

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

MEETING SUMMARY - OPEN SESSION

Sunday, March 17, 2002

**Oakland Airport Hilton
1 Hegenberger Road
Oakland, California 94621**

MEMBERS PRESENT: Harry Sondheim (Chair); Karen Betzner; Linda Foy; JoElla Julien; Stanley Lamport; Raul Martinez; Ellen Peck (for portions); Mark Tuft; Paul Vapnek; Anthonie Voogd

MEMBERS ATTENDING BY TELEPHONE: Jerome Sapiro, Jr.

ALSO PRESENT: Derek Danielson, Attorney at Law; Kevin Mohr (COPRAC Vice-Chair); Toby Rothschild (Liaison, Discreet Task Representation Committee of the State Bar Access to Justice Commission); Ira Spiro (Liaison, Judicial Council's Subcommittee on Alternative Dispute Resolution, Working Group on Ethical Standards for Court-Connected Mediation); and Randall Difuntorum and Mary Yen (State Bar staff)

I. APPROVAL OF ACTION SUMMARY FROM JANUARY 4, 2002 MEETING

The Meeting Summaries (Open and Closed Sessions) from the January 4, 2002 meeting were approved.

II. REMARKS OF CHAIR

A. Selection of Vice-Chair

The Chair announced the Commission would go into Closed Session to obtain staff input on procedural issues related to the selection of a Vice-Chair nominee. After the discussion, the Commission returned to Open Session and voted by secret ballot to nominate Paul Vapnek as Vice-Chair. Mr. Difuntorum was assigned to relay the recommendation to State Bar Executive staff and obtain instructions for the State Bar's process for acting on the Commission's nomination. Mr. Difuntorum noted that this final step is not yet known but may be by Presidential action and/or Board Committee action.

III. MATTERS FOR ACTION

Preliminary Comment: During consideration of rules 1-110, 1-120, and 1-200, several preliminary matters were covered.

1. It was suggested that neither the ABA rules nor California's Rules of Professional Conduct be presumed to be correct. Each Rule of Professional Conduct ("RPC") will be considered and decided on a reasoned basis, with consideration of ABA rules.

2. At an appropriate time, the Commission will consider inviting public comment as RPCs are finished in a series, rather than as a whole package at the end.

3. There was discussion of possible renumbering and reordering of the RPCs to fit with ABA rule numbers and order. Concern was expressed that this may cause unnecessary confusion since the RPCs were already renumbered and reordered in prior revision efforts and it would make case law research more difficult. There was support for cross-reference charts that assist members in understanding various systems of rule numbering. Consistent with discussions in prior meetings, it was the sense of the members that the issue of rule numbering be deferred.

4. Staff is asked to post the Commission's proposed changes to the RPCs on the State Bar's web site as soon as possible.

A. Consideration of Rule 1-110 (Disciplinary Authority of the State Bar)

Commissioners considered the purpose and origin of this RPC. Mr. Sapiro indicated the predecessor rule, former 9-101, was adopted to make sure that Rule of Court rule 956 was enforceable. It was noted that rule 956 still refers to the old rule 9-101. Commissioners also recalled that the Office of the Chief Trial Counsel ("OCTC") asked for the rule.

During discussion, the following comments were made: There was consensus to propose a title change to "Compliance with Conditions of Discipline". It was observed that some of the rule titles use verbs ("Complying") while others use nouns ("Compliance"). It was agreed that at an appropriate time consideration would be given to addressing this inconsistency in rule titles. There was consideration of whether the appropriate concept and term used in the rule ought to be "imposed" or "administered". Also, it was noted that the word "to" should be inserted before the words "other discipline" in the rule. There were differing opinions about whether a "Discussion" section should be included for comments, and whether cross-references to other RPCs or statutes should be added in Discussions or the body of the rules.

Drafting Assignment: Mr. Lamport and Mr. Voogd are assigned to consider the points raised during the discussion and draft a proposed amended rule 1-110, with and without a "Discussion" section. Included with the assignment should be a recommendation on whether the noun or verb form of words should be used in the rule title. Mr. Sapiro volunteered to send Mr. Lamport and Mr. Voogd

a memo from his records of the work of the former Commission regarding the reason for the rule and explaining modifications contemplated at that time.

B. Consideration of Rule 1-120 (Assisting, Soliciting, or Inducing Violations)

1. Suggestion to add disciplinary B&P code sections in the RPCs.

Commissioners considered OCTC's suggestion of replacing rule 1-120 with a rule more like ABA Model Rule 8.4. OCTC's suggestion would attempt to codify case law, and replicate provisions of the State Bar Act in the RPCs. OCTC also proposes a rule that a member shall not engage in conduct unbecoming a member of the bar, which would replace Business and Professions Code ("B&C") section 6068(f)'s former provision on offensive personality. Mr. Difuntorum noted the State Bar is asking the Commission to consider whether there should be a RPC to replace the offensive personality clause of section 6068(f).

2. Whether "knowingly" should be retained or eliminated.

Some Commission members thought "knowingly" is redundant because "wilfulness" is an element of the RPCs. Other members would keep "knowingly" to avoid vicarious liability.

3. Obligation to report misconduct by other attorneys

There was discussion of whether or not California should have a whistleblower (snitch) rule for attorneys. Commissioners recalled the rejection of a mandatory reporting rule that occurred during the prior Commission's study. In discussing whether to amend rule 1-120 to address this topic, the points raised included: 1) in the states that have mandatory reporting, attorneys tend not to report violations; 2) in an out-of-state case, *In Re Hummel*, an attorney who did not report a violation received greater discipline than the attorney who committed the underlying violation; 3) the profession can be self-regulating without requiring members to report violations; 4) mandatory reporting would create conflicts between attorneys and their clients; 5) mandatory reporting could lead to civil libel suits and an enormous defensive response from the accused attorney. It was noted that B&P code section 6094 provides that communications to the State Bar concerning discipline are privileged. Mr. Difuntorum will circulate excerpts from the former Commission's prior reports that address concepts considered but not recommended for Board adoption.

Following discussion and upon motion made and seconded, the Commission voted 9 yes and 1 no to a proposal to retain the existing language of rule 1-120. Next, upon motion made and seconded, the Commission voted 9 yes, 0 no, 1 abstention to a proposal to not recommend Board adoption of a mandatory reporting rule.

Drafting Assignment: Ms. Peck and Mr. Vapnek will work on putting select provisions from B&P code sections in a proposed new RPC. They will draw upon OCTC's suggested list and include other appropriate provisions.

Drafting Assignment: Mr. Tuft and Ms. Betzner are assigned to draft a proposed amended rule 1-120 with a "Discussion" section informing members that California does not require members to report misconduct by other members. It was suggested that the codrafters consider San Diego Ethics Opn. No. 1992-2 and a proviso in the Comment to ABA Model Rule 8.4 for developing a rationale for the Commission's position.

C. Consideration of Rule 1-200 (False Statement Regarding Admission to the State Bar)

1. Proposed Clarifying Amendments

Commissioners suggested clarifying rule 1-200(A) to clearly apply to member statements in connection with their own application for admission, not with anyone else's application. It was noted that the current language in paragraph (A) contains an ambiguity that could be interpreted to mandate reporting, which would amount to a "snitch" rule for admission candidates. Commissioners suggested redrafting the subparagraph so that it does not appear to require affirmative and mandatory disclosure. Although deletion of subparagraph (A) was discussed, there was no consensus to do so.

For paragraph (B), which applies to another member's application, there was consensus for replacing the phrase "in respect to character, education, or other relevant attributes" with words relating to an applicant's moral character or to the entirety of the admissions criteria under the B&P code section 6060. Otherwise, as currently written, it may be possible to discipline a member for furthering the application of a person who is subsequently properly admitted to practice.

Commissioners suggested clarifying the use of the term "readmission" in the Discussion section of the rule. Ms. Yen described a State Bar procedure often referred to as "mini-reinstatements." It was the sense of the Commissioners that this issue should be assigned for a study and recommendation.

In addition, it was noted the self-regulatory policy underlying the concept of the rule suggests that the scope of the rule might be extended to cover matters of registration (i.e., out-of-state arbitration counsel pursuant to Rule of Court 983.4, and potentially out-of-state corporate counsel under the pending California MJP proposal) and not just admission.

2. Expansion of Rule 1-200.

OCTC suggested expanding rule 1-200 to cover judicial applicants and maybe disciplinary proceedings too. OCTC's suggestion raised many questions. Commissioners were concerned that the suggestions go too far. For example, OCTC did not state whether it was addressing a problem by expanding the rule to cover applications for judicial office. OCTC also did not provide proposed language for its suggestion to include knowingly failing to respond to lawful demands for information from an admissions or disciplinary authority, or explain whether this meant the revision would apply to disciplinary proceedings. Ms. Yen volunteered to contact OCTC for answers to these questions.

Following discussion, and upon motion made and seconded, the Commission voted 8 yes and 2 no on a proposal to amend paragraph (A) to apply to the member's own application and amend paragraph (B) to replace "in respect to character, education, or other relevant attributes" with other wording.

Drafting Assignment: Mr. Sapiro and Ms. Foy are assigned to draft an amended rule 1-200, which will include language changes to paragraphs (A) and (B) that address the points raised in the Commission's the discussion. This assignment includes development of a recommendation on use of "readmission" versus "reinstatement".

D. Consideration of Rule 1-300 (Unauthorized Practice of Law)

Matter carried over.

E. Consideration of Rule 1-310 (Forming a Partnership With a Non-Lawyer)

Matter carried over.

F. Public Comment Outreach Status

Mr. Difuntorum provided an oral report. At the request of the Chair, a copy of a comment letter from the Los Angeles County Bar Association dated March 11, 2002 was distributed.

IV. REPORTS OF THE COMMISSION MONITORS

A. ABA Ethics 2000

Observations and comments on the Ethics 2000 activities of ABA at its 2002 Midyear Meeting were offered by the Chair, Mr. Lamport and Mr. Tuft.

B. State Bar Task Force on Multidisciplinary Practice

Matter carried over.

C. Supreme Court Advisory Task Force on Multijurisdictional Practice

Matter carried over.

D. Family and Juvenile Law Advisory Committee of the Judicial Council

Matter carried over.

E. Pro Bono Subcommittee of the State Bar Standing Committee on the Delivery of Legal Services

Matter carried over.

F. Discreet Task Representation Committee of the State Bar Access to Justice Commission

Matter carried over.

G. Judicial Council's Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System—Working Group of the Civil and Small Claims Advisory Committee Alternative Dispute Resolution Subcommittee

Matter carried over.

H. COPRAC AB 363 Subcommittee

Matter carried over.

I. Joint Task Force of the Judicial Council and the State Bar on AB 2069

Matter carried over.