

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

MEETING SUMMARY - OPEN SESSION

Friday, January 18, 2008
(9:15 am - 5:00 pm)

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

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

MEMBERS NOT PRESENT: Dominique Snyder.

ALSO PRESENT: George Cardona (U.S. Attorney, C.D. Cal.); Randall Difuntorum (State Bar staff); William Herbert (Board Liaison); Mimi Lee (State Bar staff); Meg Lodise (Executive Committee, Trusts & Estates Section); Michael Marcus (Board Liaison); Lauren McCurdy (State Bar staff); Kevin Mohr (Commission Consultant); Marie Moffat (State Bar staff); Jon Rewinski (COPRAC Liaison); Toby Rothschild (LACBA & Access to Justice Commission Liaison); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE DECEMBER 7, 2007 MEETING

The action summary for the December 7, 2007 meeting was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

1. Consideration of 2007 Accomplishments Report

Staff was authorized to consult with leadership in finalizing the Commission's 2007 Accomplishments Report.

2. Consideration of 2009 Workplan

Staff was authorized to consult with leadership in finalizing the Commission's 2009 Workplan.

B. Staff's Report

Staff reported on the issuance of a revised proposed rule on insurance disclosure with a public comment deadline of March 17, 2008. It was noted that the revised rule limits the client disclosure requirement to circumstances where "it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours" and adds a new exception for services rendered in an emergency.

Staff also reported on the status of the batch 1 interim report to the Supreme Court. To balance the report's coverage of dissenting arguments, staff was asked to include boilerplate language, following any statement of a dissenting view, indicating essentially that "notwithstanding the dissenting view, the Commission did not change its position [to retain the public comment version or to change the public version, whichever the case may be] for the reasons previously stated in the above summary."

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

A. Consideration of Rule 5-100 [no ABA counterpart] Threatening Criminal, Administrative or Disciplinary Charges

The Commission considered Draft 2 of proposed amended rule 5-100 (dated December 12, 2007). Mr. Sapiro led a discussion of the open issues and the following drafting decisions were made.

(1) Regarding the numbering of the proposed rule (which has no counterpart in the ABA Model Rules), the Commission determined to retain the rule as a standalone rule and to number it as Rule 3.10 (5 yes, 2 n, 2 abstain).

(2) There was no objection to the Chair deeming approved the following minor drafting revisions from Mr. Kehr's January 12, 2008 e-mail message to RRC E-List:

"1. The use of "paragraph (a)" twice in Comment [2] is correct in that it is the only paragraph in the Rule that can be violated, paragraphs (b) and (c) being definitional. However, Comments [1] and [3] refer to the Rule as a whole. I recommend that we be consistent, and that we do so by referring to "this Rule" both times in Comment [2].

2. B/c of the paring of Comment [2] (which I support), I recommend that what remains in Comment [2] be added to the end of Comment [1]. Their subjects seem to me to fit together, and I see no reason for two such brief paragraphs.

3. The use of “a lawyer” in Comment [3] might be argued to mean that the lawyer who does any of those three things is exempt from the application of this Rule no matter what else the lawyer has done. I suggest changing this to say: “This Rule does not apply to: (i) a threat to initiate; (ii) the offer of a civil compromise ...; or (iii) where there is probable cause, the offer by a lawyer who represents a governmental agency to settle all civil”

4. My suggested change from “government” to “governmental” in Comment was intentional, the use being adjectival (and this is consistent with the last line of paragraph (c)).

5. Also in Comment [3], I recommend removing “against a party” b/c it assumes that a court order can apply only to a party.”

(3) In Cmt. [3], the phrase “lawyer who represents a government agency” was replaced with the term “prosecutor” (7 yes, 0 no, 3 abstain).

(4) All of Cmt. [5] was deleted (8 yes, 1 no, 1 abstain).

With the above revisions, there was no objection to the Chair deeming the rule approved subject to a 10-day ballot, if necessary, to approve only the portion of Cmt. [3] (re a prosecutor’s offer to settle the civil, administrative and criminal aspects of a case) that Mr. Sapiro and Mr. Cardona would like to attempt to resolve by developing consensus language. In the event that the ballot is not passed, the Commission determined that the current Cmt. [3] language would be revised to add a “good faith” qualifier (9 yes, 2 no, 0 abstain).

[Intended Hard Page Break]

B. Consideration of Rule 5-110 [including all of ABA MR 3.8] Performing the Duty of Member in Government Service

Matter carried over.

[Intended Hard Page Break]

C. Consideration of Rule 5-120 [ABA MR 3.6] Trial Publicity

Matter carried over.

[Intended Hard Page Break]

D. Consideration of Rule 5-200 [including all of ABA MR 3.3] Trial Conduct

The Commission considered Draft 3.2 of proposed amended Rule 3.3 [5-200] (dated January 3, 2008). Justice Ruvolo led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a)(2), by consensus, the second instance of the term “misquote” was replaced with “misquotation.” In addition, there was no objection to moving this paragraph from the rule to the comments.

(2) In paragraph (a)(3), by consensus, the first instance of the term “the” was replaced with “a.”

(3) In Cmt. [2], the third sentence was deleted (5 yes, 1 no, 1 abstain).

Following discussion, the Chair asked the codrafters to implement the agreed upon changes in a revised draft. It was understood that discussion of open issues would continue at the next meeting.

[Intended Hard Page Break]

E. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness

Matter carried over.

[Intended Hard Page Break]

F. Consideration of Rule 5-220 [including all of ABA MR 3.4] Suppression of Evidence

The Commission considered Draft 2 of proposed Rule 3.4 [5-220] (dated December 19, 2007). The Chair led a discussion of the open issues and the following drafting decisions were made.

(1) A recommendation to change the proposed rule title was made but it did not receive sufficient support.

(2) The portion of paragraph (a) from MR 3.4 (prohibiting a lawyer from counseling or assisting another person to alter or destroy evidence) that was omitted in the current draft of the proposed rule was added at end of proposed paragraph (a) (8 yes, 1 no, 1 abstain).

(3) Paragraph (b) was deleted but the term “suppress” was added to paragraph (a) after the word “destroy” (8 yes, 2 no, 0 abstain). [Note: see #(5) below for subsequent action.]

(4) In paragraph (a) a recommendation to delete the phrase “or other material” and replace it with “or anything else that has potential” resulted in a tie vote (5 yes, 5 no, 0 abstain).

(5) The action taken to delete paragraph (b) and revise paragraph (a) to include the term “suppress” was reconsidered, and upon reconsideration the Commission decided to retain paragraph (b) and not move “suppress” to paragraph (a) (6 yes, 3 no, 1 abstain).

(6) In paragraph (d), there was no objection to the Chair deeming approved a recommendation to add the phrase: “Offer an inducement to a witness that is prohibited by law. . .” at the start of the paragraph.

(7) A recommendation to revise or delete paragraph (e) was made but did not receive sufficient support.

(8) Paragraph (f) from MR 3.4 (re requests to refrain from voluntarily giving relevant information) that was omitted in the current draft of the proposed rule was added to be a new paragraph (h) (6 yes, 3 no, 0 abstain). In addition, the codrafters were asked to incorporate revisions recommended by Mr. Cardona (combining subdivisions (f)(1) and (f)(2) into one subparagraph and adding a new subdivision (2) concerning “persons required by law” to refrain from giving relevant information) (7 yes, 0 no, 3 abstain). A recommendation by Mr. Cardona to add a new subdivision (3) (re information pertaining to a pending law enforcement investigation) did not receive sufficient support.

(9) In Cmt. [2], the last two sentences were deleted (6 yes, 4 no, 0 abstain). In addition, the language used in the proposed New York rule indicating that “applicable law may permit a lawyer to take temporary possession of physical evidence. . .” was added (6 yes 2 no, 1 abstain). It was understood that the added language would include citations to *People v. Lee* and *People v. Meredith*.

(10) A recommendation to delete all of Cmt. [4] was defeated (3 yes, 5 no, 0 abstain).

(11) The start of Cmt. [4] was revised to read: “Paragraph (f) permits...” and modified to substitute the phrase “to request” for the word “advising” (6 yes, 2 no, 1 abstain).

(12) All of Cmt. [5] was deleted (6 yes, 4 no, 1 abstain).

With the above revisions, there was no objection to the Chair deeming the rule and comments approved. The codrafters were asked to submit a final version of the rule.

[Intended Hard Page Break]

G. Consideration of Rules 5-300 (Contact with Officials), 5-310 (Prohibited Contact with Witnesses), 5-320 (Contact with Jurors) [including all of ABA MR 3.5]

The Commission considered Draft 2.2 of proposed Rule 3.5 [5-300, 5-310, 5-320] (dated January 14, 2007). Mr. Vapnek led a discussion of the open issues and the following drafting decisions were made.

(1) A recommendation to change the proposed rule title was made but it did not receive sufficient support.

(2) Paragraph (d) was deleted from this rule and moved to proposed Rule 3.4 to become a new paragraph (g) (9 yes, 0 no, 1 abstain). In taking this action, it was noted that paragraphs (e) and (f) were previously moved to proposed Rule 3.4.

(3) Paragraph (a) was revised to add, at the start, an exception for gifts and loans permitted by the Code of Judicial Ethics (6 yes, 2 no, 2 abstain).

(4) In paragraph (a), there was no objection to the Chair deeming approved the deletion of the phrase "Nothing contained in this rule is such" and the insertion of the phrase "This Rule shall not prohibit."

(5) In paragraph (b), the codrafters were asked to add language specifying an exception for lawyers acting as temporary judges, referees, or court appointed arbitrators (tracking the persons covered by RPC 1-710) (4 yes, 2 no, 2 abstain)

(6) In paragraph (b)(4), the addition of the term "promptly" after the term "furnished" was deemed approved.

(7) In paragraph (b)(5), the addition of the phrase "or confidential" after the term "ex parte" was deemed approved.

(8) There was no objection to the recommendation that the codrafters work with Mr. Tuft to implement non-substantive revisions and organizational changes to better track MR 3.4.

(9) A recommendation to revise paragraph (g) to replace the term "venire" did not receive sufficient support.

(10) The codrafters were asked to revise paragraph (j) to track New York's proposed rule 3.5 (in part, adding a subdivision (4) referring to a communication "intended to influence the juror's actions in future jury service" (6 yes, 2 no, 0 abstain).

(11) In paragraph (k), the addition of the word "if" after the word "mind" was deemed approved.

(12) There was no objection the Chair deeming approved paragraphs (l), (m), and (n).

(13) All of Cmt. [3] was deleted (5 yes, 0 no, 2 abstain). It was understood that a new comment would be added that cites to Code of Civil Procedure sec. 206.

(14) All of Cmt.[4] and [5] was deleted (7 yes, 0 no, 0 abstain).

(15) All of Cmt.[7] was deemed deleted subject to a codrafter's recommendation to add the subject matter of this comment to proposed Rule 3.4.

With the above revisions, there was no objection to the Chair deeming the rule approved subject to a 10-day ballot to approve only the portions of the rule and comments that have been referred to the codrafters for further drafting. All other language redrafted during the meeting would not be re-opened by the 10-day ballot.

[Intended Hard Page Break]

H. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client

The Commission considered Draft 3.1 (dated January 8, 2008) of a discussion draft of proposed amended rule 3-100 [MR 1.6 and 1.8(b)]. Prof. Mohr led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a), the concept of “implied authorization” was deleted but this action was made contingent on a subsequent majority vote to include the concept in a comment (6 yes, 5 n, 0 abstain). It was understood that the issue of including the concept of “implied authorization” in paragraph (a) would be revisited if there is no subsequent majority agreement on a new comment.

(2) In paragraph (a), a recommendation to delete the definition of “confidential information” was defeated (4 yes, 7 no, 1 abstain). It was understood that the codrafters would add a proviso that the definition was only for purposes of rule 3-100 (i.e., “as used in this rule).

(3) In paragraph (a), a recommendation to delete the phrase “information related to the representation” was defeated (3 yes, 7 no, 0 abstain). The codrafters agreed to attempt a new comment explaining the parameters of the concept of “information related to the representation.”

Following discussion, the Chair asked the codrafters to prepare a revised draft in accordance with the guidance provided by the Commission.

[Intended Hard Page Break]

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

The Commission considered Draft 10 of proposed Rule 1.15 [4-100] (dated January 2, 2008). Ms. Peck led a discussion of the open issues and the following drafting decisions were made.

- (1) For the entire draft, the codrafters were asked to survey the use of the articles “a” and “the” when referring to the noun “lawyer” and to make recommendations in the next draft.
- (2) In paragraph (b), the word “expressly” was inserted after the word “as” and before the word “ordered” (6 yes, 4 no, 1 abstain).
- (3) For the entire draft, the codrafters agreed to substitute the phrase "Client or other person" for the phrase "client, other person, or third party."
- (4) For paragraph (e), there was no objection to the Chair deeming approved the following non-substantive revisions:

(e) The lawyer may establish a relationship with a merchant bank or electronic payment service ~~so that a to have client, or other person, or third party~~ may use credit card, debit, or other electronically transferred payments to pay for advanced fees or costs ~~paid directly in~~ into a trust account, provided that the contract with the merchant bank or electronic payment service requires that the lawyer's obligations for any charges, chargebacks and offsets be paid from a source that is not a trust account.

- (5) For paragraph (h), there we no objection to the Chair deeming approved the following rewrite:

“(h) In the case of funds held in a trust account that belonging in part to a client or other person and in part, to the lawyer, the lawyer shall withdraw the portion belonging to the lawyer at the earliest reasonable time after the lawyer's interest in that portion becomes fixed, provided that:”

- (6) Regarding paragraph (h)(1), the codrafters agreed to either move the language to a comment or to add a comment defining what is meant by the term “fixed.”

Following discussion, the Chair asked the codrafters to prepare a revised draft in accordance with the guidance provided by the Commission. In particular, the codrafters were asked to consider and implement any agreed upon “nits” submitted by Mr. Tuft and Mr. Sapiro.

[Intended Hard Page Break]

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

Proposed Rules 1.17.1 and 1.17.2 were approved by 10-day ballot obviating the need for this agenda item to be called for discussion.