

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

MEETING SUMMARY -OPEN SESSION

Friday, December 12, 2008
(9:15 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; Stan Lamport (by telephone); Raul Martinez; Kurt Melchior; Ellen Peck; Jerry Sapiro; Mark Tuft; Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Hon. Ignazio Ruvolo; and Dominique Snyder (leave of absence).

ALSO PRESENT: Randall Difuntorum (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Mimi Lee (State Bar staff); Michael Marcus (Board of Governor Liaison); Kevin Mohr (Commission Consultant); Donald Steadman (State Bar OCTC); and Mary Yen (State Bar Office of General Counsel).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE OCTOBER 31, 2008 MEETING

The draft summary was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

For the January 10, 2009 Board planning meeting, it was announced that the Chair, Mr. Tuft, the Commission Consultant, and Mr. Difuntorum would represent the Commission.

B. Staffs Report

Staff reported that the Board's deadline for January 10th agenda materials required that the comparison tables on the agenda be approved at the December 12th meeting with any follow-up revisions finalized by the end of next week.

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 1)

A. Rule 1.1 Competence [3-110] Comparison Table

The Chair led a discussion of the open issues on the draft comparison table for proposed Rule 1.1. The following drafting decisions were made.

(1) In paragraph 2 of the Introduction, the drafters were asked to revise the language to clarify that ABA jurisdictions enforce MR 1.1 in a manner that is consistent with the RPC 3-110 approach (7 yes, 3 no, 2 abstain). Mr. Tuft dissented from the direction of this explanation.

(2) Also in paragraph 2, the drafters were asked to include a citation to *Lewis v. State Bar* and clarify that existing Supreme Court precedent recognizes that the State Bar discipline is not the best forum for addressing a lawyer's single act of simple negligence (10 yes, 2 no, 0 abstain).

(3) In the explanation of the rejection of MR 1.1 Cmt. [1] and [2], the drafters were asked to clarify that these MR comments are either inconsistent with the standard used in proposed Rule 1.1 or are surplusage (7 yes, 3 no, 2 abstain).

(4) The explanations of Cmt. [4] and [5] were deemed approved.

(5) There was no objection to revising Cmt. [5], itself, to include the concept of "association" as means for a lawyer to acquire competence, and the phrase: "for ill-considered action under emergency conditions can jeopardize the client's interest" was deemed deleted.

(6) MR Cmt. [5] and [6] were deleted as unnecessary and inconsistent with the proposed Rule 1.1 standard (7 yes, 2 no, 1 abstain).

(7) Staff and the Consultant were authorized to finalize any additional edits with leadership (9 yes, 1 no, 0 abstain).

With above changes, there was no objection to the Chair deeming proposed Rule 1.1, as explained in the comparison table, approved for submission to the Board.

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B. Rule 1.5.1 Financial Arrangements Among Lawyers [2-200] Comparison Table

The Chair led a discussion of the open issues on the draft comparison table for proposed Rule 1.5.1 and indicated that the minor non-substantive revisions noted in emails (including Mr. Sapiro's points 1 through 4 on page 47 of the email compilation) would be deemed approved. The following drafting decisions were made.

(1) The statement of the dissenting position was deemed revised to include the following: "In their opinion, the client will have a better understanding of the consequences of the agreement to divide fees when the fee is available to be divided than at the beginning of the arrangement between lawyers, because at the time the fee will be divided, the quantum of fees to be divided will be known instead of speculative."

(2) The drafters were authorized to modify the explanations (including deletion of the citation to *Moran v. Harris*) to avoid repetition of points made in the introduction.

With above changes, there was no objection to the Chair deeming proposed Rule 1.5.1, as explained in the comparison table, approved for submission to the Board.

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C. Rule 1.8.10 Sexual Relations With Client [3-120] Comparison Table

The Chair led a discussion of the open issues on the draft comparison table for proposed Rule 1.8.10 and indicated that the minor non-substantive revisions noted in emails (including email points noted by Mr. Kehr and Mr. Sapiro) would be deemed approved. The following drafting decisions were made.

- (1) In the Introduction, the first line, the term "so-called" was deemed deleted,
- (2) For consistency throughout all of the comparison tables, there was no objection to using the word "minority" rather than "dissenters." Also, the word "argues" should be used in the place of the phrase "points out" when attributing the view of the minority. Staff and the Consultant were asked to review all of the tables to implement these stylistic conventions,
- (3) In the Introduction, the tenth paragraph, the word "bludgeon" was deleted and replaced with "retaliation,"
- (4) Mrs. Julien dissented from the recommendation that this rule be continued,

With above changes, there was no objection to the Chair deeming proposed Rule 1.8.10, as explained in the comparison table, approved for submission to the Board,

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D. Rule 3.2 [3-200] Comparison Table

The Chair led a discussion of the open issues on the draft comparison table for proposed Rule 3.2. The following drafting decisions were made.

(1) In the Introduction, third paragraph, the substitute language recommended by Mr. Tuft in his November 30, 2008 email at page 34 of the email compilation was deemed approved.

(2) In response to points raised by Mr. Kehr concerning the policy underlying the rule, the Consultant agreed to check if "civility" was a rationale previously considered that should be noted in the explanation.

(3) In the Introduction, second paragraph, the minor non-substantive revisions noted by Mr. Kehr (in points 1 and 2 of his email on page 33 of the email compilation) and Mr. Sapiro were deemed approved.

With above changes, there was no objection to the Chair deeming proposed Rule 3.2, as explained in the comparison table, approved for submission to the Board.

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E. Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member [1-311] Comparison Table

The Chair indicated that the table for proposed Rule 5.3.1, a proposed rule with no MR counterpart, was deemed approved with the exception of some small points raised concerning the introduction. In the Introduction, the minor non-substantive revisions and comments concerning a client protection rationale for the rule, noted by Mr. Kehr (in his email messages from November 26 and 27, 2008, on page 16 of the email compilation) were deemed approved. In addition, OCTC asked that consideration be given to including a requirement for the not-entitled lawyer to report to the State Bar or Supreme Court. The Chair indicated that this suggestion could be included in an OCTC public comment so that the Commission could consider it after the public comment distribution. There was no objection to the Chair deeming proposed Rule 5.3.1 as explained in the comparison table, approved for submission to the Board.

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**F. Rule 5.5 Unauthorized Practice of Law; Multi-jurisdictional Practice of Law [1-300]
Comparison Table**

The Chair indicated that the table for proposed Rule 5.5 was deemed approved with the exception of some small points raised concerning the rule and comment explanation. In the explanation of paragraph (a)(2) of the rule, Mr. Sapiro was asked to provide recommended language concerning the absence of a *mens rea* requirement in MR 5.5. In the explanation of Cmt. [2], the word "Commission" was added to the third sentence. In the explanation of MR 5.5, Cmt. [5], the word "under" was deleted and replaced with "by." With these changes, there was no objection to the Chair deeming proposed Rule 5.5, as explained in the comparison table, approved for submission to the Board.

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G. Rule 8.3 Reporting Professional Misconduct [1-120 & 1-500(B)] Comparison Table

The Chair led a discussion of the open issues on the draft comparison table for proposed Rule 8.3. The following drafting decisions were made.

(1) It was agreed that some of the explanation of paragraph (a) of the rule could be moved to the Introduction.

(2) In the explanation of paragraph (a), the first sentence was revised to read: "Proposed Rule 8.3 would add a new disciplinary standard not currently found in the California rules in any form."

(3) In the explanation of paragraph (a), the substitution of the phrase "duty of undivided loyalty" for "primary fidelity" was deemed approved. Also, the substitution of the word "vagueness" for "opaqueness" was deemed approved.

(4) In the explanation of paragraph (a), the description of the *Himmel* case was slightly revised to read: "[. . . lawyer who abided by the client's directive not to report her former counsel's misconduct suspended.]"

(5) In the explanation of paragraph (c), the reference to "MR 3.8(c)" was replaced with a reference to "MR 8.3(c)."

(6) There was no objection to revising Cmt. [1], itself, to add language from MR 8.3, Cmt. [3] so that it includes the following at the end of Cmt. [1]: "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

(7) There was no objection to revising Cmt. [2], itself, to add a bracketed reference to Rule 1.18 so that it reads: "... as provided in Business and Professions Code section 6068(e) and [Rule 1.18]."

With these changes, there was no objection to the Chair deeming proposed Rule 8.3, as explained in the comparison table, approved for submission to the Board.

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H. Rule 8.4 Misconduct [1-120X] Comparison Table

The Chair led a discussion of the open issues on the draft comparison table for proposed Rule 8.3. The following drafting decisions were made.

(1) In the explanation of paragraph (a), the substitution of the phrase "rule-by-rule" for "case-by-case" was deemed approved.

(2) In the explanation of paragraph (b), it was agreed that an explanation of the ABA's deletion of the concept of "moral turpitude" would be added.

(3) In the explanation of paragraph (c), it was agreed that to explain the proposed addition of "intentional" (and elimination of "negligent misrepresentation" as a violation of the rule) the language suggested by Mr. Difuntorum, including the case citations, would be added (see November 18, 2008 email).

(4) In the explanation of paragraph (e), the substitution of "8.4" for "8.4.1" was deemed approved. Also, the Chair's other minor non-substantive edits were deemed approved (see November 24, 2008 email, points 5, 7, and 8).

(5) In reconsidering the deletion of MR 8.4 Cmt. [5], it was agreed that the table should indicate the Commission's intent to revisit this issue following consideration of public comment.

(6) There was no objection to revising paragraph (b), itself, to use romanets to clarify the enumeration of the types of conduct that violate the rule. However, it was understood that further clarification may be considered following consideration of public comment.

(7) The minor non-substantive revisions in Mr. Sapiro's November 30, 2008 email (see page 53-54 of the email compilation) were deemed approved, with the exception of point number 3. To address point number 3, it was agreed that Mr. Tuft's explanation would be used.

(8) Regarding an OCTC suggestion to clarify whether disruptive conduct by a lawyer acting as a pro se litigant falls within the rule, the Chair asked that this issue be raised in a written public comment to assure that the Commission can consider it after the public comment period.

With these changes, there was no objection to the Chair deeming proposed Rule 8.4, as explained in the comparison table, approved for submission to the Board.

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IV. MATTERS FOR ACTION -CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 3)

A. Rule 1.17.2 Purchase and Sale of Geographic Area or Substantive Field of a Law Practice [2-300]

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 1.17.2 [2-300]. Mr. Sapiro led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) Regarding the general policy issue of whether a rule should permit the sale of a geographic area of law apart from any defined category of substantive law practice, the Chair indicated that the starting point would be the MR 1.17 precatory language that states: "A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:" The following votes were taken: (i) include substantive area as a part of a law practice (7 yes, 3 no, 0 abstain); (ii) include a substantive area tied to a geographic area (5 yes, 5 no, 0 abstain); and (iii) include a geographic area unrestricted (7 yes, 3 no, 0 abstain). With these votes, the Chair indicated that the other issues raised by the public comments would be discussed and that the general policy issue would be revisited after those issues are resolved.

(2) In Paragraph (a) the phrase "or purchase" was added to track the MR (9 yes, 0 no, 1 abstain).

(3) For paragraphs (a)(1), (a)(2) and (a)(3), the codrafters agreed to re-structure the language to use a single opening condition.

(4) In paragraph (a)(3), the codrafters were asked to impose the prohibition against competition after a sale of good will so that it applies to both substantive area sales and geographic area sales (7 yes, 0 no, 3 abstain). It was observed that California law is unique in permitting a vibrant policy of limiting business activities by sale of good will to negotiated conditions of ceasing practice and agreeing not to re-enter the business.

(5) Regarding the issue of adding a definition of a "geographic area," the codrafters agreed to consider guidance analogous to MR 1.17 Cmt. [4], [5] and [6] or to have the rule leave this definitional issue to the contract between the buyer and seller.

(6) Regarding the issue of clarifying the precise type of notice that is required by the rule, the codrafters agreed to consider proposing a comment that sets an appropriate standard. It was noted that under former Rule of Court 955, the standard for client notice was certified mail with a copy retained by the sender.

(7) There was no objection to the Chair deeming approved paragraphs (a)(5), (a)(6) and (a)(7) subject to the codrafters checking to see if Rule 1.17.1 includes any analog to (a)(5).

(8) Paragraph (a)(8), imposing restrictions on the role of a broker, was deleted (5 yes, 4 no, 1 abstain). It was understood that although a sale must be to a lawyer or law firm, a broker may be used but any fee or compensation to a broker would be governed by RPC 1-320

(9) Paragraph (a)(9), imposing a one-time only sale limitation, was deleted (6 yes, 2 no, 1 abstain).

(10) A recommendation to delete paragraph (a)(10) failed (4 yes, 4 no, 1 abstain) but it was agreed that the codrafters would revise it to address sales of both geographic and substantive areas.

(11) Upon a reconsideration of the above action on paragraphs (a)(9), (a)(10), and (a)(11), the codrafters were asked to try to adapt MR 1.17(a) (requiring ceasing practice) but also take the ABA concept of MR 1.17, Cmt.[2] that affords an escape valve for extraordinary circumstances (7 yes, 1 no, 2 abstain).

(12) In paragraph (b)(1), substituting "each" for "the" in line 50 was deemed approved. Also, there was no objection to the codrafters tracking the 90-days standard in Rule 1.17.1.

(13) In paragraph (b)(2), everything after "seller" at line 65 was deemed deleted in order to be consistent with Rule 1.17.1.

(14) In paragraph (c)(1), the word "and" was deemed added in order to be consistent with Rule 1.17.1.

(15) In paragraph (c)(2), everything after "seller" at line 88 was deemed deleted in order to be consistent with Rule 1.17.1.

(16) In paragraph (t), the minor non-substantive revisions noted by Mr. Tuft (October 27, 2008 email at page 60 of the email compilation) were deemed approved.

Following discussion, the codrafters were asked to attempt a revised draft rule that combines the terms of Rule 1.17.1 and Rule 1.17.2.

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B. Rule 5.4 Duty to Avoid Interference with a Lawyer's Professional Independence [1-310, 1-320, 1-600]

Mr. Tuft presented Draft 12,1 of proposed Rule 5.4 (dated October 19, 2008). The Chair indicated that a 10-day ballot would be used to finalize the approval of this rule as there were few Commission member comments on the draft.

(1) The minor non-substantive revisions noted by Mr. Kehr (October 25, 2008 email at page 53 of the email compilation) were deemed approved.

(2) In Cmt. [1B], the substitution of "lawyer's engagement" for "matter" was deemed approved.

(3) In Cmt. [3A], the phrase "and not governed by this rule" or similar language was deemed added at the end of the comment.

(4) In Cmt. [5A], subject to a review by the Consultant, the clause beginning: "Except as provided" was deemed deleted.

The codrafters were asked to implement the above changes in a revised draft to be distributed for 10-day ballot approval.

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C. Rule 1.7 Conflicts of Interests: Current Clients [3-310]

Matter carried over.

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**D. Rule 1.8.1 Business Transactions with a Client and Acquiring Interests Adverse to the Client
[3-300]**

Matter carried over.

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V. **MATTERS FOR ACTION -CONSIDERATION OF RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT**

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

Matter carried over.