

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

MEETING SUMMARY - OPEN SESSION

Friday, July 28, 2006
(9:15 am - 5:00 pm)

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

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; Robert Kehr; Stanley Lamport; Raul Martinez (LA); Kurt Melchior; Ellen Peck (LA); Sean SeLegue; Paul Vapnek; and Tony Voogd (LA)

MEMBERS NOT PRESENT: JoElla Julien; Hon. Ignazio Ruvolo; Jerry Sapiro; and Mark Tuft.

ALSO PRESENT: Chris Ames (Assistant Attorney General); David Bell (Morrison & Foerster); Jim Biernat (BASF/COPRAC Liaison); Prof. Carole Buckner (Western State/COPRAC Liaison) (L.A.); Chris Carpenter (Alameda District Attorney); Randall Difuntorum (State Bar staff); Doug Hendricks (Morrison & Foerster); Diane Karpman (Beverly Hills Bar Association Liaison) (LA); Mimi Lee (State Bar staff); Lauren McCurdy (State Bar staff); Suzanne Mellard (COPRAC Liaison); Marie Moffat (State Bar General Counsel); Kevin Mohr (Commission Consultant) (LA); Tom Orloff (Alameda County District Attorney); Toby Rothschild (Access to Justice Commission & LACBA Liaison) (LA); Ronald Ryland (Sheppard Mullin); Ronald Smetana (Deputy Attorney General); Mary Yen (State Bar staff); and Richard Zitrin (Saturday).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE FEBRUARY 3, 2006 and APRIL 7 & 8, 2006 MEETINGS

The April 7&8, 2006 action summary was approved. Consideration of the June 9 & 10, 2006 summary was postponed to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair briefly outlined the order of business for the meeting.

B. Staff's Report

Staff reported on the following: (1) staff development of a facility for online submission of written public comment; (2) the 10-day ballot approval of proposed rule 1.8.3 [4-400] and proposed rule 5.4 [1-310X]; (3) the inclusion in the 2006 State Bar Annual Meeting program of a ½ page public hearing notice for the Commission's October 7, 2006 public hearing on

the first group of public comment rule drafts; (4) the status of the State Bar's study requested by the Supreme Court in *Frye v. Tenderloin Housing Clinic*; (5) COPRAC's issuance of formal opinion no. 2006-170 (re charging liens in contingency fee cases); and (6) the status of the State Bar's consideration of a proposal for a permanent disbarment policy and proposed insurance disclosure rules.

III. MATTERS FOR ACTION

A. Consideration of Rules 1-320(B) and 2-200(B) re Compensation/Rewards for Recommendations Resulting in Employment

Mr. Vapnek presented a June 5, 2006 memorandum setting forth the codrafters' recommendation for handling RPC 1-320(B) and RPC 2-200(B). The codrafters recommended that the basic principle of these rules be retained and incorporated with the Commission's proposed rule 7.2(b). The Chair noted that there was no objection to this recommendation. The following decisions were made to implement the codrafters' recommendation.

(1) The Commission considered but did not approve a recommendation to delete all of Cmt. [7] to proposed rule 2-200 [Rule 1.5(e)]. (2 yes, 7 no, 0 abstain)

(2) In Cmt. [7] to proposed rule 2-200 [Rule 1.5(e)], the first sentence was replaced with the following: "A division of a fee otherwise permitted by this rule will be improper under rule 1.5 if the total fee does not comply with rule 1.5." (5 yes, 4 no, 1 abstain)

(3) In Cmt. [7] to proposed rule 2-200 [Rule 1.5(e)], the Commission considered but did not approve a recommendation to replace the second sentence with the following: "Each lawyer who receives a part of a total fee that is unconscionable violates rule 1.5 even if the division complies with this rule." (4 yes, 5 no, 1 abstain)

With the above, there was no objection to the Chair deeming the codrafters' recommendation approved. It was understood that the codrafter team assigned to the advertising rules would implement the addition of the RPC 1-320(B) and RPC 2-200(B) concepts. It was also understood that the codrafter team assigned to proposed rule 2-200 [Rule 1.5(e)] would implement changes to the comments.

[Intended Hard Page Break]

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

Ms. Peck presented a revised draft of proposed rule 1.15 dated July 28, 2006. The Chair called for a discussion of the issues identified by the codrafters' endnotes. In discussing these issues, the following decisions were made to give guidance to the codrafters.

(1) At the suggestion of the Chair, the codrafters agreed to reconsider the issue of potential overlap between the designation of a client's file as the "property" of a client and the obligations imposed under proposed rule 1.15 for the handling of fiduciary property.

(2) In proposed paragraph (a), the codrafters were asked to consider whether it is too narrow to limit the concept of a "beneficiary" to only those contexts where there is a legal representation or the provision of a legal service.

(3) In proposed paragraph (f)(3) concerning restoration to a trust account of funds wrongfully withdrawn, the Commission determined to keep this concept in the rule rather than moving it to the comments. (4 yes, 2 no, 0 abstain)

(4) In proposed paragraph (g)(7), there was no objection to deleting the unnecessary word "or" in the third line.

(5) In proposed paragraph (g)(5) concerning advanced fees that are not deposited into a trust account, the codrafters were asked to consider whether a fixed time frame should be imposed for the requirement that disputed fees be deposited into a trust account.

The codrafters were asked to implement the above changes in a revised draft. Ms. Yen was asked to inquire with OCTC about possible steps that could be used to effectively replace the protection that arguably would be lost if proposed rule 1.15 freely permitted the use of out-of-state banks for client trust accounts.

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

Matter carried over.

[Intended Hard Page Break]

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

Mr. Lamport presented draft 3.2 of proposed rule 1.13 [3-600] dated July 12, 2006 and led a discussion of outstanding issues. It was noted that the rule text had been approved and that the draft comments were the focus of the codrafters' issues. The disposition of the issues discussed and the Commission's drafting decisions are summarized below.

(1) In paragraph (a), the Commission considered a recommendation to replace the latter portion of that paragraph ("highest authorized officer. . .") with the comparable language in MR 1.14 ("duly authorized officers. . .") but there was no consensus to make this change (3 yes, 5 no, 0 abstain).

(2) In paragraph (b), there was no objection to correcting certain typos (i.e., delete the phrase "to be" after "reasonably necessary") to more closely track MR 1.13.

(3) In paragraph (f), the codrafters were authorized to consider using Mr. Mohr's suggested changes to the second sentence that address grammar and syntax concerns.

(4) In Cmt. [1], there was no objection to replacing references to "legal entity" or "entities" with "organization" throughout the comment. Also, there was no objection to changing "including" to "such as" in the first sentence of the comment.

(5) In Cmt. [1], the third sentence was replaced with "the identity of an organization's constituents will depend on its form, structure, and chosen terminology." (5 yes, 1 no, 2 abstain)

(6) In Cmt. [1], the fifth and sixth sentences were deleted and "For example" was added to the start of the fourth sentence. (6 yes, 1 no, 1 abstain)

(7) In Cmt. [1], the seventh sentence was modified to read "In the case of other organizational forms, a constituent includes the equivalent of officers, directors. . . ." (5 yes, 1 no, 2 abstain)

(8) In Cmt. [1], the last sentence was replaced with the following: "Any agent or fiduciary authorized to act on behalf of an organization also is a constituent of the organization for purposes of the authorized matter." (4 yes, 3 no, 1 abstain)

(9) The Commission considered a recommendation to delete all of Cmt. [2] but instead the codrafters agreed to redraft the comment.

(10) In Cmt. [3], the Commission considered a recommendation to revise the first two sentences to say that an organization's confidential information is subject to Bus. & Prof. code sec. 6068(e)(1) to the same extent as an individual client's information, but instead the codrafters agreed to redraft this part of the comment.

The codrafters were asked to implement the above changes in a revised draft. The Chair indicated that discussion of the remaining issues would continue at the next meeting.

E. Consideration of Rule 4-210 [ABA MR 1.8(e)] Payment of Personal or Business Expenses Incurred by or for a Client

Ms. Voogd introduced a draft of a proposed rule 1.8.5 developed by Mr. Kehr. In introducing the draft, Mr. Voogd stated his recommendation that RPC 4-210 be deleted with no substitute rule. The Chair called for a vote on this recommendation which showed no consensus to delete the rule (2 yes, 5 no, 1 abstain). Next, Mr. Kehr led a discussion of the issues presented by the draft rule. In discussing these issues, the following decisions were made to give guidance to the codrafters.

(1) In Cmt. [2], the Commission directed the codrafters to move the concept of good faith gifts out of the comments and into the rule text (8 yes, 0 no, 0 abstain)

(2) In paragraph (a)(4), there was no objection to the codrafters' proposal that the language be modified to clarify that permissible advanced costs and expenses are those costs and expenses that arise from the relevant client representation or litigation.

(3) The Commission agreed with a recommendation to move all of paragraph (b) out of the rule and into the comments. (4 yes, 2 no, 1 abstain)

(4) In Cmt. [1], the codrafters agreed to revise the language to eliminate any perception of bias towards litigated matters so that it would be clear that the rule equally applies to non-litigation matters.

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

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**F. Consideration of Rule 4-300 [no corresponding ABA Model Rule]
Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review**

Matter carried over.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

H. 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 revised draft of proposed rule 1.7 dated June 20, 2006. In addition to the revised draft rule, the codrafters included a July 9, 2006 memorandum addressing "Thrust-Upon Conflicts." The Chair welcomed visitors David Bell, Doug Hendricks and Ronald Ryland. The Chair called for a discussion of the issues identified in the codrafters' footnotes to the draft rule. Also, the Chair noted that although Mr. Sapiro and Mr. Tuft were not present, the codrafters should make sure that their issues are considered. The disposition of the issues discussed and resolved are summarized below.

(1) In Cmt. [17], the codrafters' addition of a cross reference to Cmt. [32], in accordance with the suggestion in Mr. Ryder's April 12, 2006 memorandum, was deemed approved.

(2) In Cmt. [19], the phrase "may revoke the consent" was deleted (9 yes, 0 no, 0 abstain)

(3) In Cmt. [21], it was indicated that the Commission's departure from the language found in the comparable MR 1.7 comment should be highlighted by some specific mention in the "legislative history" that will be made available to the Board and the Supreme Court.

(4) In connection with Cmt. [33], the Chair indicated that the Commission's subcommittee on class action issues should prepare a report and recommendation for consideration at the next meeting.

Next, the Chair called for a general discussion about the policy and substantive issues raised by the concept of "advanced consent/waivers" identified by both the codrafters and the visitors. Among the points raised during the discussion were the following.

(1) The limitations on seeking an advance waiver should be the same as the usual limitations on seeking client consent (i.e., if you can't get consent because adequate disclosure is constrained, then you should not seek consent). This is an appropriate approach for dealing with advance waivers.

(2) A risk of discipline properly arises only if an attorney proceeds with an adverse interest that is not addressed by a valid client consent. There should not be a violation for seeking an advance waiver when an adverse representation does not materialize, even if the adequacy of disclosure or the consent is questionable.

(3) The clients of large law firms live with much uncertainty due to the lack of predictability on advance waivers. It would be helpful to these clients if the amended rules supplied some certainty as to advance waivers. In particular, advance waivers tend to attract tactical motions to disqualify and these proceedings are burdensome to the clients and the courts.

(4) When dealing with corporate clients and parties often there are unforeseeable circumstances, such as mergers and acquisitions, that give rise to conflicts.

(5) Consideration should be given to implementing a presumption in favor of the adequacy of disclosures to a sophisticated corporate client. A client that is savvy enough to make the business judgement decision to seek incorporation of a business or an organization should be regarded as having a certain requisite level of knowledge and understanding as to conflicts and waivers of conflicts.

(6) At the very least, there should be a reasonable expectation of a common base of sophistication when the corporation has a designate general counsel (whether inside or outside). A rule which offers greater certainty as to advance waivers entered into with a general counsel would be a marked improvement over the status quo.

(7) The distinguishing factor should be adequacy of disclosure and not client sophistication, as sophistication can greatly vary between a Fortune 500 entity and a “mom & pop” business.

(8) The concept of sophistication, standing alone, is too ambiguous. More definition is needed if sophistication is to be the basis of a legal presumption in a disciplinary rule.

Following discussion, the Chair asked the codrafters to prepare further recommendations in light of the input from the visitors. The Chair also asked the visitors to consider developing draft language that could be considered by the codrafters.

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

The Commission considered a June 29, 2006 memorandum from Mr. Kehr presenting a suggested revision of paragraph (c)(4) of proposed amended rule 2-100, along with suggested comments to that revised paragraph. The Commission also considered a version set forth in a July 24, 2006 e-mail message from the Chair. The Chair welcomed visitors Chris Ames, Chris Carpenter, Tom Orloff, and Ronald Smetana, each of whom were present to support the comments and recommendations submitted in a letter to the Commission dated July 14, 2006 from California Attorney General Bill Lockyer. The Chair began discussion by seeking Commission member consensus to work off the draft of paragraph (c)(4) submitted by the Attorney General. However, the visitors indicated a preference to work off the version prepared by the Chair. There was no Commission member objection to working off the Chair's version. Mr. Kehr led a discussion of the differences between this version and the Attorney General's version. The disposition of the issues discussed and the Commission's drafting decisions are summarized below.

(1) As used in the Attorney General's version, there was no objection to adding the term "official" to modify the type of "investigations" covered by paragraph (c)(4). With this change, the codrafters were asked to add new comments indicating that criminal, civil and regulatory investigations are various types of official investigations.

(2) The Commission considered a recommendation to delete paragraph (c)(4) and place the entire substance of this paragraph into a comment together with language indicating that there is no intent to change the status quo. There was no consensus to make this change (4 yes, 7 no, 0 abstain).

(3) The codrafters were asked to consider whether there is a substantive difference in the concept of investigations "under the direction of a government lawyer" and "under the supervision of a government lawyer." Whichever concept is used, the codrafters were asked to consider adding a clarifying discussion in the comments.

(4) Regarding the use of the word "including" in the Chair's version to avoid limiting the exception to governmental agents who have the title of "investigator," the visitors indicated that there are "analyst" and "forensic" personnel who might need to be covered and that using the word "including" might be appropriate. This issue was left for the codrafters to consider further.

(5) Regarding the use of the phrase "not prohibited by law" in the Chair's version, the visitors indicated a preference for that phrase rather than the Attorney General's version that used "authorized by law or court order."

Following discussion the Chair asked the visitors to consider the issues discussed and invited submission of a revised draft within ten days to give the codrafters the benefit of that input in developing their own redraft. Mr. Orloff had distributed a simplified (c)(4) proposal stating: "(c) Paragraph (a) of this rule is not intended to prohibit: . . .(4) Communications by government lawyers or persons at their direction which are not otherwise prohibited by law." The codrafters were asked to consider Mr. Orloff's language in preparing their redraft.