrafters also agreed to consider addressing the RPC 3-300 issue that arises where a lawyer receives funds that are the fruit of a legal service and enters into business transactions with the client concerning, for example, investment of the funds.

(6) In Cmt.[2b], the codrafters agreed to rewrite the comment to explain that if a lawyer is rendering non-legal services that are fiduciary services or are services regulated by statutes or rules that are incompatible with lawyer trust accounting standards, then the lawyer must comply with the duties specifically applicable to the fiduciary or regulated services rather than the general lawyer trust accounting duties.

(7) In Cmt. [14], by consensus it was agreed that this comment is an important warning to lawyers that lawyer trust accounting duties cannot be waived by a client, however, it was also agreed that this language would remain a comment and not be moved to the rule text.

(8) For comments, such as Cmt. [20], that might be regarded as expendable "best practices" comments, the codrafters agreed to identify in the next rule draft their views on any such comments.

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

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

The Commission considered Draft 2 of proposed Rule 3.8 [5-110] (dated January 3, 2008). Ms. Foy led a discussion of the open issues and the following drafting decisions were made. It was noted that the presentation would include consideration of New York's proposed rule 3.8 (comparing paragraphs (a) through (f) and then considering the issue of whether to add paragraphs (g) and (h))

(1) In the precatory language, there was no objection to the Chair deeming approved the inclusion of the phrase "in a criminal case" to narrow the categories of "prosecutors" covered by the rule. It was observed that prosecutors bring civil consumer actions that are not criminal cases.

(2) In paragraph (a), Mr. Tuft withdrew previously expressed concerns about the comparison of the draft to New York's paragraphs (a)(1) and (a)(2).

(3) In paragraph (c), there was no objection to the Chair deeming this paragraph approved with the understanding that the codrafters would add a comment on self-representation, and possibly a second category of parties at the investigatory stage.

(4) In paragraph (d), there was no objection to the Chair deeming approved the deletion of the phrase "at the time of the alleged violation of this Rule" with the understanding that the codrafters would add a comment clarifying that the relevant case law is that case law applicable at the time of the lawyer's conduct

(5) In paragraph (d), a recommendation to delete the word "constitutional" in the first line was considered but rejected (1 yes, 10 no, 1 abstain). It was observed that deletion would render the rule overbroad.

(6) In paragraph (d), by consensus the phrase "protective order" in the first line was retained (and not changed to "court order") as "protective order" is the phrase used in MR 3.8.

(7) In paragraph (e), a recommendation to limit the subdivision (1) exception (to only the attorney-client privilege and the work product doctrine) was considered but rejected (3 yes, 10 no, 0 abstain). However, to clarify that the paragraph (e) exceptions include the work product doctrine, the phrase "or the work product doctrine" was added to subdivision (1) (9 yes, 1 no, 1 abstain). It was observed that the New York rule includes an exception for the work product doctrine.

(8) In paragraph (f), "reasonable care" was replaced with "reasonable efforts" (10 yes, 2 no, 1 abstain). It was suggested that the codrafters consider adding a comment that cross references Rule 1.0.

(9) Paragraph (g) was deleted in its entirety (13 yes, 0 no, 0 abstain) in recognition of the fact that Bus. & Prof. Code section 6068(o)(7) already imposes a reporting obligation.

(10) Regarding the ABA's newly added MR 3.8(g) (re a prosecutor's duty to disclose credible evidence of innocence after conviction), the codrafters were asked to draft language adding to the Commission's proposed rule (this request was made following a failed recommendation to reject it completely as a matter of policy (5 yes, 6 no, 1 abstain)).

(11) Regarding the ABA's newly added MR 3.8(h) (re a prosecutor's duty to seek to remedy a conviction when there is clear and convincing evidence indicating innocence after

conviction), the codrafters were asked to add this to the Commission's proposed rule (9 yes, 0 no, 2 abstain).

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

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

The Commission considered Draft 4 of proposed Rule 3.3 [5-200] (dated January 24, 2008). Justice Ruvolo led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a)(1), there was no objection to the Chair deeming the language approved.

(2) In paragraph (a)(2), the codrafters were asked to address the issue of “controlling” v. “material” authority in the next draft.

(3) Paragraph (a)(4) was deemed approved with the understanding that the codrafters would add a comment addressing Mr. Sapiro’s concern that the focus of the prohibition should be on conduct constituting subornation of perjury.

(4) Paragraph (b) was deemed approved with the understanding that the codrafters would add a comment clarifying whether fraudulent acts need to be testimonial to be within the scope of the rule.

(5) Paragraph (c) was adopted as drafted (6 yes, 3 no, 4 abstain).

(6) In paragraph (d), there was no objection to the Chair deeming approved the following revision: “. . .inform a tribunal of all material facts that are known to the lawyer that the lawyer knows or reasonably should know are needed . . .” Subsequently, the word “material” was deleted from the foregoing language (7 yes, 4 no, 1 abstain).

(7) In Cmt. [1], the third and fourth sentences were deleted (7 yes, 2 no, 2 abstain).

(8) Regarding other issues in the comments, the codrafters were asked to consider adding a comment explaining how paragraphs (a)(4) and/or (a)(5) might apply to a deposition setting.

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

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

The Commission considered Draft 4.1 (dated February 9, 2008) of a discussion draft of proposed amendments to RPC 3-100 [MR 1.6]. The Commission Consultant led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), a recommendation to delete or modify subdivision (1) so that client embarrassment or a client demand would not be a prerequisite to confidentiality was considered but rejected (4 yes, 6 no, 1 abstain).

(2) To replace paragraphs (a)(1) and (a)(2), the codrafters were asked to implement the concept of referring to “any information relating to the representation” and adding explanatory comments (10 yes, 2 no, 0 abstain).

(3) There was no objection to the Chair deeming approved paragraphs (b)(1) and (b)(2) as drafted.

(4) Regarding paragraph (b)(3), the codrafters were asked to include with the next draft a recommendation on the issue of selective inclusion of exceptions, such as the lawyer self-defense exception.

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

**G. Consideration of Rule 3-310(E) [ABA MR 1.9] Avoiding the Representation of Adverse Interest (former client conflicts)**

The Commission considered Draft 1.2 of proposed Rule 1.9 [3-310(e)] (dated February 18, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), the language was revised to track MR 1.9, with conforming changes to paragraph (b), as follows (9 yes, 2 no, 1 abstain):

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter ~~accept or continue the representation of~~ another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the affected present and former clients gives informed written consent, ~~confirmed in writing.~~
- (b) A lawyer shall not knowingly ~~accept or continue the representation of~~ a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;unless both the affected present and former clients gives informed written consent, ~~confirmed in writing.~~

(2) Subsequently, the above language was modified to strike references to "both" clients and to "affected present and" and to make other conforming changes, so that it reads (10 yes, 1 no, 1 abstain):

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter ~~accept or continue the representation of~~ another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless ~~both the affected present and former clients~~ gives informed written consent, ~~confirmed in writing.~~
- (b) A lawyer shall not knowingly ~~accept or continue the representation of~~ a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;unless ~~both the affected present and former clients~~ gives informed written consent, ~~confirmed in writing.~~

(3) Regarding paragraphs (b) and (c), the codrafters were asked to address Mr. Sapiro's concern that the reference to a "former firm no longer represented" together with the phrase "had previously" is a grammatical problem because the verb tense is not correct.

(4) A recommendation to delete paragraph (b) in its entirety was considered but rejected (5 yes, 6 no, 1 abstain). It was understood that the codrafters would be rewriting paragraph (b) to address the concern raised above.

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft.

[Intended Hard Page Break]

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

The Commission considered Draft 1.1 of proposed Rule 1.8.7 [3-310(d)] (dated February 14, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) Regarding the rule text, the codrafters were asked to work with Ms. Peck to explore the addition of language permitting a “non-waiver mechanism” for obtaining consent from multiple clients without the absolute necessity of seeking individual consent at the time of a settlement offer.

(2) Regarding both the rule text and the comments, the inclusion of “criminal matters” within the scope of the rule was approved (10 yes, 0 no, 2 abstain) with the understanding that the codrafters would add comments addressing the issue of what is meant by “informed consent” in a criminal settlement offer context.

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft. The Chair indicated that the comments would be the focus of the next discussion of this rule.

[Intended Hard Page Break]

**I. Consideration of Rule 3-310(F) [ABA MR 1.8(f)] Avoiding the Representation of Adverse Interest (fee paid by other)**

The Commission considered Draft 1 of proposed Rule 1.8.6 [3-310(f)] (dated February 19, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) Regarding the rule text, a recommendation to reverse the sequence of paragraph (a) and paragraph (b) was considered but rejected (3 yes, 7 no, 0 abstain).

(2) All of paragraph (a)(1) was deleted (5 yes, 2 no, 1 abstain).

(3) In Cmt. [2], there was no objection to the Chair deeming approved the addition of language addressing “interference with the lawyer-client relationship.”

(4) In Cmt. [1] or another place in the comments, the codrafters were asked to add the concept that “the rule is not applicable to a payment by a third party pursuant to a settlement or an award of fees approved by a court” (6 yes, 3 no, 0 abstain). In addition, there was no objection to the Chair deeming approved the use of “payor” in the place of “payer.”

(5) In Cmt. [1], a recommendation to add “knowingly” to modify “accept” was considered but rejected (4 yes, 5 no, 1 abstain).

(6) In Cmt. [2], a recommendation to incorporate verbatim the last paragraph of RPC 3-310(F) was considered but rejected (4 yes, 5 no, 1 abstain). Subsequently, the Commission determined to use the language of RPC 3-310(F) as the starting point for revising the comment (8 yes, 0 no, 2 abstain). It was suggested that the revised comment could offer guidance to lawyers that other conflicts can arise even if there is no third party payor conflict; and also give cross-references to other potentially applicable rules.

(7) There was no objection to the Chair deeming approved the following revision of Cmt. [3]:

[3] ~~Paragraphs (a)(1) and (2) recognizes that other law might govern the relationship between a lawyer and client, such as when a lawyer can represents an indigent client through an arrangement under which the lawyer's fees are paid by a governmental agency or other funding organization without the need for the lawyer to obtain informed written consent.~~

The codrafters were asked to prepare a revised draft incorporating all of the above changes for submission to staff. Staff was asked to seek final approval of the rule through a 10-day ballot.

[Intended Hard Page Break]

**J. Consideration of Rule 3-310, Discussion paragraph #6 re imputation [ABA MR 1.8(k) and MR 1.10] Avoiding the Representation of Adverse Interest (consideration of the concept of imputed conflicts)**

The Commission considered a report from Mr. Tuft (dated February 18, 2008) outlining issues to be considered by the Commission in connection with the ABA Model Rules that involve imputation of conflicts. Mr. Tuft led a discussion of the issues and the following drafting decisions were made.

(1) In concept only, the Commission determined to consider adoption of a rule on imputation of conflicts (6 yes, 3 no, 0 abstain).

(2) In concept only, the Commission determined to consider adoption of a rule along the lines of MR 1.10(a) (6 yes, 2 no, 0 abstain). Ms. Peck asked that her dissent to this action, and any other Commission decision to adopt MR 1.10, be noted on the meeting record.

The codrafters were asked to prepare a first draft of a proposed rule(s). The Chair indicated that the codrafters need not prepare comments at this stage of the drafting process.

[Intended Hard Page Break]

## **K. Consideration of ABA MR 1.18 Duties to Prospective Client**

The Commission considered Draft 1.2 of proposed Rule 1.18 (dated February 18, 2008). The Commission Consultant led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (b), the codrafters agreed to incorporate the concept of “information relating to the consultation” and delete the phrase “learned in the consultation.” In addition, the codrafters agreed to explore adding a comment to address concerns about “forum shopping” clients.

(2) In paragraph (c), in response to concerns expressed about subjectivity, the codrafters agreed to reconsider the inclusion of a “significantly harmful” standard. It was suggested that the codrafters consider the *Speedee Oil* and the *Marriage of Egedi* cases.

(3) In paragraph (d), the codrafters agreed to consider clarifying the use of the phrase “affected current client.”

Following discussion, the codrafters were asked to implement all of the revisions in a revised draft. The Chair indicated that discussion would continue at the next meeting on the rule text rather than the comments.

[Intended Hard Page Break]

**L. Consideration of Rule 3-310 [ABA MR 1.11] Avoiding the Representation of Adverse Interest (special conflicts for government officers and employees)**

Matter carried over.

[Intended Hard Page Break]

**M. Consideration of Rule 3-310 [ABA MR 1.12] Avoiding the Representation of Adverse Interest (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral)**

The Commission considered a report from Justice Ruvolo (dated February 11, 2008) presenting MR 1.12 and identifying issues for consideration by the Commission. Justice Ruvolo led a discussion of the issues and the following drafting decisions were made.

(1) In concept, the Commission determined to consider adoption of a rule like MR 1.12 (9 yes, 1 no, 2 abstain).

(2) Regarding the concept of screening in MR 1.12(c), the Commission determined to not include this concept (8 yes, 2 no, 3 abstain). It was understood that this action to reject the concept of screening pertained only to the screening of judges and not law clerks.

(3) The codrafters agreed to review the New York rules to ascertain whether New York's versions of Rules 1.11 and 1.12 offer useful models for the Commission to follow.

(4) Regarding the use of the standard "personally and substantially" throughout the rule, the codrafters were asked to retain that standard for at least the next draft.

(5) There was no objection to the Chair deeming approved the use of the phrase "informed written consent" in the place of "consent confirmed in writing."

(6) In paragraph (b) of MR 1.12, the codrafters were asked to delete the entire second sentence (6 yes, 5 no, 0 abstain). It was understood that deletion of this sentence does not reflect a Commission policy statement condoning the conduct prohibited by that sentence but rather that the conduct is covered by other standards in California, such as civil law standards. It was also understood that this action effectively approved the addition of "law clerk" to the first sentence of paragraph (b).

(d) In paragraph (d) of MR 1.12, the codrafters were asked to rewrite the language to state: "this rule does not apply to a partisan member of a multi-member panel" (9 yes, 2 no, 1 abstain).

Following discussion, the codrafters were asked to implement all of the revisions in a first draft of a proposed rule. The Chair indicated that the comments would be the focus of the next discussion.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

**IV. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 2)**

**A. CONSENT - Rule 1.8.3 [4-400]. Gifts from Client**

The Commission considered a memorandum from Justice Ruvolo (dated February 13, 2008) reporting on the public comments received on proposed Rule 1.8.3 [4-400]. Justice Ruvolo led a discussion of recommendations for action in response to the public comments and the following decisions were made.

(1) By consensus, it was determined that a definition of a “substantial gift” should be added to the beginning of Cmt. [1].

(2) By consensus, it was determined that the issue of “related” would be handled by separate references to the Probate Code in paragraph (a)(1) and paragraph (b).

The codrafters were asked to prepare a revised draft incorporating all of the above changes for submission to staff. Staff was asked to seek final approval of the rule through a 10-day ballot.

[Intended Hard Page Break]

**B. CONSENT - Proposed Rule 1.8.5 [4-210]. Payment of Personal or Business Expenses Incurred by or for a Client**

The Commission considered a memorandum from Mr. Voogd (dated February 19, 2008) reporting on the public comments received on proposed Rule 1.8.5 [4-210]. Mr. Voogd led a discussion of recommendations for action in response to the public comments and the following decisions were made.

(1) In response to a comment from the Santa Clara County Bar Association, the Commission considered but rejected the recommended addition of “or may not” to paragraph (a)(3) (1 yes, 7 no, 2 abstain). It was observed that this addition would be redundant of the existing wording. Note: A subsequent re-vote of this same proposal also failed (3 yes, 4 no, 1 abstain).

(2) In response to a comment from COPRAC, the Commission considered but rejected the recommended deletion of the exception for loans to a client (1 yes, 7 no, 2 abstain).

(3) In response to a comment from the Orange County Bar Association seeking to add “pro bono” to the rule’s exceptions, the Commission determined this change would be an overbroad exception and that it should not be made (8 yes, 2 no, 0 abstain). Subsequently, a re-vote of this issue was taken and the Commission determined to add “pro bono” to the rule’s exceptions.

The codrafters were asked to prepare a revised draft incorporating all of the above changes for submission to staff. Staff was asked to seek final approval of the rule through a 10-day ballot. The Chair asked staff to share the 10-day ballot draft with Toby Rothschild, the liaison from the Access to Justice Commission.

[Intended Hard Page Break]

**C. CONSENT - Rule 1.8.11 [3-320]. Relationship with Other Party's Lawyer**

The Commission considered a memorandum from Mr. Melchior (dated February 8, 2008) reporting on the public comments received on proposed Rule 1.8.11 [3-320]. Mr. Melchior led a discussion of recommendations for action in response to the public comments and the following decisions were made.

(1) There was no objection to the Chair deeming adopted the codrafter's recommendation to reject the Bar Association of San Francisco's proposal to replace the "inform in writing" standard with a full "disclosure" standard.

(2) There was no objection to the Chair deeming adopted the codrafter's recommendation to reject COPRAC's proposal to replace the "inform in writing" standard with a full "written consent" standard.

(3) There was no objection to the Chair deeming adopted the codrafter's recommendation to reject the Orange County Bar Association's proposal to replace the "inform" with a "disclose."

(4) The Commission adopted the concept that the rule extends to law firms (such that it would apply to an opposing counsel and also to lawyers at the opposing counsel's firm that are known (6 yes, 5 no, 0 abstain). It was understood that this action to expand the rule would necessitate the deletion of Cmt.[2].

(5) Consistent with a comment from the Santa Clara Bar Association, by consensus the Commission revised the rule title to be "Relationship with Other Person's Lawyer."

Following discussion, there was no objection to the Chair deeming the rule completed. The codrafters were asked to prepare a revised draft for submission to staff.

[Intended Hard Page Break]

**D. CONSENT - Rule 1.8.12 [4-300]. Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**

The Commission considered a memorandum from Mr. Melchior (dated February 8, 2008) reporting on the public comments received on proposed Rule 1.8.12 [4-300]. Mr. Melchior led a discussion of recommendations for action in response to the public comments indicating that the only substantive comment was received from the Bar Association of San Francisco and that comment raised the issue of the Commission's policy decision to conform the rule to the Probate Code exceptions. The Chair stated that a reconsideration and re-vote on this policy decision would be entertained after the final comprehensive public comment distribution. Mr. Sapiro asked that his dissent be noted on the meeting record as he would have preferred to revisit the issue at this stage of the process. There was no objection to the Chair deeming this rule completed.

[Intended Hard Page Break]

**E. Proposed Rule 8.4.1 [2-400]. Prohibited Discrimination in Law Practice Management and Operation**

The Commission considered a memorandum from Ms. Peck (dated February 19, 2008) reporting on the public comments received on proposed Rule 8.4.1 [2-400]. Ms. Peck led a discussion of recommendations for action in response to the public comments and the following decisions were made.

(1) By consensus, the Commission decided that the comments should include a cross reference to Rule 5.1.

(2) In paragraph(a)(1), the codrafters were asked to address revise the language to use the concept of “knowingly permit” as this would help assure that rule will be construed to impose an affirmative obligation for a lawyer respond and not be silent.

The codrafters were asked to prepare a revised draft incorporating all of the above changes for submission to staff. Staff was asked to seek final approval of the rule through a 10-day ballot.

[Intended Hard Page Break]