

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

MEETING SUMMARY - OPEN SESSION

Friday, August 24, 2007
(9:15 am - 5:00 pm)

Saturday, August 25, 2007
(9:00 am - 5:00 pm)

SF–State Bar Office
180 Howard Street
San Francisco, CA 94105

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien (by telephone); Robert Kehr; Stanley Lamport; Raul Martinez (by telephone); Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Dominique Snyder; Mark Tuft; Paul Vapnek and Tony Voogd.

MEMBERS NOT PRESENT:

ALSO PRESENT: David Bell (Morrison & Foerster) (Friday only); George Cardona (Acting U.S. Attorney, C.D. California); Randall Difuntorum (State Bar Staff); John Drexel (State Bar staff) (Friday only); Tom Greene (Alameda County District Attorney); Prof. Geoffrey Hazard (Hastings College of the Law) (Friday only); Michael Judge (Los Angeles Public Defender; Cal. Public Defenders Association) (Friday only); Diane Karpman (Beverly Hills Bar Association liaison) (by telephone); Mimi Lee (State Bar staff); Lauren McCurdy (State Bar staff) (Friday only); Marie Moffat (State Bar General Counsel) (Friday only); Prof. Kevin Mohr (Commission Consultant); Ann Ravel (COPRAC liaison); Toby Rothschild (Access to Justice Commission, LACBA liaison); Amy Yarborough (Daily Journal) (Friday only); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE JULY 20, 2007 MEETING

The July 20, 2007 open session meeting summary was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair provided an oral report on a meeting between Commission members and representatives of the ABA Task Force on Lawyer Regulation. Among the persons in attendance from the ABA were: Stephen Gillers; Prof. Geoffrey Hazard; John Holtaway; Nancy Moore; Becky Stretch; James Towery; and Justice Norm Veasey. The Chair noted that the ABA representatives expressed concerns about the Commission's proposed variations from the ABA rule numbering system and staff emphasized that the Commission's proposed rule numbering is a tentative recommendation that will be revisited after the initial drafting of all of the proposed rules has been completed.

Regarding meeting management, the Chair clarified that visitors are free to offer comments on any issue arising in connection with a rule on the Commission's agenda even if it might be an issue that has not been identified by a codrafting team or any other Commission members as an "open issue" for discussion.

B. Staff's Report

Staff reported that due to technical problems with the RRC E-List, a new e-mail list has been implemented with the following address: rrc2@calbar.org. Commission members, liaisons and interested persons were asked to delete the old address.

Staff also reported that the State Bar's draft report in response to *Frye v. Tenderloin Housing Clinic* (2006) 38 Cal.4th 23 would be considered by the Board's Regulation Admissions and Discipline committee on Monday, August 27, 2007, for purposes of public comment authorization. Commission members were invited to submit informal feedback to staff. In addition, the Commission's approved version of proposed Rule 5.4 [1-310X] would be assigned for the next meeting and all members were encouraged to review that rule to determine if changes are warranted in light of the State Bar's draft report.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 3 RULES)

A. Consideration of Rule 1.8.1 [Rule 3-300]. Avoiding Interests Adverse to a Client

The Commission considered Draft 9.1 of proposed Rule 1.8.1 (dated 8/16/07). Although the assignments agenda indicated that this rule would be distributed for a 10-day ballot, at the request of the codrafter's, a ballot was not issued and the Chair placed this matter on the action agenda. Mr. Lamport led a discussion of the open issues and the following drafting decisions were made.

(1) By consensus, in the first sentence of paragraph (b) the words "is either" was reversed to read "either is" and two commas were added to set off the phrase ", or is advised in writing by the lawyer to seek the advice of an independent lawyer of the client's choice, . . ."

(2) In the first sentence of Cmt.[5], adding the word “to” after word “apply” was deemed approved. Also, the Commission considered two changes that did not garner sufficient support: moving the first sentence of Cmt.[6] to the end of Cmt.[5] (2 yes, 9 no, 0 abstain); and completely deleting the first sentence of Cmt.[6] (4 yes, 6 no, 0 abstain).

(3) In Cmt.[6], there was insufficient support to delete all of the second sentence (2 yes, 5 no, 3 abstain).

(4) In Cmt.[6], the word “However” was added at the start of the second sentence (8 yes, 2 no, 1 abstain).

(5) In Cmt.[6], the third sentence was revised to read: “Once a lawyer-client relationship has been established, the lawyer owes fiduciary duties to the client that apply to the agreement.” (9 yes, 2 no, 0 abstain)

(6) In the first sentence of Cmt.[8], the word “is” was changed to “be” (6 yes, 0 no, 4 abstain).

(7) In the second sentence of Cmt.[8], the phrase “is communicated in a manner that” was deleted (8 yes, 3 no, 0 abstain).

(8) In the third sentence of Cmt.[8a], the word “truthfully” was deleted (7 yes, 5 no, 0 abstain).

(9) In the third sentence of Cmt.[8b], the deletion of the word “Moreover” was deemed approved.

(10) In Cmt.[9], there was no objection to revising the first sentence to read: “There are additional considerations when the lawyer-client relationship will continue after the transaction or acquisition.”

(11) In the second sentence of Cmt.[9], the word “may” was changed to “might” (7 yes, 3 no, 1 abstain).

(12) The fourth sentence of Cmt.[9] was revised to read: “The lawyer must either: (i) inform the client that the lawyer will not represent the business, or represent the client with respect to the business or interest, and must then act accordingly; or (ii)” There was no exception to deeming this change approved subject to further consideration by the Mr. Lamport.

(10) In the second sentence of Cmt.[10], adding the word “must” after the word “and” was deemed approved.

(11) In the first sentence of Cmt.[11], reversing the order of the words “represent” and “competently” was deemed approved. In addition, the codrafters were authorized to unsplit any other infinitives found in the comments.

(12) All of Cmt.[14] was deleted (9 yes, 1 no, 1 abstain). It was observed that this comment likely is inconsistent with California case law holding that all members of a law firm have a lawyer-client relationship with each client of the firm.

With the above changes, the rule was deemed approved for inclusion in the Commission's third batch of public comment proposals. The codrafters were asked to provide staff with a final version of the rule. Staff was asked to seek input from the State Bar's Office of Enforcement once the rule is out for comment.

[Intended Hard Page Break]

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

This rule was circulated for a 10-day ballot with a deadline of August 24, 2007. The Chair inquired whether there were six members who objected to approval of this rule on ballot and the following members stated objections for the record: Mr. Lamport; Mr. Sapiro; Mr. Tuft; Mr. Melchior; Mr. Vapnek; and Ms. Peck (who clarified that she was changing a previous e-mail vote in support of the rule). As there were six members who objected, the Chair declared that the rule had failed to be approved on ballot and that it would be placed on the next agenda for further consideration.

[Intended Hard Page Break]

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

The Chair specially set this matter for discussion at 1:00 pm on Friday, August 24, 2007. The Chair welcomed the following visitors who were present for the discussion of this rule: David Bell; George Cardona; Tom Greene; Prof. Geoffrey Hazard; Michael Judge; Ann Ravel; and Amy Yarborough. The Commission considered Draft 14.2 of proposed amended Rule 2-100 (dated 8/13/07).

Mr. Judge and Mr. Greene addressed the Commission. In part, both speakers expressed concerns about the Commission's decision to recommend that rule 2-100 be revised to govern communications with a represented "person" as opposed to a represented "party." After their comments, a straw vote was taken to ascertain if there were six members who favored discussion of possible reconsideration of the Commission's prior vote on "party v. person" scope of the proposed rule. Upon vote, there were only three members (Ms. Peck, Ms. Snyder and Mr. Voogd) who favored discussion of possible reconsideration. As the Chair's procedures for any discussion of a matter resolved by a prior vote required six member votes, there was no discussion of possible reconsideration. Next, the Chair led a discussion of the open issues raised by the visitors and the codrafters. The following drafting decisions were made.

(1) In the last sentence of Cmt.[7c-2], replace the word "what" with "which criminal and civil" (8 yes, 3 no, 2 abstain).

(2) Following comments from Ms. Ravel (as a county counsel practitioner and not as a COPRAC liaison) indicating that the exception in paragraph (g), as amplified by Cmt.[7], would be problematic for lawyers representing public agencies in litigation matters, Cmt.[7] was revised to delete the entire second sentence (with the first and last sentence remaining) (8 yes, 3 no, 2 abstain).

(3) Following comments from Mr. Bell indicating that the proposed rule could be improved by clarifying its applicability to contacts with an in-house counsel, the Chair asked that written comment be submitted by Morrison & Foerster during the public comment period and suggested that State Bar's request for comment memorandum could specifically mention the Commission's interest in comments on this issue.

(4) Following comments from Mr. Cardona, Cmt.[13] was modified: to delete the phrase "or who have actual or implied authority to speak for and bind the organization" (at line 182 of the agenda materials); and to add "or rank" (at line 185 of the agenda materials) (9 yes, 0 no, 2 abstain).

(5) Cmt.[16] (as set forth in footnote no. 41 of the draft) was added back into the comments but modified to end at the citation to "Evid. Code sec. 1222" (11 yes, 0 no, 1 abstain).

(6) Cmt.[19] was amended (11 yes, 1 no, 1 abstain) to read as follows:

"[19] The prohibition against "indirect" communication with a person represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person through an intermediary such as an agent or investigator. The Rule is not intended to preclude a lawyer from assisting or preparing a client to communicate

directly with the opposing party. A lawyer may advise a client about what to say or not to say to a represented person and may draft or edit the client's communications with a represented person, subject to paragraph (e) of this Rule."

With the above changes, the rule was deemed approved for inclusion in the Commission's third batch of public comment proposals. The codrafters were asked to provide staff with a final version of the rule. The Chair invited Mr. Cardona to submit public comment on the whistle-blower issue, including but not limited to, any recommendation to consider the relevant language of the discussion draft prepared by a subcommittee of the Conference of Chief Justices for consideration by the ABA Ethics 2000 Commission.

[Intended Hard Page Break]

D. Consideration of Rule 2-100 [ABA MR 4.3] Dealing with Unrepresented Person

The Commission considered Draft 1 of proposed Rule 4.3 (dated 7/8/07). Following initial discussion, a vote was taken to ascertain whether the Commission would proceed to consider possible adoption of a rule like Rule 4.3 and there was support to proceed (7 yes, 5 no, 0 abstain). The following decisions were made to give guidance to the codrafters.

(1) A recommendation was made to include that part of the first sentence of paragraph (a) which provides that there are circumstances where a lawyer must affirmatively inform a third party that they are representing a client but there was insufficient support to include this concept (4 yes, 8 no, 0 abstain).

(2) The codrafters were asked to consider the concepts in the Restatement section 103 and MR 4.3 that deal with a lawyer's duty not to mislead a third party or take improper advantage of a third party (7 yes, 4 no, 0 abstain).

(3) The codrafters were asked to consider the second sentence of the proposed rule imposing a requirement to correct a third party's misapprehensions (10 yes, 1 no, 0 abstain).

(4) A recommendation was made to instruct the codrafters to not consider the last sentence of paragraph (a) due to conflict with California law on the duty of undivided loyalty, but there was insufficient support to issue this instruction (5 yes, 7 no, 0 abstain). Although this recommendation failed, the codrafters agreed to offer necessary recommendations to harmonize the proposed rule with California's conflicts of interest standards.

The codrafters were assigned to prepare a revised rule for consideration at the next meeting.

[Intended Hard Page Break]

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

The Commission considered Draft 7.1 of proposed Rule 1.13 (dated 7/9/07). Mr. Lamport led a discussion of the open issues. The following drafting decisions were made.

(1) In Cmt.[4a], the phrase “in the ordinary course of a representation” was deleted (8 yes, 2 no, 2 abstain).

(2) In Cmt.[4b], the last sentence was revised (8 yes, 0 no, 5 abstain) to read:

“The ‘knows or reasonably should know’ standard requires the lawyer to engage in the level of analysis that a lawyer of reasonable prudence and competence would undertake to ascertain whether the conduct meets the criteria that triggers the lawyer’s obligations under paragraph (b).”

(3) In Cmt.[4b], by consensus all instances of the word “triggers” was changed to use the singular form “trigger.”

(4) Cmt.[5] was revised to end the third sentence at the word “matter” and to begin a new fourth sentence with the balance of the third sentence (language appearing after the word “matter”), but adding “For example” at the very start of this new fourth sentence. There was no objection to deeming this change approved.

(5) The first sentence of Cmt.[5a] was revised to add a comma after the word “that.” There was no objection to deeming this change approved.

(6) In the last sentence of Cmt.[5a], the word “reposes” was deleted and replaced with the word “is.” Also, the word “in” was deleted. There was no objection to deeming these changes approved.

(7) Towards the end of the second sentence of Cmt.[6], the phrase “reasonably should not know” was deleted (6 yes, 4 no, 2 abstain).

(8) In the last sentence of Cmt.[6], the word “internal” was deleted and the phrase “as determined by applicable law” was added at the very end (7 yes, 4 no, 0 abstain).

(9) In the last sentence of Cmt.[10], the word “terminate” was deleted and replaced with the word “withdraw” (6 yes, 3 no, 3 abstain).

(10) All of Cmt.[11] was deleted (7 yes, 3 no, 1 abstain).

(11) Following comments from Ms. Ravel (as a county counsel practitioner and not as a COPRAC liaison) expressing concerns about subordinate lawyers violating client confidentiality, the sixth sentence of Cmt.[12] was deleted (10 yes, 1 no, 1 abstain).

(12) In Cmt.[13], the first sentence was retained with the deletion of the word “outside” and the remainder of the comment was deleted (11 yes, 0 no, 1 abstain).

(13) By consensus, in Cmt.[14] brackets were added to set off the reference to “[See Rule 4.3.]”.

(14) By consensus, in Cmt.[15] the listed rules were placed in numerical order.

(15) In Cmt.[16], the sentence "Similar issues can arise in a derivative action." was added just before cite to the *Forrest v. Baeza* case (10 yes, 0 no, 2 abstain).

(16) All of Cmt.[17] was deleted (12 yes, 0 no, 0 abstain).

(16) All of Cmt.[18] was deleted (12 yes, 0 no, 0 abstain).

With the above changes, the rule was deemed approved for inclusion in the Commission's third batch of public comment proposals. The codrafters were asked to provide staff with a final version of the rule.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

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

The Commission considered Draft 2.1 of proposed Rule 1.5 (dated 7/9/07). Mr. Vapnek led a discussion of the open issues. The following drafting decisions were made.

(1) In Alternative B of paragraph (b), the word “so” was added after the word “provided.” There was no objection to the Chair deeming this change approved.

(2) In Cmt.[1], the word “an” was added before “unconscionable” and there was no objection to the Chair deeming this change approved.

(3) In Cmt.[2], the phrase “must be established promptly” was added and there was no objection to the Chair deeming this change approved.

(4) In Alternative B of paragraph (b), the first sentence was revised to change the word “and” to “or” so that it reads: “A fee is unconscionable if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee. . . .” (7 yes, 0 no, 1 abstain).

(5) In Alternative B of paragraph (b), the first sentence was modified to add the phrase “for purposes of this Rule” after the word “unconscionable” (7 yes, 2 no, 0 abstain).

(6) In Alternative B of paragraph (b), the language was further revised (8 yes, 1 no, 0 abstain) to read:

"A fee is unconscionable for purposes of this Rule if it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience, or the lawyer, in negotiating or setting the fee, has engaged in fraud or overreaching so that the fee charged, under the circumstances, constitutes a practical appropriation of the client's funds."

(7) A recommendation was made to delete all of the factors in Alternative B of paragraph (b) but there was insufficient support to make this change (1 yes, 8 no, 0 abstain).

(8) In Alternative B of paragraph (b), factor number 3 (re time, labor, novelty and difficulty) was revised to be two separate factors as in the language of current RPC 4-100 (6 yes, 1 no, 1 abstain).

(9) In Alternative B of paragraph (b), factor number 5 was deleted (7 yes, 0 no, 1 abstain). Also, it was understood that factor number 12 was essentially deleted because the substance of that factor was moved into paragraph (b).

(10) A new paragraphs (c) was added to set off the factors from the rest of paragraph (b) (7 yes, 0 no, 1 abstain). The new paragraph (c) would begin with second sentence of paragraph (b) and include the list of the factors.

(11) The codrafters were asked to add a comment on “illegal” fees (7 yes, 1 no, 0 abstain).

(12) All of paragraph (d) was deleted (5 yes, 0 no, 2 abstain).

(13) All of paragraph (e) was deleted ((5 yes, 0 no, 2 abstain).

(14) By consensus, all of paragraph (f) was referred back to the codrafters for further research.

(15) The last sentence of Cmt.[15] was deleted (5 yes, 2 no, 1 abstain).

The codrafters were asked to prepare a revised rule for consideration at the next meeting.

[Intended Hard Page Break]

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

The Commission considered Draft 7 of proposed comments to Rule 1.7 (dated 8/5/07). Mr. Kehr led a discussion of the open issues. The following drafting decisions were made.

(1) There was no objection to the Chair deeming approved the minor, non-substantive revisions set forth in Mr. Sapiro's July 14, 2007 e-mail message as numbered points: 2, 3, 4, 5, and 8.

(2) There was no objection to the Chair deeming approved Mr. Sapiro's modification of the fifth sentence in Cmt.[9].

(3) The first sentence of Cmt.[15] was revised to read: "The following are examples of actual conflicts in representing multiple clients in a single matter: . . ." (10 yes, 0 no, 2 abstain).

(4) In Cmt.[15], the language describing enumerated examples 2 and 3 was revised (8 yes, 0 no, 3 abstain) to read:

“(2) the clients have inconsistent interests or objectives so that it becomes impossible for the lawyer to advance one client's interests or objectives without detrimentally affecting another client's interests or objectives; (3) the clients have antagonistic positions and the lawyer's duty requires the lawyer to advise each client about how to advance that client's position relative to the other's position, since the lawyer cannot be expected to exercise independent judgment in that circumstance; . . .”

(5) The codrafters were asked to reverse the order of Cmt.[14] and Cmt.[15] and to add a "potential conflict" example in Cmt.[14] by taking one of the actual conflicts listed in Cmt.[15] and presenting it as reasonably foreseeable future conflict (6 yes, 5 no, 3 abstain).

(6) There was no objection to the Chair deeming approved the deletion of the word "not" in the last sentence of Cmt.[16].

(7) In the first sentence of Cmt.[16], the word "creates" was deleted and replaced with the phrase "can create" (6 yes, 5 no, 0 abstain).

(8) Mr. Lamport was asked to assist the codrafters in revising Cmt.[22] (6 yes, 5 no, 1 abstain).

(9) Cmt.[23] was approved as drafted (11 yes, 2 no, 0 abstain).

(10) The codrafters agreed to redraft Cmt.[24] to present examples 1 and 2 as unqualified examples and to make example 3 the only qualified example. However, the general substance of Cmt.[24] should be retained (8 yes, 2 no, 1 abstain).

(11) In the first sentence of Cmt.[19], the word "a" was inserted before the word "reason" (6 yes, 1 no, 3 abstain).

(12) The last sentence of Cmt.[29] was deleted (6 yes, 3 no, 1 abstain).

(13) The Chair asked the Class Action Subcommittee to submit a report on whether the proposed comments to Rule 1.7 should include Cmt.[33].

(14) By consensus, Cmt.[36] was deemed approved.

The codrafters was asked to prepare a revised rule for consideration at the next meeting. The Chair indicated that discussion of the recommendations on advance waivers and “thrust upon conflicts” would continue at the next meeting.