

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

MEETING SUMMARY - OPEN SESSION

Friday, April 7, 2006
(9:15 am - 5:00 pm)

Saturday, April 8, 2006
(9:00 am - 5:00 pm)

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

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien; Bob Kehr; Stanley Lamport; Raul Martinez (Saturday); Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo (Friday); Jerry Sapiro; Sean SeLeague; Mark Tuft; Paul Vapnek; Tony Voogd

MEMBERS NOT PRESENT: (all members attended either both days or one day of the meeting)

ALSO PRESENT: Jim Biernat (BASF Liaison); Prof. Carole Buckner (COPRAC Liaison/Western State) (Saturday); Chris Carpenter (CDAA/Alameda D.A.'s Office) Randall Difuntorum (State Bar Staff); David Goldberg (Latham & Watkins); Rachel Grunberg (State Bar staff); Audrey Hollins (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Meg Lodise (L.A.) (T&E Executive Committee); Lauren McCurdy (State Bar staff); Kevin Mohr (Commission Consultant); Chris Munoz (BASF); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Rob Sall (COPRAC) (Friday); Peter Stern (S.F.) (T&E Executive Committee); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE DECEMBER 2, 2005 AND FEBRUARY 3, 2006 MEETINGS

The open session summaries from the December 2, 2005 meeting and the February 3, 2006 meeting were deemed approved

II. REMARKS OF CHAIR

A. Chair's Report

For the future, the Chair reminded members to make a good faith effort to attend meetings at the in-person meeting site, as the remote video conference connection is primarily intended to facilitate the attendance of interested persons. The Chair also reminded members to submit e-mail comments as early as possible prior to a meeting. Regarding the upcoming June and July meetings, the Chair indicated that leadership and staff will be considering options for altering the scheduled meeting dates to facilitate the attendance of members whose availability to attend has changed.

The Chair outlined the order of matters to be considered for the two meeting days. In accordance with the assignments agenda, the Chair indicated that 10-day ballot items and consent agenda items would be considered first and only after those items were completed would other action items be called for discussion.

The Chair summarized the status of the ballot items and the consent items. Items deemed approved on consent or by ballot were the following: (1) IV.C. Rule 5.3.1 [1-311] (10-day); (2) IV.D. Rule 5.5 [1-300] (10-day); (3) IV.E. Rule 1.0.1 ["Law Firm" Definition] (10-day); (4) IV.I.2 Rule 8.3 [1-120]; (5) IV.K. Rule 1.8.10[3-120]; (6) IV.O. Rule 5.2 [1-310X]; (7) IV.P. Rule 5.3 [1-300]; (8) IV.R. Rule 2.4.2 [1-700]; (9) IV.S. Rule 2.4.1 [1-710]; (10) IV.V. Rule 7.2 [1-400]; (11) IV.X. Rule 7.4 [1-400]; and (12) IV.Y. Rule 7.5 [1-400].

B. Staff's Report

Staff reported that the Board of Governors voted to oppose AB1612 (government lawyer whistle blower), in part, based upon an understanding that the Commission was considering the underlying substantive issues in connection with studies of relevant California and ABA rules. Staff also reported that flyers and registration information for the upcoming Annual Statewide Ethics Symposium were mailed and that Commission members could begin outreach efforts to maximize attendance.

III. MATTERS FOR ACTION

A. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

Mr. SeLegue presented a March 17, 2006 memorandum seeking Commission direction on certain Rule 1.7 issues identified by the codrafters in the course of developing a draft 2 (dated January 17, 2006) of the proposed rule and comments. The following drafting decisions were made:

(1) Paragraph (a) was modified to read: "(a) Representation directly adverse to current client. A lawyer shall not, without informed written consent from each client, accept or continue representation of a client in a matter in which the lawyer's representation of that client in that matter will be directly adverse to another client the lawyer currently represents in another matter, ~~without informed written consent from each client.~~" As modified it was approved (8 yes, 2 no, 0 abstain).

(2) For Cmt. [1], the Commission considered three options: Choice #1 - Mr. SeLegue's draft of a concise statement of basic fiduciary duties; Choice #2 - Mr. Kehr's longer draft; and Choice #3 - Mr. Melchior's one sentence version. The Commission selected Choice #2 (6 yes, 5 no, 0 abstain).

(3) Cmt.[6] (concerning conflicts checks) was deleted in its entirety (6 yes, 4 no, 0 abstain). It was understood that the issue might be revisited in connection with the topic of imputed conflicts.

(4) Cmt. [7] (concerning the rationale underlying the prohibition against directly adverse representations) was deleted in its entirety (5 yes, 4 no, 2 abstain).

All other issues considered were not definitively resolved by vote or consensus. The codrafters agreed to consider the relevant e-mails and, in light of the Commission's discussion, would rewrite Cmts. [15], [16], [21], [28], [29, and [34].

Mr. Tuft raised an overarching policy issue concerning the Commission's decision to follow the approach of the existing California conflicts rules. Specifically, a question was raised as to whether the ABA concept of "material limitation" conflicts could be explored by the codrafters. The Chair asked the codrafters to include Mr. Tuft in the team's efforts to prepare a revised draft of the rule and comments.

Regarding conflicts issues arising in the context of class action matters, the Chair indicated that Mr. Voogd, Ms. Peck and Mr. Tuft would serve as a subcommittee to consider various class action issues, not limited to conflicts of interests. Ms. Karpman agreed to assist the subcommittee.

[Intended Hard Page Break]

B. Consideration of Rule 2-100 [ABA MR 4.2] Communication With a Represented Party

The Commission considered draft 8 (dated March 8, 2006) of proposed amended rule 2-100. Mr. Martinez summarized the revisions implemented in the draft. The Chair welcomed Chris Carpenter, a representative of the CDAA, and David Goldberg of Latham & Watkins. Mr. Carpenter reported that a representative of the California Attorney General had planned to attend but was not able to make it. Mr. Carpenter read comments provided by that representative and agreed to e-mail the comments to Ms. Yen for distribution to the Commission. Mr. Goldberg indicated that the 'land use' law firm group would not be able to support the current redraft of the rule. The Chair led a discussion with Mr. Carpenter about prosecutor concerns with the direction of the Commission's proposed amended rule. Commission members asked questions of Mr. Carpenter to better understand the concerns. The Chair asked both Mr. Carpenter and Mr. Goldberg to submit proposed language that might address their concerns. The Chair next called for discussion of the issues raised by the codrafters in the footnotes to draft 8 of the proposed rule. The following drafting decisions were made.

(1) In paragraph (a), the phrase "in a related matter" was deleted (8 yes, 3 no, 2 abstain). The phrase "in a related matter" initially was added by the codrafters to address the State Bar Court interpretation of RPC 2-100 in the case *In the Matter of Dale* (State Bar Ct. Rev. Dept., 2005) 2005 WL 1389226. In deleting the phrase, it was recognized that the codrafters' latest recommendation to replace the word "party" with "person" rendered the phrase "in a related matter" unnecessary and potentially confusing.

(2) In paragraph (b)(1), the bracketed phrase "[or public]" was deleted (8 yes, 2 no, 1 abstain). In deleting this phrase, it was understood that public organizations would be covered by paragraphs (b)(2) and (c)(1).

(3) In paragraph (b)(2), there was no objection to the codrafters' decision to include the phrase "of such person" in order to clarify the reference back to an organization's "current employee, member, agent or constituent."

(4) Paragraph (g) was modified and approved (10 yes, 0 no, 1 abstain) to read:

"(g) As used in this rule, "public official" means a duly-appointed or elected public officer of the United States government, or of ~~the State of California~~ a state, or of a county, township, city, or other subdivision ~~of California~~." Prior to this action, the Commission considered modifying paragraph (g) to address government organization constituents who exercise authority delegated by a public official. The motion to pursue this change failed (4 yes, 5 no, 3 abstain).

For the next meeting, the Chair asked members to focus on the rule text rather than the rule comments, as the comments would be considered only after the rule text is finalized.

[Intended Hard Page Break]

C. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].

The Commission considered draft 6 (dated April 3, 2006) of proposed new rule 1.14. Ms. Foy reported on input received from stakeholders in the development of the latest draft. Specifically, Ms. Foy indicated that the codrafters agreed with a stakeholders' recommendation that the revised rule not be subject to a broad exception for any case or matter where a client's fundamental liberty interests were at risk. Rather than this broad exception, the codrafters' current draft excepts only criminal matters, representation of minors, and conservatorship proceedings. It was observed that these categories of cases were matters where the legal system already has protections for impaired clients and applicable law offers procedures for lawyers to follow. The Chair called for a top-to-bottom discussion of each paragraph of the rule and the following drafting decisions were made.

(1) In paragraph (a), the Commission considered a motion to replace the word "normal" with some other word or phrase, such as the phrase "as with other clients" or the phrase "same type of" but this motion did not pass (3 yes, 7 no, 0 abstain).

(2) Paragraph (a) was approved as drafted (8 yes, 1 no, 1 abstain).

(3) The introductory clause of paragraph (b) was modified and approved (8 yes, 2 no, 1 abstain) to read:

"Except where the lawyer represents a minor, a client in a criminal matter or ~~a client in~~ the subject of a conservatorship proceeding, when the lawyer reasonably believes. . ." It was understood that this approval was subject to the development of an appropriate comment clarifying the exempted categories.

(4) For the limited purpose of starting the drafting and consideration of proposed comments, paragraphs (a), (b) and (c) were conditionally approved.

A redraft, including proposed comments, was requested for the next meeting.

[Intended Hard Page Break]

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

Ms. Peck presented a March 10, 2006 memorandum that continued the codrafters' enumerated outline of rule amendment issues. Ms. Peck led a discussion of these issues and the following guidance was given to the codrafters.

(1) Issue 5.1: Codrafters to address the concept a lawyer's duty to non-clients with regard to funds entrusted to the lawyer. This would be limited to a lawyer's practice of law activities but might include ancillary business activities (10 yes, 0 no, 1 abstain).

(2) Issue 6: Codrafters to maintain the California status quo of a client trust account requirement rather than exploring the less restrictive ABA standard that only requires a "separate account" (9 yes, 1 no, 2 abstain).

(3) Issue 7: Following a straw vote, the Chair indicated that it was the sense of the Commission that the codrafters should maintain the California status quo of strictly limiting the ability of lawyers to hold client funds in accounts that are outside of California rather than implementing the ABA standard which allows a lawyer to keep trust funds out-of-state so long as consent to do so is obtained.

(4) Issue 8: Codrafters to broaden the type of permitted depository beyond current IOLTA Bank or S&L institutions so that any deposit allowed under Supreme Court Order 1981 is authorized by the rule (11 yes, 0 no, 1 abstain).

(5) Issue 9: Codrafters to add new language identifying various types of trust account administrative fees/charges that are permitted and do not give rise to a commingling violation (12 yes, 0 no, 0 abstain).

(6) Issue 10: Codrafters continue the status quo that disputed funds must be held in a trust account until the dispute is resolved (7 yes, 0 no, 3 abstain).

(7) Issue 10.1, 10.2, 10.3: The codrafters volunteered to consolidate these issues and prepare a further recommendation.

(8) Issue 11: Codrafters to address, in the rule or comment, the issue of restoration of funds wrongfully withdrawn from a trust account as discussed in *Guzzetta v. State Bar* (1987) 43 Cal.3d 962 (11 yes, 0 no, 0 abstain).

(9) Issue 12: Codrafters to explore the feasibility of clarifying or defining the concept of "fixed or earned" for purposes of disbursement of a lawyer's fees (9 yes, 0 no, 1 abstain).

(10) Issue 13: In consideration of State Bar Formal Op. No. 2005-169, codrafters to add guidance on the issue of the "earliest reasonable time" when an interest in trust funds becomes fixed (by consensus).

(11) Issue 14: Codrafters to address the propriety of overdraft protection as a feature of a trust account (9 yes, 0 no, 2 abstain).

(12) issue 15: The codrafters indicated that they will expand this issue to cover "paypal" and other payment options similar to credit card payment and prepare a further recommendation.

(13) Issue 16: Codrafters to classify interests on non-IOLTA accounts as belonging to the owner of the principal funds (usually the client) (10 yes, 0 no, 1 abstain).

(14) Issue 17: The codrafters requested that consideration of this issue be deferred.

(15) Issue 18: Codrafters to codify the *Fonte* duty to account for funds not held in a trust account (6 yes, 1 no, 2 abstain).

(17) Issue 19: The codrafters indicated that will further research and study this issue.

(18) Issue 20: The codrafters withdrew this issue due to concerns that consideration of the Standards for Attorney Sanctions for Professional Misconduct is beyond the scope of the codrafters assignment to consider amendments to CRPC 4-100.

With this direction from the Commission, a first draft of a proposed amended rule was requested for the next meeting.

[Intended Hard Page Break]

E. Consideration of Rule 3-500 and Rule 3-510 [ABA MR 1.4] Communication; Communication of Settlement Offer

The Commission considered comments received in response to a March 10, 2006 mail ballot to approve proposed new Rule 1.4. The members who objected to the mail ballot approval were: Mr. Kehr; Mr. Martinez; Mr. Melchior; Mr. Sapiro; and Mr. Voogd. In consideration of the views expressed by these members, the Commission's officers added their votes against the mail ballot to place the rule on the action agenda. Following discussion of the issues raised on Friday, the Commission requested a redraft which was hand-distributed at the meeting on Saturday. The Commission approved the rule, as modified in accordance with the discussion. The disposition of the various issues and drafting decisions is summarized below.

(1) A new paragraph (a)(5) was added to incorporate the concept of "access" to significant documents (5 yes, 4 no, 0 abstain). The word "furnishing" was substituted for the word "providing" in the last sentence (8 yes, 5 no, 0 abstain). The new paragraph reads:

"(5) promptly comply with reasonable client requests for access to significant documents necessary to keep the client reasonably informed as required by paragraph (a)(3), which the lawyer may satisfy by permitting the client to inspect the documents or by furnishing copies of the documents to the client; and. . . ."

(2) In response to the issue of potential confusion on whether lawyers are prohibited from claiming fees or costs for matters other than the copying expenses incurred under the proposed rule, Cmt. [3] was revised to read (7 yes, 2 no, 1 abstain):

"[3] A lawyer may comply with paragraph (a)(5) by providing to the client copies of significant documents by electronic or other means. A lawyer may agree with the client that the client assumes responsibility for the cost of copying significant documents the lawyer provides pursuant to paragraph (a)(5). A lawyer must comply with paragraph (a)(5) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. This Rule is not intended to prohibit a claim for the recovery of the member's expense in any subsequent legal proceeding."

(3) A new Cmt. [9], which is the substance of MR 1.4, Cmt. [7], was added to be a place-holder for possible further efforts to revise the rule to address public defender concerns about releasing sensitive information to criminal defendants (8 yes, 1 no, 1 abstain). New Cmt. [9] reads:

"[9] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. This Rule is not intended to require a lawyer to disclose to a client any information or document that a court order or non-disclosure agreement prohibits the lawyer from disclosing to that client. This Rule is also not intended to override applicable statutory or decisional law requiring that certain information not be provided to criminal

defendants who are clients of the lawyer. Compare Rule [1.16, comment ____].”

(4) Cmt. [5] was modified to clarify that liberty rights are involved in criminal matters and warrant a different standard (8 yes, 1 no, 1 abstain). The last sentence of the comment also was deleted (6 yes, 0 no, 1 abstain). The revised comment reads:

“[5] Because of the liberty interests involved in a criminal matter, paragraph (c)(1) requires that counsel in a criminal matter convey to the client all offers, whether written or oral.”

(5) Cmt. [3] and [3a] were combined with the second sentence of Cmt. [3a] deleted (9 yes, 0 no, 3 abstain).

With these changes the revised draft distributed on the second day of the Commission’s meeting was deemed approved.

[Intended Hard Page Break]

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

Matter not called for discussion.

[Intended Hard Page Break]

G. Consideration of Rule 3-700 [ABA MR 1.16] Termination of Employment

The Commission considered draft 1 (dated February 24, 2006) of proposed rule 1.16. Mr. Kehr summarized the efforts of the codrafters to place the substance of RPC 3-700 into the format of MR 1.16. The following drafting decisions were made.

(1) RPC (C)(4) regarding a lawyer's mental or physical condition was added to the list of permissive causes for withdrawal in the paragraph (b) of the proposed rule (6 yes, 0 no, 1 abstain).

(2) The second sentence of paragraph (c) regarding a lawyer's compliance with a court order to continue representing a client was deleted (7 yes, 0 no, 0 abstain). It was understood that the codrafters could re-introduce this concept as a proposed new comment.

(3) Codrafters to add MR 1.16 permissive withdrawal concept of an "unreasonable financial burden" on the lawyer (4 yes, 3 no, 0 abstain).

For the next meeting, discussion of the issues timely raised on the draft would continue and the codrafters were asked to incorporate the drafting decisions made by the Commission.

[Intended Hard Page Break]

H. Consideration of Concept of Law Firm Discipline

Mr. Tuft presented a March 17, 2006 memorandum providing an overview of the concept of law firm discipline as a component of a lawyer discipline system, including a summary of the State Bar of California's prior consideration. Mr. Tuft led a general discussion and among the points raised were the following.

(1) One way of simplifying this inquiry is to ask whether California should adopt rules similar to the rules in New York and New Jersey or, in the alternative, should California follow the ABA Model Rules and the majority of states that rely upon the 5 series of supervision rules to accomplish the underlying goals of law firm discipline.

(2) Considering the experience of the ABA and other states is helpful but there should be a needs assessment that is focused on the California disciplinary system.

(3) There is a threshold purview question: Does the State Bar Act allow the Board to formulate rules that discipline law firms as opposed to lawyers?

(4) The recent California Supreme Court decision in *Frye* suggests that the Supreme Court has primary authority over the practice of law, including authority over entities that are practicing law but not registered with the State Bar.

Following discussion, the Chair asked Ms. Yen to inquire with State Bar Enforcement staff to ascertain their views on law firm discipline. The Chair indicated that this matter would be on hold until the views of State Bar Enforcement staff could be considered.

[Intended Hard Page Break]

I. Consideration of Rule 4-200 [ABA MR 1.5] Fees for Legal Services

This matter was deferred to the next meeting at the discretion of the Chair.

[Intended Hard Page Break]

IV. Consent Agenda - Tentatively Approved Rules for Public Comment Batch 1

Excerpt of Consent Agenda Procedures from the Agenda & Assignments:

[Note: These are the Batch 1 Public Comment Rules: 1-100, 1-110, 1-120, 1-120X, 1-200, 1-300 (includes: 5.3; 5.5), 1-310 (includes: 5.1; 5.2; 5.4; also covers 1-600), 1-311, 1-400 (includes: 7.1; 7.2; 7.3; 7.4; 7.5), 1-500; 1-700; 1-710; 1-720; 2-200; 3-110; 3-120; 3-200; 3-210; 3-400; 3-500; 3-510 and 5.7.]

IMPORTANT CONSENT AGENDA PROCEDURE: This consent agenda constitutes an assignment to **All Members**. Matters listed on this consent agenda will be deemed adopted for submission to the Board of Governors for official public comment distribution unless one of the following occurs prior to the e-mail comment deadline of **12:00 noon on Monday, March 27, 2006** : (1) an item with an outstanding 10-day ballot process does not result in tentative approval; (2) all of the members of a drafting team submit a joint request, supported by a redraft or written explanation, to take their item off the consent agenda; or (3) written requests, supported by redrafts or written explanations, are received from six members of the Commission on any individual consent item. Consent items that are not deemed adopted will be handled as action items and resolved by a vote taken at the meeting. Deliberation will be limited to the issues identified in the redrafts or explanations that caused the item to be taken off the consent agenda.

(NOTE: Consent agenda items A through E below have been circulated for 10-day mail ballots.)

A. Proposed Rule 1.1 [Rule 3-110]. Competence

The Commission considered comments received in response to a March 8, 2006 mail ballot to approve proposed Rule 1.1. The members who objected to the mail ballot approval were: Mrs. Julien; Mr. Kehr; Mr. Martinez; Mr. Melchior; Mr. Ruvolo; Mr. Sapiro; Mr. SeLegue; Mr. Tuft; and Mr. Voogd. Following discussion of the issues raised, the Commission approved the rule, as modified in accordance with the discussion. The Commission's disposition of various issues and the Commission's drafting decisions are summarized below.

(1) As the California cases on supervision are consistent with the Commission's recommendation to adopt the ABA 5 series of rules, Cmt. [2] was modified to read (6 yes. 3 no, 2 abstain):

"[2] The duties set forth in this Rule include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452 [229 Cal.Rptr. 101, 714 P.2d 1239]; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525, 695 P.2d 1066]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834, 685 P.2d 1185]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122 [177 Cal.Rptr. 670, 635 P.2d 163]; *Black v. State Bar* (1972) 7 Cal.3d 676, 692

[103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577]. See also Rules 5.1 and 5.3.)

(2) To be more precise, the exemption for simple negligence was modified to read (9 yes, 1 no, 1 abstain):

“[6] This Rule is not intended to apply to a single act of negligent conduct or a single mistake in a particular matter.”

(3) Cmt. [3] was modified to use the more common phrase “know or reasonably should know” (6 yes, 1 no, 3 abstain). In the second sentence of Cmt. [3], the word “when” was changed to “as to which” (6 yes, 4 no, 1 abstain). As modified, that comment reads:

“[3] It is a violation of this Rule if a lawyer accepts employment or continues representation in a matter as to which the lawyer knows or reasonably should know that the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence. It is also a violation of this Rule if a lawyer repeatedly accepts employment or continues representation in a matter when the lawyer does not have, or will not acquire before performance is required, sufficient time, resources, and ability to perform the legal services with competence.”

(4) Paragraph (c) was modified to use the present tense in stating the lawyer’s reasonable belief (10 yes, 1 no, 1 abstain). As modified, that paragraph reads:

“(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may nonetheless provide competent representation by 1) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, 2) acquiring sufficient learning and skill before performance is required, or 3) referring the matter to another lawyer whom the lawyer reasonably believes to be competent.”

(5) To make the subject of the second sentence of Cmt. [4] more definite, the word “provision” was added after the word “[t]his” (6 yes, 0 no, 5 abstain). As modified this comment reads:

“[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This provision applies to lawyers generally, including a lawyer who is appointed as counsel for an unrepresented person.”

In accordance with the above decisions, the revised rule was deemed approved. The Chair indicated that issue of adding a reference to *Lewis v. State Bar* (1981) 28 Cal.3d 683 in Cmt. [6] would be taken up after the end of the public comment period.

[Intended Hard Page Break]

B. Proposed Rule 1.8.8 [Rule 3-400] Limiting Liability to Client

The Commission considered comments received in response to a March 9, 2006 mail ballot to approve proposed Rule 1.8.8. The members who objected to the mail ballot approval were: Mr. Sapiro; Mr. SeLegue; and Mr. Voogd. In consideration of the views expressed by these members, the Commission's officers added their votes against the mail ballot to place the rule on the action agenda. Following discussion of the issues raised, the Commission approved the rule, as modified in accordance with the discussion. The Commission's disposition of various issues and the Commission's drafting decisions are summarized below.

(1) Paragraph (b)(2) was modified to use the passive phrase "advised in writing by the lawyer that. . . ." Also, Cmt. [1] was conformed to track this modification to paragraph (b)(2) (9 yes, 0 no, 1 abstain).

(2) Cmt. [2] was modified to delete the proviso clause of the first sentence (8 yes, 0 no, 1 abstain). As modified, this comment reads:

"[2] This Rule does not prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims. See, e.g., *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102 [63 Cal.Rptr.2d 261]; *Lawrence v. Walzer & Gabrielson* (1989) 207 Cal.App.3d 1501 [256 Cal.Rptr. 6]. Nor does this Rule limit the ability of lawyers to practice in the form of a limited-liability entity. [Placeholder for cross-reference to Task Force's proposed Rule Of Professional Conduct re disclosing insurance coverage]."

(3) Cmt. [3] was modified to delete the phrase "principles to make full and candid disclosures and to act honestly" (10 yes, 1 no, 1 abstain). As modified, this comment reads:

"[3] Paragraph (b) addresses only particular aspects of agreements that limit a lawyer's liability to a client or former client. It is not intended to override any obligation the lawyer might have under other law."

(4) Cmt. [4] was modified to delete the phrase "employment or" so that the reference is only to "representation" (8 yes, 1 no, 2 abstain).

In addition to the foregoing, the Commission took action on two separate matters. First, the Commission's consideration of an "active v. passive" voice writing style led to a vote to follow the Bryan Garner style manual to the extent that the State Bar and the California Supreme Court are conforming other rules to that style guide (8 yes, 4 no, 1 abstain). Second, the Commission's consideration of an insurance disclosure rule place-holder reference in Cmt. [2] led the Chair's appointment of a subcommittee authorized to prepare comments to the State Bar's Insurance Disclosure Task Force. Mr. Kehr, Mr. Mohr, Ms. Peck, and Mr. Tuft were appointed to the subcommittee and given deadlines for preparing a draft comment letter for submission to the Task Force by May 3, 2006.

[Intended Hard Page Break]

C. Proposed Rule 5.3.1 [Rule 1-311]. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

D. Proposed Rule 5.5 [Rule 1-300]. Unauthorized Practice of Law

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

E. Proposed Rule 1.0.1. Law Firm Definition

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

F. Proposed Rule 8.1.1 [Rule 1-110]. Disciplinary Authority of the State Bar

This proposed rule, as modified to implement non-substantive clean-up revisions, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

G. Proposed Rule 8.1 [Rule 1-200]. False Statement Regarding Admission to the State Bar

This proposed rule, as modified to implement non-substantive clean-up revisions, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

H. Proposed Rule 5.6 [Rule 1-500]. Agreements Restricting a Member's Practice

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them with one exception. The Commission determined to revert to the version of Cmt. [1] as it appeared in the original agenda materials. With this adjustment, the rule was approved (7 yes, 2 no, 0 abstain).

[Intended Hard Page Break]

I. 1. Proposed Rule 8.4 [Rule 1-120X]. Misconduct

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them with one exception. The Commission determined to revert to the version of paragraph (g) as it appeared in the original agenda materials. With this adjustment, the rule was approved (6 yes, 3 no, 1 abstain).

2. Proposed Rule 8.3 [Rule 1-120]. Reporting Professional Misconduct

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

J. Proposed Rule 1.2.1 [Rule 3-210]. Scope of Representation

This proposed rule, as modified to implement non-substantive clean-up revisions, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

K. Proposed Rule 1.8.10 [Rule 3-120]. Sexual Relations With Client

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

L. Proposed Rule 3.1 [Rule 3-200]. Meritorious Claims and Contentions

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

M. Proposed Rule 1.0 [Rule 1-100]. Rules of Professional Conduct, in General

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them with one exception. The Commission determined to delete “California” from the rule title. With this adjustment, there was no objection to deeming the rule approved.

[Intended Hard Page Break]

N. Proposed Rule 5.1 [Rule 1-310X]. Responsibilities of Partners, Managers, and Supervisory Lawyers

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them with a few exceptions. In Cmt. [1], the word “upon” was changed to “on.” In Cmt. [3], the Commission deleted the word “and” at the end of the second line. Lastly, Cmt. [4] was modified to use the phrase “may be vicariously responsible.” With these adjustments, there was no objection to deeming the rule approved.

[Intended Hard Page Break]

O. Proposed Rule 5.2 [Rule 1-310X]. Responsibilities of Subordinate Lawyer

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

P. Proposed Rule 5.3 [Rule 1-300]. Nonlawyer Assistants

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

Q. Proposed Rule 5.4 [Rule 1-310X]. Professional Independence of a Lawyer

At the recommendation of State Bar staff, this rule was pulled from the consent agenda and the Chair assigned the codrafters to reconsider the proposed rule in light of the California Supreme Court's recent decision in *Frye v. Tenderloin Housing Clinic* (2006) 40 Cal.Rptr.3d 221. Rachel Grunberg of the State Bar's Office of General Counsel presented an oral report on the status of a State Bar working group formed to coordinate the study required by the *Frye* decision.

[Intended Hard Page Break]

R. Proposed Rule 2.4.2 [Rule 1-700]. Member as Candidate for Judicial Office

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

S. Proposed Rule 2.4.1 [Rule 1-710]. Member as Temporary Judge, Referee, or Court-Appointed Arbitrator

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

T. Proposed Rule 2.4 [Rule 1-720]. Member as Third Party Neutral

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them along with two additional changes. First, at the start of Cmt. [6], by consensus the Commission replaced an uppercase “C” to a lowercase “c.” Second, the term “member” was changed to “lawyer” throughout the rule and comments. With these adjustments, the rule was approved (9 yes, 1 no, 1 abstain).

[Intended Hard Page Break]

U. Proposed Rule 7.1 [Rule 1-400]. Communications Concerning the Availability of Legal Services

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them along with two additional changes. First, paragraph (e), as a rule paragraph, was deleted and the Advertising Standards adopted by the Board were moved to the end of the comments . Second, the term “member” was changed to “lawyer” throughout the rule and comments. With these adjustments, there was no objection to deeming the rule approved.

[Intended Hard Page Break]

V. Proposed Rule 7.2 [Rule 1-400]. Advertising

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

W. Proposed Rule 7.3 [Rule 1-400]. Direct Contact with Prospective Clients

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them along with one additional change. In second sentence of Cmt. [5], the style of the enumerated phrases was changed to parenthetical numbers (“(1)”) rather than bracketed numbers (“[1]”). With this adjustment, there was no objection to deeming the rule approved.

[Intended Hard Page Break]

X. Proposed Rule 7.4 [Rule 1-400]. Communication of Fields of Practice and Specialization

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

Y. Proposed Rule 7.5 [Rule 1-400]. Firm Names and Letterheads

This proposed rule, as distributed for the meeting, was deemed approved in accordance with the consent agenda procedures.

[Intended Hard Page Break]

Z. Proposed Rule 1.5.1 [Rule 2-200]. Financial Arrangements Among Lawyers

The Commission considered the modifications made to implement non-substantive clean up revisions and adopted them along with one additional change. At the end of Cmt. [6], the word “Paragraph” was changed to “paragraph” with a lowercase “p,” in order to be consistent with the Commission’s adoption of the ABA format. With this adjustment, there was no objection to deeming the rule approved.

[Intended Hard Page Break]