

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

DRAFT MEETING SUMMARY - OPEN SESSION

Friday, October 31, 2008
(9:15 am - 5:00 pm)

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

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

MEMBERS NOT PRESENT: Ellen Peck; Hon. Ignazio Ruvolo; and Dominique Snyder (leave of absence).

ALSO PRESENT: Kristopher Accardi (WSU Student); Ryan Bay (WSU Student); Jim Biernat (Bar Association of San Francisco liaison) (by telephone); Doreen Boxer (San Bernardino Public Defender); Carole Buckner (COPRAC liaison) (by telephone); George Cardona (U.S. Attorneys Office, C.D. California); Benjamin de Mayo (County Counsel, Orange County); Randall Difuntorum (State Bar Staff); Holly Fujie (State Bar President) (closed session only); Beth Jay (Principal Attorney to Chief Justice Ronald George) (closed session only); Michael Judge (Los Angeles Public Defender); Mimi Lee (State Bar Staff); Lauren McCurdy (State Bar staff) (by telephone) (closed session only); Jeff Mendoza (WSU Student); Prof. Kevin Mohr (Commission Consultant); Marie Moffat (State Bar General Counsel) (by telephone); Toby Rothschild (Access to Justice Commission & LACBA liaison); and Jon Straw (WSU Student).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE SEPTEMBER 26 & 27, 2008 MEETING

The draft summary was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reported that there was some difficulty ascertaining the open issues on items included in the agenda. The Chair encouraged members, especially lead drafters, to assure that draft rules include recommendations of the drafting team, even if there is a split decision on some points, so that the meeting preparation time is optimized. The objective of a draft rule agenda item is to clearly list all open issues and to identify among those open issues, which ones are addressed by drafters' recommendations and which ones have divided or split positions among the drafters. As has been the Chair's procedure, drafters' recommendations may be deemed approved in the absence of adequate objections prior to the meeting.

B. Staff's Report

Staff reported that RAD's consideration of the Commission's request to issue a fourth batch of public comment rule drafts had been taken off RAD's November agenda and postponed until RAD's March 5, 2009 meeting.

Staff also reported that the Board will consider the Commission's work on selected Batch 1 rules at the Board's January 8-10, 2009 planning meeting. The following Batch 1 rules were tentatively selected (lead drafter identified by brackets): 1.1 [Mr. Vapnek]; 1.3 [Mr. Vapnek]; 1.5.1 [Mr. Lamport]; 1.8.10 [Justice Ruvolo]; 3.2 [Mr. Voogd]; 5.1 -5.3 [Mr. Tuft]; 5.3.1 [Mr. Voogd]; 5.5 [Ms. Peck]; 5.6 [Ms. Foy/Mr. Sapiro]; 8.3 [Mr. Kehr]; 8.4 [Ms. Peck/Mr. Sapiro]. It was understood that the final assignments would be announced by email after further consultation among the Commission Consultant, leadership and staff.

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

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

The Commission continued the discussion, that began at the Commission's August meeting, of a 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) In Cmt. [3], there was no objection to the Chair deeming approved the following revision of the second sentence: "This Rule also applies to ~~lawyers engaged in the sale of~~ when a lawyer sells to a client goods or non-legal services that are related to the practice of law, such as ~~when a lawyer sells~~ insurance, brokerage or investment products or services ~~to a client~~."

(2) In Cmt. [10], there was no objection to the Chair deeming approved the following modifications: replacing "greatest" with "heightened" in the first sentence; and adding the phrase "Because the lawyer has an interest in the transaction or acquisition," at the start of the third sentence.

(3) In Cmt. [14], the Commission considered but rejected a recommendation to add "has the learning and skill. . ." as a new romanet (iii) (0 yes, 7 no, 2 abstain). Subsequently, a different recommendation for a new romanet (iii) ("represents the client with respect to the transaction or acquisition") was approved (8 yes, 0 no, 1 abstain). Also, in romanet (ii), the phrase "an ongoing" was replaced with "a" (8 yes, 0 no, 2 abstain).

(4) In Cmt. [14], the Commission considered but rejected a recommendation to rework the concept to a negative statement (i.e., "A lawyer is *not* independent if. . .") (2 yes, 4 no, 3 abstain).

(5) In Cmt. [14], the last sentence was deleted as an unnecessary repetition of the rule language itself (5 yes, 4 no, 1 abstain).

(6) In Cmt. [15], there was no objection to the Chair deeming approved the codrafters' recommendation to not implement the SDCBA's proposal that would've deleted the first clause of the second sentence: "Under such circumstances, the lawyer is not required to provide legal advice to the client". In addition, a recommendation to rewrite Cmt. [15] to permit the interested lawyer to give advice to the client or to the client's independent lawyer was considered but rejected (2 yes, 6 no, 1 abstain).

(7) In Cmt. [15], the last sentence, a recommendation to replace "is" with "may be" was considered but rejected (2 yes, 6 no, 1 abstain). In the second sentence, the phrase "such independent counsel" was replaced with "the independent counsel" (4 yes, 2 no, 2 abstain).

Following discussion, the Chair indicated that discussion of this rule would continue at the next meeting and would focus on the issue of whether, and to what extent, the rule should address modification of fee agreements.

(Intended Hard Page Break)

B. 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)

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

The Commission continued the discussion, that began at the Commission's August meeting, of a August 13, 2008 report on the public comments received on proposed Rule 4.2 [2-100]. The Chair welcomed the following visitors who were present to address this matter: Doreen Boxer; George Cardona; Benjamin de Mayo; and Michael Judge. Each visitor was given an opportunity to address the Commission. Mr. Kehr led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) Regarding the visitors' recommendation that the Commission consider including in the rule, not just in the comments, an express exception for communications arising from law enforcement investigations that clearly permits all investigations not prohibited by current RPC 2-100, the Commission approved a recommendation to *not* make this change and, instead, retain the public comment version of paragraph (c)(3) that generally refers to communications that are authorized "by law or court order" (8 yes, 1 no, 0 abstain).

(2) In Cmt. [19], there was no objection to the Chair deeming approved the public comment version of this comment. A recommendation to use Mr. Cardona's version of the comment was considered but rejected (3 yes, 4 no, 1 abstain).

(3) In Cmt. [19], a recommendation to add the concept of juvenile delinquency proceedings was approved (4 yes, 3 no, 1 abstain).

(4) In Cmt. [20], there was no objection to the Chair deeming approved the public comment version of this comment.

(5) Regarding the issue of the exception for communications with a public officer, the codrafters agreed to attempt to address the concerns raised by the visitors and prepare a revised draft for a 10-day ballot. The Chair noted that there seemed to be a consensus to delete the phrase "duly appointed or elected" from paragraph (g) and also to consider moving the language in Cmt. [16] into the rule text.

Following discussion, the Chair noted that the Commission's consideration of paragraph (e) would be taken-up together with proposed Rule 4.3 and ABA Model Rule 4.4. The codrafters were asked to implement all of the changes in a revised draft in preparation for a 10-day ballot.

(Intended Hard Page Break)

D. 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)

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

In response to the six objections to the 10-day ballot to approve this rule (Mr. Martinez, Mr. Ruvolo, Mr. Sapiro, Mr. Tuft, Mr. Voogd, and the Chair), the Chair indicated that the rule had failed the 10-day ballot. However, rather than calling for discussion of the issues raised in the objections, the Chair announced that the rule would be placed on a future agenda when there could be more time to discuss the rule.

(Intended Hard Page Break)

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

In response to the six objections to the 10-day ballot to approve this rule (Mr. Kehr, Ms. Foy, Mr. Ruvolo, Mr. Tuft, Mr. Voogd, and the Chair), the Chair indicated that the rule had failed the 10-day ballot and then called for a discussion of the open issues raised in the objections. The following drafting decisions were made. In paragraph (a), the first sentence, two phrases were deleted: “unknowingly or” (5 yes, 0 no, 1 abstain); and “with the intent to impair its availability” (4 yes, 1 no, 1 abstain). With the resolution of these issues, there was no objection to the Chair deeming the revised rule approved.

(Intended Hard Page Break)

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

Although this rule was deemed to have passed its 10-day ballot, Mr. Lamport indicated that there were a few issues left open in the mail ballot version of the rule. Mr. Lamport led a discussion of those issues and the following drafting decisions were made. In Cmt. [2], the word “duly” was deleted throughout but it was understood that “duly” would be retained in paragraph (a) as part of the phrase “duly authorized constituents” (6 yes, 0 no, 1 abstain). In paragraph (g), the wording was revised to conform to ABA Model Rule 1.13(g) by replacing the phrase “duly authorized constituent” with the phrase “an appropriate official.” With these changes, there was no objection to the Chair deeming the rule approved.

(Intended Hard Page Break)

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

Prior to the meeting, the Chair withdrew this item from the agenda in order for the rule to be discussed at the same time as ABA Model Rule 4.4 and the Commission's proposed Rule 4.2(E)

(Intended Hard Page Break)

IV. MATTERS FOR ACTION - CONSIDERATION OF RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT

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

The Commission considered Draft 4.4 (10/20/08) of proposed Rule 1.8.7. Mr. Kehr led a discussion of the issue of whether the rule should require a lawyer to obtain “informed written consent” from clients before participating in an aggregate settlement. Following discussion, the Commission decided to use the ABA language “informed consent in a writing signed by the client” (4 yes, 1 no, 1 abstain). It was understood that this ABA terminology was not consistent with the usual California RPC concept of “informed written consent” and the codrafters were authorized to consider appropriate explanations of the Commission’s terminology.

(Intended Hard Page Break)

**B. Report of the Subcommittee on Conflicts Imputation and Screening
[anticipated recommendation for seeking public comment on concepts and
policies related to ABA MR 1.10, 1.11, 1.18, and 1.12]**

Matter carried over.

(Intended Hard Page Break)

C. 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)

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

This matter was not called for discussion as the rule was deemed approved as having passed on 10-day ballot.

(Intended Hard Page Break)