

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

**OPEN SESSION – MEETING SUMMARY**

**Friday, February 20, 2004**  
**(9:00 am - 4:55 pm)**

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

**MEMBERS PRESENT:** Harry Sondheim (Chair); JoElla Julien; Stanley Lamport; Raul Martinez; Ellen Peck (by telephone); Hon. Ignazio Ruvolo; Jerry Sapiro; Mark Tuft; and Tony Voogd.

**MEMBERS NOT PRESENT:** Karen Betzner; Linda Foy; Ed George; and Paul Vapnek.

**ALSO PRESENT:** Jonathan Arons (BASF Liaison); Jonathan Bishop (State Bar staff); Keith Bishop (Business Law Section Corporations Committee Liaison); Bill Calderelli (Litigation Section Liaison); John Daly (CAJ Liaison); Randall Difuntorum (State Bar staff); Max Factor III (CAJ Liaison); Steve Hazen (Business Law Section Corporations Committee Liaison); Kevin Mohr (Commission Consultant); Gerald Phillips (LACBA Liaison); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Rob Sall (COPRAC Liaison); Ira Spiro (State Bar ADR Committee Liaison); Nancy Wojtas (Business Law Section Corporations Committee Liaison); Mary Yen (State Bar staff); and Nancy Youngs.

**VISITORS ON ADR DISCUSSION:** Roger Alford; Robert Ashen; Ms. Ballard; Eron Ben-Yehuda (Daily Journal); Prof. Robert Cochran; Catherine Cordic; Nancy Erbe; Phillip Meldman; Susan Pulfinch; Charles Rumbaugh; Ken Weiman; and Nancy Yeend.

**I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE OCTOBER 24 & 25 AND DECEMBER 12, 2003 MEETINGS**

At the request of staff, only an October 12, 2003 summary was considered. This summary was approved as distributed.

## **II. REMARKS OF CHAIR**

### **A. Chair's Report**

The Chair asked all members to make a good faith effort to be present at the scheduled starting time of each meeting. The Chair indicated that members who are running late should try to contact staff or the meeting room by telephone to help the Chair ascertain when a quorum might be achieved.

The Chair presented new 'meeting management' protocols intended to accelerate the work of the Commission. Prior to each meeting, if a drafting team has submitted a draft rule for an agenda and no member or interested person communicates an objection to any aspect of the draft, then, at the meeting, that draft is subject to being deemed tentatively approved for posting on the website. Similarly, prior to each meeting, if a member recommends a revision to a proposed draft submitted by a drafting team for an agenda, then that drafting team must either accept the revision or object to it. A failure by the drafting team to object will be deemed acceptance of the recommended revision.

At the suggestion of a member, the Chair also indicated assignment and agenda deadlines will be set as early as possible to ensure that there is ample time, prior to each meeting, to consider and respond to rule drafts.

The Chair reported on the plans for the Commission's participation in the 2004 Annual Statewide Ethics Symposium, indicating that the following members will represent the Commission: Mr. Ruvolo; Mr. Sapiro; Mr. Tuft; Mr. Vapnek; and Mr. Voogd. The topics to be addressed include: proposed new rule 1-120X; the concept of a new rule on ADR; and the concept of a new rule on billing/time record keeping.

### **B. Staff's Report**

Staff reported that a new area has been added to the Commission's pages at the State Bar website to assist interested persons in following the work of the Commission. The new area is a "Meeting Materials" page where Acrobat PDF files of agenda items will be posted. Due to the size of the Commission's agenda materials it is often problematic to send the files via a single e-mail message.

## **III. MATTERS FOR ACTION**

### **A. Consideration of Rule 1-400. Advertising and Solicitation**

The Commission considered a February 5, 2004 e-mail from Mr. Mohr reporting on the status of proposed amendments to rule 1-400 (draft prepared for the December 12, 2003 meeting). In response, Mr. Voogd made a recommendation that the Commission vote to adopt, in concept, the substance and format of ABA Model Rules 7.1 through 7.5 (rule text only, not comments) with slight amendments, as needed to conform to related existing California law. Among the points raised in the discussion of the recommendation were the following.

(1) Advertising is an area of lawyer regulation where national uniformity would be particularly helpful to the courts, the public, and practicing lawyers.

(2) The benefits of uniformity outweigh any perceived flaws that might be corrected by pursuing material modifications.

(3) The vote should be on the ABA rules as a template and not on the ABA substance and language.

(4) Consideration of the standards adopted by the Board under RPC 1-400(E) and the existing authority granted to the Board by RPC 1-400(E) should not be prejudiced by this vote. This issue should be kept open.

(5) The last draft from the subcommittee seemed too long and complicated and it might be helpful for public comment purposes to start with the comparable ABA rules to find out what California lawyers think about those rules.

Following discussion, Mr. Voogd revised his recommendation to provide that the issue of RPC 1-400(E) and the standards would be kept open. The Chair called for a vote and the recommendation was adopted with 5 yes, 3 no, and 1 abstain.

The Chair asked the codrafters to work with Mr. Mohr to prepare a draft that implements the ABA rules and specifically identifies areas where the codrafters believe that modifications are necessary to conform with California law.

**B. Consideration of a “Practice of Law” Definition**

Matter carried over to next meeting.

[Intended Hard Page Break]

**C. Consideration of Rule 1-710 (Member as Temporary Judge, Referee, or Court-Appointed Arbitrator)**

The Commission considered a proposed amended rule 1-710 presented by Mr. Ruvolo. The draft presented was first distributed for the Commission's December 12, 2003 meeting but was not considered at that meeting. The proposed amendments included an expansion of the scope of the rule to cover a lawyer's conduct when serving as a neutral in any mediation or any settlement conference. As proposed, this would be accomplished by incorporating by reference the existing Judicial Council Standards for Mediators in Court Connected Mediation Programs (rules 1620 - 1620.9 of the California Rules of Court). The Chair welcomed visitors present to address ADR issues and called for discussion the concept of the proposed expansion of the rule. Among the points raised during the discussion were the following.

(1) The Judicial Council's adoption of standards for mediators in court connected mediation is evidence that the conduct of mediators require regulation as a matter of public protection and fairness.

(2) Members of the State Bar are subject to State Bar discipline even when they are not acting as a lawyer. The Supreme Court's original suggestion and ultimate adoption of existing rule 1-710 is a precedent for the proposition that the rules of professional conduct properly regulate a member's actions as an ADR neutral.

(3) The issue is not whether mediation conduct constitutes the practice of law but whether the conduct of members as neutrals has demonstrated problems that warrant promulgation of a lawyer disciplinary rule.

(4) Unlike the Code of Judicial Ethics which is incorporated in current RPC 1-710, the Judicial Council mediation standards were not drafted to be used as lawyer disciplinary rules and it should not be presumed that those standards can simply be incorporated by reference.

(5) If the Judicial Council standards already have relevant sanctions, such as removal from a court's panel, then why over-regulate the conduct by adding State Bar discipline.

(6) As drafted, amended RPC 1-710 would expand the reach of the Judicial Council standards to private mediation proceedings that are not court-connected.

(7) The Furia v. Helm case suggests that there are real lawyer conduct issues in private mediation but this decision is a civil matter not a disciplinary matter. Issues like those in Furia may not be infrequent but the questions remain as to whether a disciplinary rule is needed and whether incorporating the Judicial Council standards is the right regulatory approach.

(8) Rather than focusing on the Judicial Council standards, consideration should be given to starting with MR 2.4 and then determining if something more is needed.

(9) Beyond the subjects covered by MR 2.4, there are issues of conflicts and confidentiality that could be addressed.

(10) Issues of bias and impartiality are the types of concerns that are raised in complaints to the State Bar.

(11) Competence also is a frequent concern raised by mediation participants.

(12) In considering MR 2.4(b), it should be noted that it applies only in the case of unrepresented parties.

(13) Implicit in the concept of expanding the current rule to govern private mediation is an assertion that mediation constitutes the practice of law.

(14) Mediation is protected by public policy standards of confidentiality and enforcement of regulatory standards through complaints and the testimony of mediation participants could undermine that confidentiality.

(13) There are thousands of neutrals who are not lawyers and concerns about mediation proceedings should be governed by uniform state law standards applicable to all neutrals.

(14) Putting aside the concept of expanding RPC 1-710, for redrafting purposes, the drafting team should consider deleting the phrase "in addition to these rules of professional conduct where not in conflict with Canon 6D" as this phrase is more likely to cause confusion than offer guidance. To the extent that the phrase is true, it does not need to be underscored in the rule text.

(15) Consideration also should be given to exempting a lawyer's informal intervention to assist in disputes among friends and family.

Following discussion, the Commission considered a proposal to delete the proposed language in paragraph (1) that follows the word "canon" and to substitute the language of MR 2.4(b) for the language in proposed paragraph (2) but with the addition of cross-references to the duty of competence, conflicts, and confidentiality, and a possible definition section to clarify who is regarded as a "third party neutral." The Commission approved this direction for the next draft by a vote of 7 yes, 1 no, and 1 abstain. Mr. Spiro volunteered to assist Mr. Ruvolo and Mr. Mohr on the next draft.

#### **D. Proposal for New Rule Requiring Members to Advise Clients re ADR**

The Commission considered a December 23, 2003 report from the State Bar's ADR Committee presenting a proposal that the RPCs should include a new rule that attorneys advise their clients on ADR. Materials provided by Gerald Phillips were also provided to the Commission. The Chair again recognized the visitors present to address ADR issues and first called for comments in opposition to the concept of the proposal. Among the points raised during the discussion were the following.

(1) States that have favorably considered this concept seem to endorse a standard that encourages advice but does not impose a mandatory duty. In California, the RPCs are disciplinary rules and an aspirational standard would not be appropriate as rule text.

(2) The concept of this rule fails to appreciate the fact that not all matters handled by all lawyers are appropriate for ADR. In some instances, ADR simply may not be available for a particular matter. If implemented, the rule would have the effect of micro-managing a lawyer's professional discretion in determining the advice and counsel given to a client.

(3) The purpose of the proposed rule seems to be covered generally under a lawyer's existing duty of competence and communication. Under *Considine Co. Inc. v. Shadle, Hunt & Hagar et al.* (1986) 187 Cal.App.3d 760, there may already be an adequate obligation arising from a lawyer's standard of care.

(4) A first step is a determination of whether there is client harm arising from a failure of the profession to advise clients about ADR in appropriate cases or matters.

(5) As a matter of State Bar discipline, complaints would have to meet the standard of gross negligence in order to 'second guess' a lawyer's substantive advice.

(6) There are other approaches that can educate attorneys on the importance of advising ADR options. This includes attorney MCLE programs and law school efforts to teach ADR to students. An advisory ethics opinion by the State Bar or a local bar ethics committee might also be explored as an effective means to educate lawyers.

(7) Judicial Council forms already require a 'sign-off' that ADR opportunities have been properly considered and this is sufficient.

Following this portion of the discussion, the Chair called for comments in support of the concept of the proposal and among the points raised during the discussion were the following.

(1) The proposed rule is needed because an obligation to communicate ADR options is analogous to the existing duty to communicate settlement offers. Not all lawyers field settlement offers and although ADR may not be universal, it is frequently applicable to many lawyers' practices and these benefits are not being adequately communicated to clients.

(2) The requirement imposed by the Judicial Council forms often is too little, too late because a lawyer and client have, at the point of filing, already committed themselves to a litigation strategy. The concept of the proposed rule is better than the status quo because it promotes a productive discussion of ADR options at the outset of a representation (or at least pre-filing) before client expectations are formed and before a hardened litigation posture with the opposing party is established.

(3) While the concept may appear to micro-manage, sometimes public protection calls for such regulation. This is true when there has been a market failure in the information provided to consumers. In actuality, or at least in appearances, lawyers have a conflict of interest as to informing clients about ADR because greater fees are generated when a client litigates. The proposed rule would afford special protection for clients of lesser financial means as sophisticated corporate clients often are aware of, and understand, the benefits of ADR options.

(4) The proposed rule can be likened to MR 1.2 regarding scope of representation and allocation of authority between client and lawyer. California has no RPC counterpart to MR 1.2. The Commission should entertain the proposal at least on this basis.

(5) The ABA Solo Section study suggests that lawyers do not do a good job of regulating themselves and that manipulation and corruption is perceived. The proposed rule is client oriented and would help demonstrate that lawyers place client interests above their own.

(6) A rule on ADR may need to be preceded by ethics opinions that set out in greater detail an analysis of the existing rules and the client protection issues.

(7) As evidenced by the responses given by attendees at mediation MCLE programs, many attorneys have a lack of knowledge, and a lack of appreciation, of the client benefits afforded by ADR.

Following this discussion, the Chair called for a consensus vote on a proposal that the Commission explore the concept of a new RPC concerning advice to clients about ADR options. By a vote of 0 yes, 9 no, and 1 abstain, it was determined that the Commission would not explore an ADR rule at this time.

Next, the Chair called for a consensus vote on a proposal that the Commission explore whether the concept of the proposed ADR rule might be included as part of the revisions to RPC 3-110 (re competence), RPC 3-500 (re keeping a client informed), or as part of the Commission's consideration of MR 1.2(a). By a vote of 6 yes, 3 no, and 1 abstain, it was determined that the Commission would explore the concept of the proposed ADR rule in these contexts and at the appropriate time. Ms. Susan Pulfinch, one of the ADR visitors, volunteered to assist the Commission on this item in any manner deemed appropriate.

**E. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs)**

The Commission considered a February 10, 2004 memorandum from Mr. Tuft presenting a Draft No. 3 of Rule 5.4 (1-310X), a Draft No. 2 of a partial rule Discussion section with drafter's notes, and comments on a revised chart prepared by Mr. Mohr. Mr. Tuft briefly summarized changes in the latest draft and asked for comments on the text of Draft No. 3 of Rule 5.4. Among the points raised during the discussion were the following.

(1) Regarding proposed Rule 5.4(a)(2), consideration should be given to adding the word "who" after "or" in second line.

(2) Regarding proposed Rule 5.4(a)(3), consideration should be given to changing the phrase "these rules" to "another rule of professional conduct."

(3) Regarding proposed Rule 5.4(a)(4), the language may be over-broad given that a lawyer may seek to share court awarded fees with a large or well-known 501(c)(3) and this may involve a prohibited interest but may not necessarily pose the danger that the rule is intended to avoid.

(4) Regarding proposed Rule 5.4(a)(4), consideration should be given to limiting the organizations to public benefit organizations.

(5) Proposed Rule 5.4(a)(4) is based upon the recent addition to MR 5.4 made by Ethics 2000.

(6) Some of the matters covered by the proposed rule do not constitute a fee split as defined by the Supreme Court in *Chambers v. Kay* and as discussed in ethics opinions from the State Bar and the Los Angeles County Bar Association.

(7) Regarding proposed Rule 5.4(a)(5), the phrase "prescribed registration fee, referral, or participation fee" may not accurately capture the fees that are paid to certified referral services. Consideration should be given to changing the phrase to describe the up-front fees and percentage fees that are routinely collected.

(8) Regarding proposed Rule 5.4(a)(5), the second part of the RPC 2-200 fee division requirement is not included, i.e., that the entire fee is not increased solely by reason of the fee split.

(9) Regarding proposed Rule 5.4(b), the addition of the concept of "other business entity" may have unintended consequences for insurance companies and house counsel.

(10) Proposed Rule 5.4(d) represents a combination of the ABA MR counterpart language and concepts from RPC 1-600.

(11) Regarding proposed Rule 5.4(d), consideration should be given to changing the word “association” to “entity” and to deleting the phrase “for a profit.”

(12) Regarding proposed Rule 5.4(d)(1), consideration should be given to expressly permitting ownership in a revocable trust so long as a non-lawyer trustee cannot exercise control. This would allow a lawyer’s surviving spouse to avoid a probate of the trust.

Following this discussion, the Chair commended the above drafting suggestions to the drafting team and specifically invited e-mail comments on proposed rule 5.4(a)(4). Mr. Mohr volunteered to contact ABA staff to inquire about the Ethics 2000 addition to MR 5.4.

[Intended Hard Page Break]

**F. Consideration of Rule 3-600. Organization as Client**

The Commission considered the policy issue of a lawyer's right or duty to identify and seek to rectify misconduct by a client organization. In particular, the co-drafters sought guidance on whether proposed amendments should include some form of outside reporting. Among the points raised during the discussion were the following.

(1) Consideration should be given to adopting the ABA MR 1.13 treatment of the instant policy issues. Corporate client representations often cross state lines and lawyers who represent corporate clients should not be placed in the difficult position of having to reconcile rules that implement divergent and likely contradictory policies.

(2) MR 1.13 does not adequately address situations where there is no "substantial injury to the organization" because it imposes no duty to act and does not guide a lawyer to consider the best interests of the organization.

(3) In 2003, MR 1.13 was materially revised in response to the recommendations of the ABA Task Force on Corporate Responsibility to include outside reporting and to make internal reporting more prescriptive. If the Commission determines that outside reporting is not the appropriate policy, then consideration should be given to the latest version of MR 1.13 but without incorporating the outside reporting language. The policy of tightening-up internal reporting should be adopted.

(4) RPC 3-600 mirrors the simpler language of the original MR 1.13 and on the basis of clarity, it is preferable to the new MR 1.13.

(5) Corporate counsel are under siege. The Thompson memorandum calling for assaults on the attorney-client privilege illustrates the current challenges in corporate representations. The Commission should not adopt a policy that puts corporate counsel in the role of an internal policeman who has a duty to seek out misconduct, particularly misconduct beyond the scope of the lawyer's representation, as it would contribute to the eroding of the trust relationship between corporations and their counsels.

(6) The California Legislature may become active in this area of attorney regulation and consideration should be given to coordinating with legislative representatives any policies that may be viewed as impacting broader public policy concerns of corporate accountability and investor protection.

(7) Consideration should be given to broadening the trigger for internal reporting and establishing clear preferences or actual presumptions that promote such reporting.

(8) Mandatory internal reporting - under penalty of discipline - carries with it the potential for excessive reporting by lawyers who fear discipline and third party liability. The SEC rules have this defect.

(9) Consideration should be given to a rule with one trigger mandating internal reporting in certain instances, and another trigger that mandates that the lawyer simply remonstrate with the client.

After the discussion, the following issues were resolved by consensus votes:

1. The Commission agreed with a proposal to not pursue amendments that permit outside reporting by a vote of 7 yes, 0 no, and 1 abstain.
2. The Commission agreed with a proposal to not pursue amendments that track the SEC approach in mandating internal reporting for *all* violations of law or *any* injury to the corporation by a vote of 6 yes, 0 no, and 2 abstain.
3. The Commission agreed with a proposal that the co-drafters incorporate the MR 1.13 standard of “a violation of law that reasonably might be imputed to the organization” by a vote of 5 yes, 2 no, and 2 abstain.
4. The Commission agreed with a proposal that the co-drafters incorporate the MR 1.13 standard of “a violation of a legal obligation to the organization” by a vote of 6 yes, 1 no, and 2 abstain.
5. The Commission agreed with a proposal that the co-drafters retain the RPC 3-600(B) policy of allowing lawyer discretion to remonstrate and to make an internal report, all as subject to the duty of confidentiality by a vote of 6 yes, 0 no, 1 abstain.

For the next meeting, Mr. Lamport volunteered to prepare a draft that attempts to capture the Commission’s consensus on the policy and language issues. The Chair encouraged all members to send e-mail comments to Mr. Lamport to assist him in tackling the next draft.

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**G. Consideration of Rule 1-500. Agreements Restricting a Member's Practice**

The Chair briefly addressed this item. The co-drafters' recommendation to not include an exception permitting an attorney to seek a protective order similar to the situation in the *Chan v. Intuit* case was noted and Mr. Vapnek agreed to do further checking on the relevant practices by patent lawyers. In preparation for a fuller discussion at the next meeting, the Chair asked the co-drafters to address the points raised in his December 10, 2003 e-mail. The Chair also asked all members to post e-mail comments on the current draft of proposed amended RPC 1-500.

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#### **H. Consideration of Proposed New Rule re “Recording Time”**

The Commission considered a February 5, 2004 revised draft of a proposed new rule on recording time. As an alternative to a new rule, it was suggested that a new factor be added to RPC 4-200 regarding factors to consider in determining whether a fee charged is unconscionable. It was also suggested that a records retention period be specified in the proposed new rule. After this brief discussion, the co-drafters were asked to prepare a redraft for the next meeting.

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