

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

DRAFT MEETING SUMMARY - OPEN SESSION

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

Saturday, August 30, 2008
(9:00 am - 5:00 pm)

SF–State Bar Office
180 Howard Street
San Francisco, CA 94105

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

MEMBERS NOT PRESENT: Hon. Ignazio Ruvolo; and Dominique Snyder.

ALSO PRESENT: Dorothy Bischoff (San Francisco Public Defenders Office) (Friday only); George Cardona (U.S. Attorney, C.D. Cal.); David Bell (Morrison & Foerster) (Friday only); Randall Difuntorum (State Bar staff); Doug Hendricks (Morrison & Foerster) (Friday only); Diane Karpman (Beverly Hills Bar Association Liaison)(by telephone); Mimi Lee (State Bar staff); Prof. Kevin Mohr (Commission Consultant); Dianne McLean (COPRAC Liaison) (Friday only); Tom Orloff (Alameda County District Attorney) (Friday only); Toby Rothschild (Access to Justice Commission and LACBA Liaison); Mary Yen (State Bar Office of General Counsel) (Friday only); and Jan Zabriskie (Dept. of Justice) (Friday only).

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

Consideration of the July 25, 2008 open session action summary was postponed to the next meeting at the request of staff.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reminded all persons present about the importance of keeping deadlines. The deadlines set for assignments, email comments, and official public comment letters enable the Commission to conduct business in an orderly and efficient manner. The Chair stressed that when deadlines are missed it is not fair to: (1) individual Commission members who make an effort to meet assignment and email deadlines; (2) the Commission as a whole, particularly in the case of late public comment letters, because the process prior to a meeting requires adequate preparation time for thoughtful consideration of a commentator's concerns and recommendations; (3) other public commentators who adjust their priorities to meet a public

comment deadline; and (4) the Board of Governors and the Supreme Court which must endure delays in the Commission's work when public comment is submitted late or when other deadlines are missed. Given the adverse consequences of missed deadlines, the Chair asked that deadlines be conscientiously observed.

The Chair also described a modified plan for considering matters returning from public comment. The Chair explained that rather than holding to the consensus standard of six votes to consider an issue that is already the subject of a unanimous subcommittee recommendation, any issue raised by a Commission member matter could be discussed provided that it is not a "nit" or an issue that has been thoroughly debated (in which case a vote would be taken, without re-debating the issue, in order to ascertain if there is a consensus to reconsider the Commission's prior action).

(1) Staff's Report

Regarding activity by COPRAC, staff reported that a proposed formal opinion, Interim No. 98-0001, addressing waiver of statutory attorney fees was circulating for public comment with a deadline of October 31, 2008. It was also noted that another proposed formal opinion would soon be issued for public comment and would address a successor attorney's duty to honor a prior attorney's lien.

Staff reported that the California Law Revision Commission's latest materials on posthumous survival of the attorney-client privilege mentions a possible referral to the State Bar concerning the duty of confidentiality. Staff indicated that the California Law Revision Commission's materials would be provided to the relevant drafting teams for consideration.

Staff offered observations considering the length of the rules, in terms of a word count. The following was noted:

- The ABA Model Rules have 39,174 more words than the current California rules.
[56,874 (ABA) - 17,100 (current CA) = 39,174]
- The Commission's proposed rules in Batches 1, 2 and 3 have 18,159 less words than the all of the ABA Model Rules.
[56,874 (ABA) - 38,715 (RRC B1-B3) = 18,159]
- The Commission's proposed rules in Batches 1, 2, and 3 have 21,015 more words than the current California rules.
[38,715 (RRC B1-B3) - 17,100 (Current CA) = 21,015]

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 3)

A. Rule 1.5 Fees for Legal Services [4-200]

The Commission considered an August 13, 2008 report on the public comments received on proposed Rule 1.5 [4-200]. Mr. Vapnek led a discussion of the codrafter's recommendations and the open issues, noting that the primary issue raised in the public comments was an objection to the Commission's perceived proposal to eliminate non-refundable advanced fees. The following drafting decisions were made.

(1) Regarding paragraph (f), the codrafters were asked to redraft the language along the lines of the following concepts: (1) non-refundable fees for the performance of future services would be prohibited; (2) a "true retainer" fee would be permitted; (3) a fixed or flat fee would be permitted subject to compliance with stated requirements such as the requirements used in Washington's proposed Rule 1.5(f)(2); and (4) there would be restrictions (in the rule or in the comments) on what lawyers can or cannot say to their clients to avoid misleading clients about the refundable nature of a fee (e.g., proposed Washington Rule 1.5(g)) (10 yes, 0 no, 1 abstain).

(2) In response to the public comments received addressing the issue of "unconscionable" v. "unreasonable" as the operative term in the rule, the Chair took a straw vote to ascertain whether there was consensus to reconsider the Commission's prior action to use the term "unconscionable." The straw vote was 4 yes, 6 no, so the Commission did not reconsider this issue.

(3) In paragraph (b), there was no objection to the Chair deeming approved the substitution of the word "under" for the phrase "for purposes of."

(4) Regarding the OCTC comments, the codrafters agreed to include recommendations on these issues in the next draft.

Following discussion, the codrafters were asked to implement the above action in a revised draft.

(Intended Hard Page Break)

B. Rule 1.7 Conflicts of Interests: Current Clients [3-310]

The Commission considered an August 11, 2008 report on the public comments received on proposed Rule 1.7 [3-310]. The Chair welcomed Mr. Bell and Mr. Hendricks who addressed the Commission on the issue of advanced waivers. Mr. Kehr led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) The Commission considered but rejected a recommendation to substitute MR 1.7(a)(1) for paragraph (a) (3 yes, 6 no, 1 abstain).

(2) Regarding the general issue of including citations to ethics opinions in comments to rules (such as the OCTC suggestion to add a citation to State Bar Formal Op. No. 1999-153 to clarify Rule 1.7(b)), the Commission considered but rejected a recommendation to include citations to ethics opinions in the final versions of rules (3 yes, 7 no, 1 abstain) so opinions will not be cited in final versions. However, the Commission did determine to include citations to ethics opinions in public comment drafts of rules (6 yes, 4 no, 1 abstain) so long as the citations are bracketed and there is a footnote or other notice indicating the Commission would not include ethics opinion citations in final versions of the rules.

(3) In response to the comment from the Trust & Estates Section regarding paragraph (b), the codrafters agreed to consider revising the language of Cmt. [10] along the lines of the following:

“[10] Paragraph (b) applies when a lawyer represents multiple clients in a single matter, as when multiple clients intend to work cooperatively as co-plaintiffs or co-defendants in a single litigation, or as co-participants to a transaction or other common enterprise. Examples of such a transaction or common enterprise include the formation of a business organization for multiple investors, the preparation of an ante-nuptial agreement, the preparation of a post-marital agreement, or a trust or wills for a husband and wife spouses, and the resolution of an “uncontested” marital dissolution.”

(4) In paragraph (d), a recommendation to substitute an “informed written consent standard” for the “written disclosure standard” was considered but rejected (1 yes, 9 no, 0 abstain). A vote to retain paragraph (d) as drafted in the public comment version was taken to ascertain the sense of the Commission. That vote was 6 yes, 6 no, 0 abstain. (NOTE: The vote to retain the language of paragraph (d) did not carry. However, none of the subsequent votes to modify the paragraph in one way or another carried either. Because no subsequent drafter recommendation or full Commission vote was successful in altering that language (see subsequent votes taken below), paragraph(d) is deemed approved by relating back to the prior vote that authorized it for public comment.)

(5) In paragraph (d), a recommendation to add an informed written consent requirement together with the concept of “substantial affect” on the lawyer’s representation in paragraphs (d)(1)-(4) was considered but rejected (3 yes 9 no 0 abstain). Similarly, a recommendation to add an informed written consent standard when a lawyer “knows or

reasonably should know that the interest or relationship would substantially affect the representation” was considered but rejected (2 yes 6 no 3 abstain).

(6) In paragraph (d)(3), the language was revised (5 yes, 4 no, 2 abstain) to read:

“(3) The lawyer has or had a legal, business, financial, professional, or personal relationship with another person or entity ~~when and~~ the lawyer knows or reasonably should know that either the relationship or the person or entity would be affected substantially by resolution of the matter.”

(7) In paragraph (e), there was no objection to the Chair deeming approved the codrafters’ recommendation to make no changes in response to the public comment received.

(8) In Cmt. [2], the Commission agreed with a codrafters’ recommendation to *not* add language to address public comment received on the need for a definition of a “matter” (5 yes 2 no, 4 abstain).

(9) The following recommendations to amend Cmt. [33] were considered but rejected: (i) delete all of Cmt. [33] (2 yes, 8 no, 1 abstain); (ii) delete the first eight sentences of Cmt. [33] (5 yes, 5 no, 2 abstain); (iii) delete just the third sentence (as suggested by the LACBA comment) (4 yes, 5 no, 2 abstain); and (iv) keep only the first sentence and the last three sentences (5 yes, 5 no, 2 abstain). After the foregoing unsuccessful votes to modify Cmt. [33], there was no objection to the Chair deeming approved the public comment version of the comment.

(10) Regarding the codrafters’ proposal for Cmt. [9], the Chair asked that the language be finalized and distributed for a 10-day ballot approval.

(11) In Cmt. [10], the word “might” was replaced with the phrase “reasonably possible” (8 yes, 3 no, 0 abstain). It was understood that the final approval of this action would be a part of the 10-day ballot.

(12) There was no objection to the Chair deeming approved a codrafter recommendation to implement COPRAC’s suggestion to move Cmt. [17] to follow Cmt. [3].

(13) In Cmt. [18], the following sentence was deleted (6 yes, 2 no, 3 abstain): “A lawyer’s disclosure under paragraph (c) shall include informing A and B that the lawyer will continue to protect the confidential information of each one. See Comments [29] - [32] regarding disclosure and informed written consent. See Rule 1.6 concerning confidentiality.” It was understood that the codrafters could revise the sentence and include it as part of the 10-day ballot.

(14) In Cmt. [20], there was no objection to the Chair deeming approved a codrafter recommendation to *not* implement a LACBA suggestion to substitute the concept of “written confirmation” for “informed written consent.”

(15) Regarding the codrafters’ proposal for Cmt. [21], the Chair asked that the language be finalized and distributed for a 10-day ballot approval.

(16) There was no objection to the Chair deeming approved a codrafter recommendation to *not* modify Cmt. [23] in response to LACBA's concern that the guidance on "potential" conflicts was obscure.

(17) There was no objection to the Chair deeming approved a codrafter recommendation to *not* implement COPRAC's suggested changes to Cmt. [27]. However, it was understood that the codrafters would fix the cross reference to Rule 1.8.8(a) which was an additional issue noted by COPRAC.

(18) There was no objection to the Chair deeming approved a codrafter recommendation to slightly modify Cmt. [34] (see text below) in response to the Orange County Bar Association's concern that the comment was too complicated.

"[34] This Rule applies to a lawyer's representation of named class representatives in a class action, whether or not the class has been certified. For purposes of this Rule, an unnamed ~~current or potential~~ member of a plaintiff class or a defendant class ~~in a class action lawsuit~~ is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to obtain the consent of ~~such a person~~ an unnamed class member before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed class member ~~of the class~~ whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class or proposed class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect."

(19) Regarding an OCTC suggestion to add guidance on "consent" similar to Cmt. [20] to MR 1.7, the codrafters were asked to develop placeholder language for Rule 1.7's comments or for the anticipated global terminology section.

(20) Regarding an OCTC comment about Cmt. [1], there was no objection to the Chair deeming approved a slight amendment to say "a lawyer should consider all of the circumstances including the following . . ."

(21) Regarding an OCTC comment about Cmt. [10], there was no objection to the Chair deeming approved the substitution of the term "performance" for the phrase "full performance" in both places where that phrase appears.

(22) There was no objection to the Chair deeming approved a codrafter recommendation to *not* move Cmt. [11] into the rule proper as suggested by OCTC.

(23) There was no objection to the Chair deeming approved a codrafter recommendation to *not* modify Cmt. [13] to revert back to the language found in Discussion paragraph 7 to RPC 3-310.

(24) There was no objection to the Chair deeming approved a codrafter recommendation to *not* modify Cmt. [23] in response to an OCTC concern about undermining the a lawyer's performance of conflicts checks.

After the discussion, the codrafters were asked to implement the above revisions in a revised draft to be submitted to staff for processing of the requested 10-day ballot.

(Intended Hard Page Break)

C. Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client [3-300]

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 1.8.1 [3-300]. Mr. Lamport presented Draft #10 of the proposed rule (dated June 6, 2008) and led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) A recommendation to add language to the rule expressly stating that the rule is to be viewed at the time of the business transaction or the acquisition of an adverse interest was considered but rejected (2 yes, 8 no, 0 abstain). Similarly, a recommendation to add this to the comments was considered but rejected (3 yes, 7 no, 0 abstain).

(2) In paragraph (b), a recommendation to delete the "represented client exception" was considered but rejected (3 yes, 7 no, 0 abstain).

(3) In paragraph (c), there was no objection to the Chair deeming approved amendments (in response to the public comment from Richard Zitrin and other signatories) that assure parallel references to both a business transaction and an acquisition of an adverse interest.

(4) In paragraph (c), the MR 1.8(a)(3) language re "the lawyer's role" was added but the concept of "essential" from MR 1.8(c) that was added by the codrafters in response to the public comment was deleted (11 yes; 0 no, 0 abstain). It was understood that references to "transaction" should be singular rather than plural throughout the rule unless necessary in the specific context.

(5) Regarding Cmt. [1] and Cmt. [2], Mr. Tuft asked that his objection to the inadequate interrelationship of Rules 1.7 and Rules 1.8.1 be noted for the record.

(6) In Cmt. [3], the codrafters were asked to recommend revisions to address LACBA's comment concerning ancillary business services. In addition, the Chair asked the MR 5.7 codrafters (Mr. Kehr and Mr. Sapiro) to reconsider MR 5.7 rule in light of the LACBA comment. Mr. Tuft was added to the MR 5.7 codrafter team to fill the vacancy left by Mr. SeLegue's resignation. It was noted that COPRAC's formal opinion 1995-141 was issued to implement the Board's adoption of COPRAC's conclusion that ancillary business services is a topic that is best addressed in an opinion rather than a rule.

(7) There was no objection to the Chair deeming approved a codrafter recommendation to *not* modify Cmt. [4] to include the new sentence suggested by the San Diego Bar Association comment.

(8) In Cmt. [4], it was understood that the citations to ethics opinions would be for public comment purposes only and not to be included in the final version of the rule.

(9) In Cmt. [6], a recommendation to delete the entire comment (in response to some of the public comment and on the basis that the approach to "modification of fee agreements" is bad guidance and unsupported by existing law) was considered but rejected (1 yes, 10 no, 0 abstain).

(10) A recommendation to approve Cmt. [5] and Cmt. [6] as drafted was considered but rejected (5 yes, 6 no, 0 abstain) and the Chair asked the codrafters to redraft those comments. The members who voted against approval were asked to send language to the codrafters.

(11) To ascertain the sense of the Commission on LACBA's suggestions regarding Cmt. [7], the Chair took a straw vote on whether there should be an attempt to change the rule of law set by *Fletcher v. Davis* concerning compliance with RPC 3-300 when a lawyer acquires a charging lien in an hourly fee representation. The straw vote was 3 yes, 6 no, 2 abstain, so there was no discussion of changing *Fletcher*.

(12) Cmt. [9], the last sentence, was revised to read: "Except in a disciplinary proceeding, the burden is always on the lawyer to show that the transaction or acquisition and its terms were fair and just and that the client was fully advised. *Moore v. State Bar*, 62 Cal.2d 74,[41 Cal.Rptr. 161]; *Felton v. Le Breton* (1891) 92 Cal. 457, 469 [28 P. 490, 494]." There was no objection to the Chair deeming this change approved.

(13) In Cmt. [10], a recommendation to delete the LACBA substitution of "heightened" for "greatest" that was added by the codrafters was considered but rejected (5 yes, 5 no, 0 abstain). In addition, the codrafters were asked to revise Cmt. [10] to clarify the inter-relationship between Rule 1.7 and Rule 1.8.1 (9 yes, 0 no, 1 abstain).

(14) Cmt. [11] was retained (9 yes, 1 no, 0 abstain). Also in Cmt. [11], there was no objection to the Chair deeming approved the addition of the phrase: "Before entering into the transaction or making the acquisition, the lawyer must either. . ." at the start of the fourth sentence.

(15) All of Cmt. [13] was deleted (6 yes, 3 no, 1 abstain). An earlier recommendation to revise the comment to include a sentence on competence and limited scope representation was considered but rejected (2 yes, 6 no, 2 abstain).

The Chair indicated that the discussion of this item would continue at the next meeting.

(Intended Hard Page Break)

D. Rule 1.13 Organization as Client [3-600]

Matter carried over.

(Intended Hard Page Break)

E. Rule 1.16 Declining or Terminating Representation [3-700]

Matter carried over.

(Intended Hard Page Break)

F. Rule 1.17.1 Purchase and Sale of a Law Practice [2-300]

Matter carried over.

(Intended Hard Page Break)

G. Rule 1.17.2 Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

Matter carried over.

(Intended Hard Page Break)

H. Rule 3.4 Fairness to Opposing Party and Counsel [5-200(E)][5-220][5-310(A)]

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 3.4 [5-200(E)][5-220][5-310(A)]. Ms. Peck presented Draft #4 of the proposed rule (dated August 12, 2008) and led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) In paragraph (a), the phrase: "for the purpose of impairing its availability in a reasonably foreseeable future or pending proceeding" was added in response to LACBA's public comment suggesting that "unlawfully" should be qualified as a "knowing" or "intentional" act (9 yes, 3 no, 0 abstain). It was understood that the codrafters could modify the language in implementing this change.

(2) There was no objection to the Chair deeming approved the codrafters' recommendation that there be no changes to paragraphs (b) and (c). It was noted that there was no public comment on these paragraphs.

(3) There was no objection to the Chair deeming approved the codrafters' recommendation for a non-substantive modification (deleting redundant phrase "A lawyer shall not") to paragraph (d).

(4) In paragraph (e), there was no objection to the Chair deeming approved the addition of "and/or" at the end of (e)(2). Also, a recommendation to delete "reasonable" in (e)(3) was considered but rejected (2 yes, 9 no, 0 abstain).

(5) In paragraph (f), there was no objection to the Chair deeming approved the codrafters' recommendation that there be no changes. The OCTC proposal was noted but the codrafters believed that it was vague.

(6) Paragraph (h), as set forth in the current draft, was deleted (8 yes, 3 no, 1 abstain). In addition, it was determined that the concept of (h) should not be included in any form in this rule (8 yes, 2 no 2 abstain). It was understood that this action included a conforming deletion of all of Cmt. [5].

(7) In Cmt. [1], with the minor change of making the word "procedure" plural, there was no objection to the Chair deeming the comment approved.

(8) In Cmt. [2], with addition of the codrafters' recommended new sentence at the end of the comment ("Applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authorities, depending on the circumstances."), there was no objection to the Chair deeming the comment approved. It was noted that the new sentence responds to the San Diego County Bar Association's public comment.

(9) In Cmt. [3], with the minor change of substituting the phrase "This Rule does not establish" for "Nor is this Rule intended to establish," there was no objection to the Chair deeming the comment approved.

(10) As Cmt. [5] was deleted with paragraph (h), the codrafters were asked to consider a new comment in response to the OCTC letter.

With these changes, there was no objection to the Chair deeming the rule approved subject to a 10-day ballot that is to be limited to the changes that require further drafting.

I. Rule 3.10 Threatening Criminal, Administrative or Disciplinary Charges [5-100]

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 3.10 [5-100]. Mr. Shapiro led a discussion of the codrafters' recommendations and the open issues, noting that a threshold issue raised by Mr. Tuft was whether the concept of this rule should be abandoned because: (1) the rule is not in the ABA Model Rules; (2) the public comments demonstrate difficulty in applying the rule; (3) the rule affects speech resulting in 1st Amendment implications; and (4) the conduct addressed by the rule can be addressed under other rules. The following drafting decisions were made.

(1) A motion was made to delete the entire rule but the motion received no second.

(2) In Cmt. [2], everything after the first sentence was deleted in response to the public comments criticizing the government lawyer exception (12 yes, 0 no, 0 abstain).

(3) In paragraph (a), there was no objection to the Chair deeming approved the codrafters' recommendation to make no changes. It was noted that the codrafters considered but rejected the LACBA suggestion to replace "present" with "initiate."

(4) In Cmt. [1], there was no objection to the Chair deeming approved the codrafters' recommendation to add the phrase "or which contains words of similar import" at the end of the comment. It was noted that this phrase responds to a suggestion from LACBA but that the codrafters rejected the concept of also adding "by itself."

With these changes, there was no objection to the Chair deeming the rule approved. The codrafters were asked to submit a final version of the rule to staff.

(Intended Hard Page Break)

J. Rule 3.5 Impartiality and Decorum of the Tribunal [5-300, 5-320]

No materials received. Matter carried over.

(Intended Hard Page Break)

K. Rule 4.2 Communication with a Person Represented by Counsel [2-100]

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 4.2 [2-100]. At the request of interested persons, this agenda item was specially set by the Chair to be called for discussion at 3:00 pm. The Chair welcomed Dorothy Bischoff (San Francisco Public Defenders Office), Tom Orloff (Alameda County District Attorney), and Jan Zabriskie (Dept. of Justice). Each visitor addressed the Commission and expressed concerns about the change from “party” to “person.” After the visitors addressed the Commission, the Chair called for a straw vote to ascertain if there was a consensus to reconsider the change from “party” to “person.” The straw vote was 3 yes, 8 no, 0 abstain and, as a result, the Chair concluded that there was no consensus for the Commission to reconsider the change from “party” to “person.” However, the Chair asked the visitors to consider submitting proposed language for the rule or the comments that would mitigate their concerns about the change. In deference to the desire of the visitors to participate in the further discussion of this rule, the Chair indicated that the discussion would continue at the Commission’s next meeting to be held during the State Bar Annual Meeting in Monterey.

(Intended Hard Page Break)

L. Rule 4.3 Dealing with Unrepresented Person [n/a]

Matter carried over.

(Intended Hard Page Break)

M. Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence [1-310, 1-320, 1-600]

Matter carried over.

(Intended Hard Page Break)

IV. MATTERS FOR ACTION - CONSIDERATION OF RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (Name with asterisk indicates the lead drafter.)

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

Matter carried over.

(Intended Hard Page Break)

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

Matter carried over.

(Intended Hard Page Break)

C. 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)

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

Matter carried over.

(Intended Hard Page Break)

E. 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)

F. Consideration of ABA MR 1.18 Duties to Prospective Client

Matter carried over.

(Intended Hard Page Break)

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

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

The Commission considered Draft 14.1 of proposed Rule 1.15 [4-100] (dated August 19, 2008). Ms. Peck led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (d), there was no objection to the Chair deeming approved the following rewrite: "(d) A lawyer may, but is not required to, deposit an advance for fees in a trust account. Regardless of whether the lawyer has deposited an advance for fees in a trust account: . . ." It was understood that the last clause of (d)(1) ("or other person who advanced the fees") would be deleted.

(2) In paragraph (e), the second sentence was deleted (5 yes, 3 no, 2 abstain).

(3) In paragraph (g)(1), there was no objection to the Chair deeming approved the following revision: "(1) ~~although a lawyer and a client or other person may agree in advance in writing to when the lawyer's interest in entrusted funds will become fixed, the client or other person may still dispute that the lawyer has earned the funds.~~"

(4) Paragraphs (j) & (k) were deleted (6 yes, 4 no, 0 abstain) based on a rationale that they constitute non-critical practice pointers. It was understood that the codrafters were free to add new comment language, perhaps as to paragraph (h), indicating that use of an interpleader is permitted. The Chair noted that any such proposal would be handled through a 10-day ballot.

(5) There was no objection to the Chair deeming approved new Cmt. [16A]: "With respect to the timing and frequency of a lawyer's accounting under paragraph (m)(4), see Business & Professions Code §6091."

(6) There was no objection to the Chair deeming approved a revised title for paragraph (m) "Management, recordkeeping and accounting for funds and property held in trust." Also, paragraph (n) would be moved to the comments.

(7) In Cmt. [2], there was no objection to the Chair deeming approved the retention of the "other law" concept in the penultimate sentence.

(8) In Cmt. [7], the discussion of the geographic scope of the rule was retained but moved from the comments to the rule and placed in brackets pending the Commission's consideration of MR 8.5 (8 yes, 2 no, 1 abstain).

(9) There was no objection to the Chair deeming approved the deletion of Cmt. [10] and the modification of Cmt. [9] to read: "[9] ~~A true retainer fee, as defined in Rule 1.5, Comment [], is earned by the lawyer when paid because the lawyer is entitled to the money regardless of whether the lawyer actually performs any services for the client. Because it is earned on receipt and so is not held for the benefit of the client, the lawyer may not deposit it a true retainer fee in a client trust account. (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164.)~~" Also, the Chair asked the codrafters to write a definition of a "true retainer" and provide it to the Rule 1.5 codrafters for inclusion in brackets in that rule.

With these changes, there was no objection to the Chair deeming the rule approved subject to a 10-day ballot that is to be limited to the changes that require further drafting.