

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

MEETING SUMMARY - OPEN SESSION

Friday, June 13, 2008
(9:15 am - 5:00 pm)

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

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

MEMBERS NOT PRESENT: Linda Foy and Hon. Ignazio Ruvolo.

ALSO PRESENT: John Amberg (COPRAC Liaison); George Cardona (U.S. Attorney, C.D. Cal.); Randall Difuntorum (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Mimi Lee (State Bar staff); Michael Marcus (Board of Governor Liaison); Marie Moffat (State Bar General Counsel) (by telephone); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission and LACBA Liaison).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE APRIL 25, 2008 MEETING

The Chair postponed consideration of the draft action summary to allow the Consultant to provide non-substantive edits to staff.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reported on the Commission's plans to work with the Inns of Court to present an educational program at the 2008 State Bar Annual Meeting. Commission members were asked to suggest topics to the panelists (Mr. Kehr; Mr. Lamport; Mr. Vapnek; and Mr. Sondheim). The Chair also explained procedures for conducting the discussion of action items, emphasizing that members who submitted emails would be given more than one opportunity to speak to an issue. Finally, the Chair expressed condolences to Ms. Snyder on the passing of her mother.

B. Staff's Report

Staff reported on the public comments received, to date, on the Commission's third batch of proposed rules. Members were given instructions on how to retrieve the comments at the Commission's collaboration website. There was brief discussion of plans to begin the consideration of comments at the Commission's August meeting. Staff also reported that the interim report to the Supreme Court on the Commission's first batch of proposed rules was submitted on May 27, 2008. Regarding the activity of the Board of Governors, staff reported that the Board approved an insurance disclosure rule (rule 3-410), opposed Conference of Delegates Resolution No. 01-06-08 (re ethical walls), and will consider, at its July meeting, a proposal to explore a State Bar certified speciality in legal malpractice.

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

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

The Commission considered Draft 3 of proposed Rule 3.8 [5-110] (dated March 16, 2008). The Chair led a discussion of the open issues and the following drafting decisions were made.

(1) Regarding the non-substantive edits recommended by Mr. Tuft in his April 21, 2008 message, there was no objection to the Chair deeming approved the following: in paragraph (d), removing the comma after "law;" in Cmt. [2], replacing "pro se" with "pro per;" in Cmt. [5], replace "Nothing in this comment is intended to" with "This comment is not intended to;" in Cmt. [6] replace "reasonable care" with "reasonable efforts;" and in Cmt. [6A], replace "Reference to a 'prosecutor'" with "The term 'prosecutor' in this Rule includes...."

(2) Paragraph (c) was amended to add the following at the end of the current language "unless the tribunal has approved the appearance of the accused pro se" (8 yes, 3 no, 0 abstain). It was understood that this action also includes a conforming deletion of the third sentence of Cmt [2].

(3) In paragraph (c), a suggestion to change "accused" to "person" failed to garner adequate support.

(4) In paragraph (d), there was no objection to the Chair deeming approved a non-substantive modification, changing the second instance of the word "mitigates" to "mitigate."

(5) Paragraph (g), the term "credible" was retained (6 yes, 4 no, 1 abstain). Also, the phrase "comes to know" was added (6 yes, 2 no, 3 abstain). These changes were made following consideration of the New York version of Rule 3.8.

(6) Paragraph (g)(1) was revised to read: "disclose that evidence to the convicted defendant and any appropriate court and the chief prosecutor of the jurisdiction where the conviction occurred." (7 yes, 4 no, 1 abstain) Subsequently, the term "promptly" was added together with an exception stating "unless a court authorizes delay." (8 yes, 1 no, 3 abstain)

(7) Paragraph (g)(2) was revised to read: “if the conviction was obtained in the prosecutor’s jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.” (9 yes, 1 no, 2 abstain)

With the above changes, there was no objection to the Chair deeming the rule approved. The Chair indicated that consideration of the comments would be the next step for this item.

(Intended Hard Page Break)

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

The Commission considered Draft 2.4 of proposed Rule 1.8.7 [3-310(D)] (dated May 20, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), the second sentence was deleted because it was unnecessary and an incomplete statement of the disclosure obligation imposed by the rule (9 yes, 3 no, 0 abstain). In addition, the codrafters were asked to add a new comment similar to comment [2] addressing the disclosure obligation under this rule (9 yes, 3 no, 0 abstain).

(2) Paragraph (b) was deleted, in part, due to concerns that a lawyer could exploit this provision to dilute client autonomy (7 yes, 5 no, 0 abstain). Mr. Melchior asked that the meeting record indicate that he voted no but not as to the content of the provision.

After discussion, there was no objection to the Chair deeming approved the rule and Cmt.[1]. The codrafters were asked to consider revising the remaining comments in light of the changes made to the rule and the discussion concerning the deletion of paragraph (b).

(Intended Hard Page Break)

C. Consideration of ABA MR 1.18 Duties to Prospective Client

The Commission considered Draft 2.1 of proposed Rule 1.18 (dated May 17, 2008). The Commission Consultant led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (b), the phrase “in the consultation” was retained to track the language of MR 1.18 (8 yes, 1 no, 2 abstain). It was understood that the codrafters would revise Cmt.[3] to explain that the phrase “in the consultation” encompasses both the concept of “during” and “as a result of” the consultation.

(2) Concerning the phrase “or through an authorized representative” in paragraph (a), the chair deemed approved explaining the meaning of the phrase in a comment rather than repeating the phrase in paragraphs (b) and (c).

(3) In paragraph (b), the word “confidential” was inserted before the word “information” (9 yes, 0 no, 1 abstain). The codrafters were asked to place in brackets the word “confidential” and the phrase referring to “Rule 1.9” at least until the Commission has considered Rule 1.9, especially the issue of including reference to the substantial relationship test in the Rule itself.

Following discussion, the Chair indicated further consideration of this item would be taken up at the August meeting in conjunction with the consideration of other related conflicts issues in proposed Rules 1.8(k), 1.9, 1.10, and 1.11.

(Intended Hard Page Break)

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

The Commission considered Draft 1 of proposed Rule 3.6 [5-120] (dated May 27, 2008). Mr. Lamport led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), a recommendation to explore changing the “substantial likelihood” standard to more precisely reflect a “clear and present danger standard” was rejected (3 yes, 7 no, 1 abstain).

(2) Paragraph (b) was revised to begin as follows: “Notwithstanding paragraph (a), and to the extent permitted by [Rule 1.6], a lawyer may state: . . .” (7 yes, 0 no, 3 abstain)

(3) Regarding a suggestion to move Cmt.[5] into the rule text, there was no objection to the Chair deeming this proposal rejected.

(4) Regarding the issue of including guidance on the application of the rule to both prosecutors and defense attorneys, there was no objection to the Chair deeming adopted the language of Cmt. [8] to MR 3.6. It was understood that the first discussion paragraph of RPC 5-120 would not be used.

(5) Regarding Cmt. [1], the first comment to the comparable D.C. rule was considered together with the first comment to MR 3.6 and the codrafters were asked to adapt the first comment to the D.C. rule but not include the last sentence in that comment (7 yes, 3 no, 0 abstain). Mr. Melchior asked that the meeting record indicate that his vote should not be interpreted as a repudiation of the concept in the last sentence of the D.C. comment. In adapting the D.C. comment, the codrafters were asked to consider Cmt. [3] to MR 3.6.

(6) Regarding Cmt. [2] to MR 3.6, there was no objection to the Chair deeming approved the concept of this comment.

(7) Regarding Cmt. [4] to MR 3.6, there was no objection to the Chair deeming approved the concept of this comment.

(8) Regarding Cmt. [5] to MR 3.6, there was no objection to the Chair deeming approved the concept of the second discussion paragraph to RPC 5-120 to be used in the place of Cmt. [5] to MR 3.6. It was understood that the codrafters could attempt to combine this comment with the language in Cmt. [2] to MR 3.6.

(9) Regarding the third discussion paragraph to RPC 5-120, there was no objection to the Chair deeming approved the concept of this comment. In addition, it was suggested that the guidance provided on the concept of statements made “by or on behalf of” a lawyer could be expanded to address agents and associates.

(10) Regarding Cmt. [6] to MR 3.6, there was no objection to the Chair deeming approved the concept of this comment.

(11) Regarding Cmt. [7] to MR 3.6, there was no objection to the Chair deeming approved the concept of this comment. In addition, it was suggested that the codrafters consider deleting the word “finally” at the start of the comment and adding a new proviso stating “unless prohibited by court order . . .”

Following discussion the codrafters were asked to implement the above action in a revised draft. To facilitate consensus in the codrafters' incorporation of the revisions, the Chair indicated that four member objections would be needed to place the revisions on the table for discussion at the next meeting.

(Intended Hard Page Break)

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

Discussion of this matter was postponed to the next meeting.

(Intended Hard Page Break)

F. Consideration of Rule 5-200 [including all of ABA MR 3.3] Trial Conduct
Matter carried over.

(Intended Hard Page Break)

G. 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)

Matter carried over.

(Intended Hard Page Break)

H. Consideration of Rule 1.8.5 [4-210] Payment of Personal or Business Expenses Incurred By or For a Client

The Commission considered Draft 6.1 of proposed Rule 1.8.5 [4-210] (dated May 5, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), the phrase “or sanction a representation” was deleted and the word “or” was added after “guarantee” and before “represent” (5 yes, 4 no, 1 abstain). It was indicated that this deletion was not a substantive change and was intended simply for brevity and clarity.

(2) In paragraph (a), there was no objection to the Chair deeming approved the stylistic addition of the word “that” after “except” and before “a.”

(3) Regarding paragraph (b), the codrafters agreed to rewrite the paragraph to capture the concept that a gift, by definition, is something that is not given in anticipation of consideration. The Chair indicated that the codrafters could request approval of their revision by using a 10-day ballot, if the codrafters felt that a ballot was necessary.

(4) Regarding Cmt. [1], a proposal to delete the entire comment was rejected (3 yes, 5 no, 1 abstain). Instead, the codrafters were asked to revise the comment to state the concept that a lawyer “might” have a financial stake in the client’s matter when subsidizing the client’s costs or expenses (8 yes, 1 no, 0 abstain).

(5) Regarding Cmt. [2], there was no objection to the Chair deeming approved Mr. Kehr’s rewrite which states:

[2] Paragraph (a)(2) does not permit a lawyer to lend money, or to offer, promise or agree to lend money, to a prospective client. It does permit a lawyer to lend money to a client after the lawyer is retained, but the lawyer then must comply with Rule 1.8.1 [3-300] and make a disclosure under Rule 1.7(d)(4) [3-310(B)(4)] concerning the effect the proposed agreement might have on the lawyer’s representation of the client. Nothing in this Rule shall be deemed to limit the application of Rule 1.8.12 [4- 300].

(6) In Cmt. [3], there was no objection to the Chair deeming the comment approved with a slight change at the end to reverse the order of “rule of court” and “statute” so that it reads: “. . . any applicable statute or rule of court.”

(7) All of Cmt. [4] was deleted (7 yes, 2 no, 0 abstain).

With the above changes, there was no objection to the Chair deeming the rule completed and approved. The codrafters were asked to submit a final draft to staff.

(Intended Hard Page Break)

I. Consideration of Rule 1.8.6 [3-310(F)] Payments Not From Clients

The Commission considered Draft 2 of proposed Rule 1.8.6 [3-310(F)] (dated April 8, 2008). Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) Paragraph (b) was revised to use the active voice (“neither the payor nor anyone else interferes with the lawyer’s performance of any duty owed to the client”) (7 yes, 2 no, 0 abstain).

(2) In Cmt. [1], everything except the last sentence was deleted and at the start, the following language was added: “This rule recognizes that the lawyer’s sole loyalty must be to the client.” This was deemed approved.

(3) Regarding Cmt. [4], the codrafters agreed to consider a rewrite as part of the next draft.

Following discussion the codrafters were asked to implement the above revisions and submit a new draft for consideration at the next meeting.