

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

DRAFT MEETING SUMMARY - OPEN SESSION

Friday, December 2, 2005
(9:15 am - 5:00 pm)

VIDEO-CONFERENCE MEETING

SF–State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105

LA–State Bar Office
1149 So. Hill Street, Room 723
Los Angeles, CA 90015

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Sean SeLegue; Mark Tuft; and Paul Vapnek.

MEMBERS NOT PRESENT: Kurt Melchior; Tony Voogd.

ALSO PRESENT: James Biernat (COPRAC); Carol Buckner (Western State University); Paul Hokokian (State Bar Board of Governors); Diane Karpman (Beverly Hills Bar Association Liaison); Lauren McCurdy (State Bar Staff); Kevin Mohr (Commission Consultant); Leeor Neta (Barger & Wolen); Edward Poll; Toby Rothschild (Access to Justice Commission Liaison); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE OCTOBER 28-29, 2005 MEETING

This matter was carried over to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

Public Comment Proposal

The Chair thanked Mr. Mohr and Mr. Difuntorum for their work on the public comment proposal. The Chair indicated that discussion of the public comment proposal would be held at the February, 2006 meeting, with only issues raised prior to the meeting being called for discussion. If no comments are received prior to the February meeting, the proposal will be deemed approved.

Rule Discussion

The Chair mentioned that Ms. Julien had raised concerns regarding the Commission's progress. He indicated that, in order to expedite progress on the consideration of the rules, all rule comment issues must be raised in writing, with only issues raised by the subcommittee, e-mail or by Mr. Mohr or Mr. Difuntorum to be discussed at the meeting.

Misc.

The Chair reported the health emergency regarding Kurt Melchior's daughter and the Commission members present agreed to send flowers to his daughter, with the assistance of State Bar staff.

B. Staff's Report

No staff report given.

[Intended Hard Page Break]

III. MATTERS FOR ACTION

A. **Consideration of Rule 1-300 [ABA MR 5.5, MR 5.3] (Unauthorized Practice of Law; Multijurisdictional Practice of Law) (Including consideration of discussion section re “definition of the practice of law” in rule 5.5 and proposed rule 5.3.1 [1-311])**

The Commission considered: draft 7.0 of rule 5.3 (dated 4/8/05); draft 7.1 of rule 5.5 (dated 11/17/05); and rule 5.3.1 as approved on July 11, 2003 (with annotations revised 4/8/05).

Regarding rule 5.3, the Commission considered whether to define the term “nonlawyer” as a natural person but took no action. The Commission tentatively approved the draft rule as submitted (6 yes, 1 no, 1 abstain).

Regarding rule 5.3.1, the Commission changed “member” to “lawyer throughout the rule in those instances where “member” refers to the employer or supervisory lawyer (7 yes, 0 no, 2 abstain). The Chair directed the codrafters to conform the comment to the relevant comment found in rule 5.5 or to make appropriate cross-references. With these changes, there was no objection to circulating the rule for a 10-day ballot to tentatively approve both the comment and the few changes to the rule text that are to be implemented by the codrafters.

Regarding rule 5.5, the Commission made the following drafting changes.

(1) In (a)(2), added a mens rea requirement (“knowingly”), so that it reads: “knowingly assist a person or organization in the performance of activity that constitutes the unauthorized practice of law.” (8 yes, 1 no, 1 abstain).

(2) In (b)(2), deleted the phrase “or entitled” (6 yes, 2 no, 1 abstain).

(3) Conformed the language of (b) to MR 5.5(b) so that the exception for authorized practice applies only to actual practice activity but not to a person’s “holding out” of an ability to practice law in California (6 yes, 0 no, 2 abstain).

(4) Approved Cmt. [3] subject to codrafters implementation of revisions considered but not the subject of specific votes (3 yes, 1 no, 4 abstain).

(5) In Cmt. [4], deleted reference to “legislation,” in recognition of the primacy of the Supreme Court in defining the practice of law (6 yes, 0 no, 2 abstain).

(6) In Cmt. [4], deemed approved a revised description of the practice of law activity in the *Bluestein* case [“Non-lawyer providing legal advice to California resident in California, even if the advice is with regard to non-U.S. law.”].

(7) Deleted Cmts. [5] & [6] (8 yes, 0 no, 1 abstain).

(8) Combined the last sentence of Cmt. [3] with Cmt. [7] and added a reference to (a)(2) (8 yes, 0 no, 1 abstain).

(9) Throughout the comment, tracked the MR style by changing references to "Rule 4.3" to references to "this Rule" (8 yes, 0 no, 0 abstain).

The codrafters were asked to implement these changes in a revised draft and there was no objection to using the Commission's 10-day ballot procedure to tentatively approve the rule.

[Intended Hard Page Break]

B. Consideration of Rule 3-500 [ABA MR 1.4] Communication; and Consideration of Rule 3-510 [ABA MR 1.2(a)] Communication of Settlement Offer

The Commission considered draft 2.1 of proposed rule 1.4 dated November 15, 2005. Mr. Ruvolo highlighted some of the comments received on the draft. In particular, it was noted that the Commission should defer consideration of any comments addressing portions of the draft rule that have already been the subject of a vote. The Chair called for discussion of the issues raised by in comments submitted by Mr. Kehr, Mr. Sapiro and by the codrafters. The Commission made the following drafting decisions.

(1) In Cmt. [2], deleted the definition of “significant development” (5 yes, 4 no, 0 abstain).

(2) In Cmt. [2], revised the second sentence to read: “A change in lawyer personnel might be a significant development depending on the circumstances such as whether responsibility for overseeing the client’s work is being changed, whether the new attorney will be performing a significant portion or aspect of the work, and whether staffing is being changed from what was promised to the client.” (7 yes, 1 no, 0 abstain).

(3) The Commission deemed approved the substitution of the word “and” for the “comma” in the second sentence of Cmt. [2].

(4) The Commission deemed approved the following modifications to the first and second sentences of Cmt. [2]:

Examples of “significant” events or circumstances include changes in lawyer personnel assigned ...

Examples of “insignificant” events or circumstances include the payment of ...

(5) Instead of the term “insignificant,” by consensus the Commission authorized the codrafters to rework Cmt. [2] to address examples of matters that are “not significant.” Also, the Commission authorized the codrafters to change “are” to “may be” so that the examples will not be read as absolutes.

(6) In Cmt. [2], deleted the example referring to preparation of a state court case management statement (8 yes, 0 no, 1 abstain).

(7) Modified Cmt. [3] to use the existing language in the second discussion paragraph of RPC 3-500 (7 yes, 0 no, 3 abstain)

(8) Modified the Cmt. [3] language adapted from RPC 3-00 to delete the phrase: “in their employment agreement” (5 yes, 4 no, 0 abstain).

(9) Further modified the adapted language to read: “A lawyer’s employment agreement may provide that the client assumes responsibility for the cost for copying the documents.” (9 yes, 1 no, 0 abstain)

(10) By consensus, in Cmt. [2] and Cmt. [7], the Commission deleted the quotation marks around the word “significant” as that term is not defined in the rule.

(11) The codrafters were authorized to modify the comment to include the concept of informing clients about ADR options in relation to both paragraph (a)(2) and (a)(3) of the rule (6 yes, 4 no, 0 abstain).

(12) Regarding the proposed addition of MR 1.4 Cmt. [2], the codrafters were authorized to modify the last sentence of that comment to address more precisely the concept of pre-authorization to accept or reject a settlement offer (6 yes, 3 no, 0 abstain). It was understood that this might involve separate treatment of civil and criminal matters.

(13) Regarding MR 1.4 Cmt. [3], there was no objection to the drafter’s recommendation that this comment not be included.

(14) Regarding MR 1.4 Cmt. [4], there was no objection to the drafter’s recommendation that this comment not be included.

(15) Regarding MR 1.4 Cmt. [5], a vote to include the first sentence of this comment failed (3 yes, 5 no, 1 abstain) and no motion was made on other parts of the comment suggested for possible inclusion.

(16) Regarding the proposed addition of MR 1.4 Cmt. [6], the codrafters were authorized to draft language to adapt the concept of this comment in light of the Commission’s work on Trust and Estates Legislative proposal no. 2005-02 (proposed rule 1.14) (8 yes, 1 no, 1 abstain).

(17) Regarding MR 1.4 Cmt. [7], there was no objection to the drafter’s recommendation that this comment not be included.

The codrafters were asked to implement these changes in a revised draft. In addition, regarding Cmt. [9], Mr. Sapiro agreed to assist the codrafters with the child custody issues raised by this comment.

[Intended Hard Page Break]

C. Consideration of ABA MR 5.7. Responsibilities Regarding Law-Related Services (no California counterpart)

The Commission considered draft 3 of proposed rule 5.7 dated October 31, 2005. The Chair read a staff comment indicating that it might be helpful to obtain public comment on a California version of MR 5.7 but that ethics opinions and case law appear adequately to address the concepts covered by the rule. A general discussion about whether to proceed with a rule followed.

Among the points raised in favor of proceeding with the rule were: (1) the rule would instill awareness of the California law concerning duties relating to law-related services, non-lawyer fiduciary services and dual-occupation services of which most lawyers are not aware; and (2) the rule would correct the erroneous belief held by some lawyers that if they are not functioning as lawyers, then they cannot be disciplined. It was noted that the draft rule would serve a different purpose from MR 5.7.

Among the points raised in opposition to proceeding with the rule were: (1) MR 5.7 has not been adopted by a majority of the states; (2) in the mid-1990's COPRAC considered MR 5.7 and recommended to the Board that the rule not be adopted; (3) State Bar Formal Op. No. 1995-141 provides sufficient guidance to lawyers on many issues sought to be covered by the rule; and (4) it is not clear that this rule fits within the four functions articulated in the Commission's draft rule 1-100.

Following discussion, the Commission determined not to proceed with the concept of this rule, and also not to issue MR 5.7 for public comment (6 yes, 5 no, 1 abstain).

[Intended Hard Page Break]

D. Consideration of Rule 3-600 [ABA MR 1.13] (Organization as Client)

The Commission considered draft 2 of proposed rule 1.13 distributed by e-mail on December 1, 2005. Mr. Lamport led a discussion of the issues enumerated in the codrafters' endnotes, starting with Endnote 16, and following consideration of those issues, the Commission made the following drafting decisions.

(1) Regarding paragraph (d), after a series of votes the Commission determined to modify it to read:

“(d) If, despite the lawyer’s actions in accordance with paragraph (b), the officer, employee or other person insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably imputable to the organization, and . . .” (7 yes, 0 no, 0 abstain).

(2) Paragraph (d) also was revised to be two sentences:

“... to result in substantial injury to the organization, the lawyer shall continue to proceed as is reasonably necessary in the best lawful interests of the organization. The lawyer’s response may include the lawyer’s right, and where appropriate, duty to resign or withdraw in accordance with rule 3-700 [1.16].” (3 yes, 0 no, 4 abstain)

(3) Paragraph (e) was modified to substitute “shall inform the organization’s highest authority of the lawyer’s discharge” for “shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge” (6 yes, 4 no, 0 abstain)

(4) Paragraph (f) was modified to read:

“(f) In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer representing an organization shall explain the identity of the lawyer’s client, whenever the lawyer knows or reasonably should know (i) that the organization’s interests are adverse to those of the constituent(s) with whom the lawyer is dealing or (ii) that the constituent believes that he or she is in a client-lawyer relationship with the lawyer. The lawyer shall not mislead such a constituent into believing, and shall not allow the constituent to believe, that the constituent can communicate confidential information to the lawyer in a way that the lawyer will not disclose to the organization or use for its benefit” (8 yes, 1 no, 1 abstain).

(5) Paragraph (f) was further modified to read:

“(f)In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer

representing an organization shall explain the identity of the lawyer's client, whenever the lawyer knows or reasonably should know (i) that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing or (ii) that the constituent REASONABLY believes that he or she is in a client-lawyer relationship with the lawyer. The lawyer shall not mislead such a constituent into believing, and shall not allow the constituent to believe, that the constituent can communicate confidential information to the lawyer in a way that the lawyer will not disclose to the organization or use for its benefit " (7 yes, 2 no, 0 abstain).

(6) Regarding Endnote 27, there was no objection to retaining the phrase "or organization members" in paragraph (g).

The codrafters were asked to implement these changes in a revised draft and there was no objection to using the Commission's 10-day ballot procedure to tentatively approve the rule.

[Intended Hard Page Break]

E. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

The Commission considered draft 5 of proposed amended rule 2-300 presented in a November 17, 2005 memorandum from the codrafters. The Chair welcomed visitor Edward Poll. At the invitation of the Chair, Mr. Poll offered observations on the proposed amended rule. Mr. Poll observed that the draft was too complex and recommended that expansions in the policy be accomplished by adopting the MR 1.17. Mr. Poll expressed support for allowing the sale of an area of practice and noted that this expansion would level the playing field for small and solo practitioners who cannot accomplish the types of practice area sales that large law firms often achieve through other means. Next, the Chair called for a discussion of the issues raised by the e-mail comments and in the codrafters' memorandum. The Commission made the following drafting decisions.

(1) The Commission deemed approved Mr. Kehr's revision to paragraph (a):

“(a) Either the lawyer whose practice is sold has died; or the lawyer or law firm has sold substantially all of the practice, or of the geographic or substantive area of the practice, of the selling lawyer or law firm ~~is sold~~.”

(2) The Commission deemed approved Mr. Kehr's revision to paragraph (b):

“(b) A lawyer or law firm may sell its ~~The~~ practice, or a particular geographic or substantive area of the practice, ~~of a lawyer or law firm may only be sold one time and may only be sold directly to another lawyer or law firm.~~”

(3) Regarding the issue of adding an “exigent circumstances” exception to the limit imposed by paragraph (b), the codrafters were authorized to implement this concept in the next draft (5 yes, 3 no, 2 abstain).

(4) Retained the word “solely” in paragraph (c) (6 yes, 2 no, 2 abstain).

(5) Regarding Cmt. [7], deleted the first sentence (7 yes, 2 no, 0 abstain) and keep the rest so that it reads:

“[7] ~~Under paragraphs (c) and (e), the purchaser may not charge the former clients of the seller a different fee than the seller did.~~ If the client agrees to retain the purchaser, the purchaser must enter into a written fee agreement with the client, subject to paragraph (c), or assume in writing the duties of the seller under the seller's fee agreement, if required by Business and Professions Code sections 6147, 6147.5, or 6148 or similar laws. However, if the client refuses to retain the purchaser, the seller may have to continue to represent the client unless withdrawal is permitted under applicable rules such as Rule 3-700 [1.16].” (5 yes, 0 no, 3 abstain).

(6) The Commission deemed approved paragraph (d) with a colon replacing the semi-colon so that it reads:

“(d) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then:”

(7) Paragraph (d)(2)(A) was revised to read:

“(A) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the seller will continue to represent the client, unless the client elects (i) to retain the buyer, (ii) retains other counsel, or (iii) elects to appear in propria personam, or unless the seller has cause to withdraws from the representation under in compliance with rule 1.16 3-700(D); that the client may take possession of any client papers and property, as required by rule 1.16 3-700(D); and that, if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 7.2 4-400(D) and any provisions relating to attorney-client fee arrangements;”
(6 yes, 0 no, 2 abstain)

(8) The Commission deemed approved the following revision of paragraph (d)(1)(B):

“(B) *the purchaser shall obtain the written consent of the client, ~~provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) is received~~ within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period, such consent shall be presumed until the purchaser is otherwise notified by the client.*”

(9) In consideration of the above changes to paragraph (d)(1)(B), the codrafters were authorized to explore making similar changes to paragraph (d)(2)(B) along the lines of the following:

“(B) *the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer. If no response is received to the notification specified in paragraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, ~~provided that such consent shall be presumed until~~*”

~~*the client notifies the seller or the purchaser to the contrary otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.*~~

(10) There was no objection to modifying paragraph (e) (with consequent re-lettering of the rule paragraphs) to read:

~~(e)~~(e) If substitution is required by the rules of a tribunal in which a matter subject to the proposed sale is pending, all steps necessary to substitute a member shall be taken.”

(11) There was no objection to modifying paragraph (f) to read:

~~(e)~~(f) The sale may not be financed by increases in fees charged to the clients of the seller's practice. Existing agreements between the seller and the seller's clients as to fees and the scope of work must be assumed by the purchaser.”

The codrafters were asked to implement these changes in a revised draft.

F. Consideration of Rule 9.1 [Rule 2-400]. Prohibited Discriminatory Conduct in a Law Practice

The Commission considered draft 4 of proposed rule 9.1 and proposed rule 8.4(d) dated November 17, 2005. Ms. Peck summarized the changes made in the latest draft and noted that there were outstanding issues among the codrafters that had not yet been resolved. The Chair called for discussion of the issues raised by in codrafters' notes and, in particular, the separate comments submitted by Mr. Martinez. The Commission made the following drafting decisions.

(1) The Commission approved paragraph (b) of proposed rule 9.1 as drafted, including the last clause clarifying that the rule covers associates as well as managerial lawyers. (The vote to exclude associates failed, 4 yes, 4 no, 2 abstain.)

(2) The rule number was changed from Rule 9.1 to Rule 8.4.1 in consideration of the nexus of the rule's subject matter with the other issues addressed in the 8.4 series of rules (4 yes, 3 no, 3 abstain).

(3) As the Commission voted not to proceed with a proposed rule 5.7, there was no objection to deleting that term from Cmt. [2].

(4) The Commission deemed approved the deletion of Cmt. [5].

(5) The Commission deemed approved Cmt. [6] as drafted.

(6) Regarding proposed rule 8.4(d), the Commission considered the issue of whether to retain the concept of "prejudicial to the administration of justice" but took no action as the Commission has already approved the use to that term of art in proposed rule 1-120X [rule 8.4].

After discussion, the codrafters were asked to implement these changes in a revised draft. With these changes, the Commission determined to use the 10-day ballot process to tentatively approve the entire rule and comment and also proposed rule 8.4(d) (6 yes, 2 no, 2 abstain).

[Intended Hard Page Break]

G. Consideration of Rule 1.8.1 (Rule 3-300). Avoiding Interests Adverse to a Client

Matter carried over.