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

MEETING SUMMARY - OPEN SESSION

Friday, January 16, 2009
(9:45 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); Robert Kehr; Stan Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Jerry Sapiro; Mark Tuft; Paul Vapnek (by telephone); and Tony Voogd.

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

ALSO PRESENT: Randall Difuntorum (State Bar Staff); Mimi Lee (State Bar Staff); Howard Miller (Board Liaison); Jeffrey Tidus (COPRAC Liaison); Russell Weiner (Office of the Chief Trial Counsel); and Mary Yen (Office of General Counsel) (by telephone).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE DECEMBER 12, 2008 MEETING

At the request of staff, consideration of the December 12, 2008 action summary was carried over to the next meeting.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair indicated the order of items to be called for discussion and noted the priority of finalizing proposed Rule 1.8.6 and Rule 1.15 in order to include them in the next public comment batch. The Chair also indicated that the new emphasis on comparisons to the ABA Model Rules permits codrafters to make recommendations to reconsider issues previously resolved. Staff was requested to add a folder at the Commission's collaboration site for all of the background materials that are being gathered to assist codrafters in drafting explanations for the deviations from the ABA Model Rules.

B. Staff's Report

Staff distributed a working draft of the Commission's 2008 Accomplishments Report. There was no objection to authorizing leadership to finalize the draft for submission to RAD. Commission members were asked to review the report and provide any comments or edits.

Staff reported on the Commission's special report to the Board at the January 10, 2008 Board planning meeting. The Commission presented its proposed format for selected rule comparisons with the ABA Model Rules. The Commission's representatives answered Board member questions about the Commission's proposed rules and specific deviations from comparable ABA Model Rules. The Board also discussed the Commission's charge and the guidance afforded on issue of conformance to the ABA Model Rules. Following discussion, the State Bar President assigned a new Board Subcommittee to review the Commission's charge and to report back with any recommendations for clarifications or changes. The State Bar President expressed appreciation for the Commission's hard work and effort. State Bar Deputy Executive Director also offered his perspective cautioning that a complete substitution of the current California rules with the ABA Model Rules would have a significant impact on the discipline system as that might spark litigation on issues that have long been settled by case precedents interpreting the current rules.
Leadership authorized to finalize

III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 3) & PROPOSED RULES NOT YET CIRCULATED FOR PUBLIC COMMENT (BATCH 4)

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

The Commission continued the discussion from its December 12, 2008 of a report on the public comments received on proposed Rule 1.8.1 [3-300]. Mr. Lamport presented Draft #11 of the proposed rule (dated November 17, 2008) and led a discussion of the codrafter's recommendations and the open issues. The Chair welcomed Russell Weiner of the Office of Chief Trial Counsel who provided comments on the issue of modification of fee agreements. The following drafting decisions were made.

(1) Regarding the issue of completely revising paragraph (a) to use the MR language, there was no objection to the codrafters making this change but also including additional language in the comments, perhaps as an add-on to Cmt. [1], clarifying the rule has two-prongs: adverse business transactions; and acquisitions of adverse interests.

(2) In paragraph (a), the second instance of the phrase "to the client" was retained (5 yes, 4 no, 1 abstain) but as this is a deviation from current MR 1.8(a), the codrafters will explain that the Commission is recommending tracking the pre-ABA Ethics 2000 version of MR 1.8(a) that includes the phrase.

(3) In paragraph (a), the MR phrase "can be reasonably understood" was retained (6 yes, 4 no,

0 abstain). Mr. Melchior asked that his dissent to this action be recorded as he views this as a material change that lessens public protection. (Note: This vote was a revote of an immediately prior vote due to a misunderstanding of the Chair's desire that motions be posed as recommendations to deviate from MR language.)

(4) In paragraph (b), the Chair inquired if there was a recommendation to delete the phrase "by the lawyer" at the end of the second line but there was no motion to make this change. As this is an addition to the MR language, it was understood that the codrafters would explain the language as affording greater public protection.

(5) In paragraph (b), the Chair inquired if there was a recommendation to delete the phrase "by the lawyer" at the end of the second line but there was no motion to make this change. As this is an addition to the MR language, it was understood that the codrafters would explain the language as affording greater public protection. Similarly, there was no motion to revise the phrase "advising to seek the advice" to track the MR language referring to the "desirability of seeking." It was understood that there is action affords greater public protection because "advising" a client to do something is a stronger statement than the MR's reference to a "desireability."

(6) In paragraph (c), a recommendation to change the MR client consent terminology to track the RPC consent language failed (2 yes, 8 no, 0 abstain).

(7) In paragraph (c), the term "essential" was deleted (9 yes, 1 no, 0 abstain) and it was understood that the codrafters would explain the added public protection that results from this deletion (e.g., that "essential" is an unnecessary limitation on the client's right to information about a conflicting interest).

(8) In paragraph (c), a recommendation to change the MR language by adding the term "thereafter" failed (2 yes, 7 no, 1 abstain).

(9) The minor non-substantive edits on paragraph (c) noted by Mr. Sapiro in his January 14, 2009 email were deemed approved (e.g., changing "effect" to "effects," changing "prior to" to "before," and changing "clients" to "client") with the exception of his suggestion to change "where" to "if."

(10) As a global stylistic matter, it was suggested that all defined terms used in the Commission's draft rules be printed in bold font to give notice to the reader that the term should be reviewed in the terminology section.

(11) Regarding the public comment received on the issue modification of fee agreements, a recommendation that the Commission not postpone deliberations on this issue until after RAD's action on COPRAC's proposed formal opinion Interim No. 05-0001 was approved (7 yes, 3 no, 0 abstain). Next, the Commission directed that a new comment be drafted stating the concept that the rule does not per se apply to every modification but may cover certain modifications (5 yes, 2 no, 2 abstain). It was understood that the codrafters could use the ABA approach of including "bookend" examples that illustrate where the rule clearly applies and where the rule clearly does not apply so that a lawyer understands that there is a continuum to consider in

deciding whether the rule applies to a modification. Mr. Lamport invited members to provide suggested language for this comment.

(12) In Cmt. [7], regarding the citation to *Fletcher v. Davis*, the addition of the phrase "for example" was deemed approved. Also, the phrase "significantly impair the client's receipt or use of the client's property, ...or summarily extinguish" was deemed approved.

(13) In Cmt. [7], a recommendation that the codrafters clarify that the concept in this comment does not abrogate the concept in Cmt. [5] (e.g. that the rule does not inherently apply to an ordinary contingent fee arrangement) failed (4 yes, 5 no, 0 abstain).

(14) In Cmt. [10], the codrafters agreed to make change the term "will" to either "might" or "could."

(15) A recommendation to modify Cmt. [15] to state that "the conflicted lawyer must inform the client that the lawyer is not representing that client in that transaction" failed (1 yes, 6 no, 2 abstain).

Following discussion, the codrafters were asked to implement the changes a revised draft and to place the draft into a MR comparison table. There was no objection to the Chair deeming the rule approved subject to review of the comparison table.

(Intended Hard Page Break)

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

Matter carried over.

(Intended Hard Page Break)

C. Rules 1.17.1 & 1.17.2 Purchase and Sale of a Law Practice [2-300]

Matter carried over.

(Intended Hard Page Break)

D. Rule 1.7 Conflicts of Interest: Current Clients [3-310]

Matter carried over.

(Intended Hard Page Break)

E. Rule 1.5 Fees for Legal Services [4-200]

Matter carried over.

(Intended Hard Page Break)

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

Matter carried over.

(Intended Hard Page Break)

G. Rule 4.2 Communication with a Person Represented by Counsel [2-100]

Matter carried over.

(Intended Hard Page Break)

IV. MATTERS FOR ACTION - CONSIDERATION OF RULES TENTATIVELY APPROVED, BUT NOT YET DISTRIBUTED FOR PUBLIC COMMENT (BATCH 4)

A. Consideration of Rule 1.8.6 [Rule 3-310(F)] Payments Not From Clients

The Commission considered Draft 4.5 (dated January 6, 2009) of proposed Rule 1.8.6. Mr. Kehr led a discussion of the open issues and the following drafting decisions were made.

(1) In paragraph (a)(1), a recommendation to use of the MR language "the client gives informed written consent. . . " was deemed approved.

(2) In paragraph (a)(2), a recommendation to use the MR language "there is no interference with . . . " was deemed approved.

(3) As a global stylistic matter, it was suggested that the phrase "client-lawyer relationship" be used rather than "lawyer-client relationship."

(4) In paragraph (a)(3), placing the reference to Rule 1.6 in brackets was deemed approved.

(5) Regarding the policy issue of the rule covering "cost reimbursement," a recommendation to not include this concept was approved (8 yes, 3 no, 0 abstain).

(6) The codrafters agreed to incorporate the revisions noted in Mr. Sapiro's January 14, 2009 email (e.g., the following drafting edits: in the introduction to the spreadsheet, at line 7, inserting the phrase "a lawyer's receipt of;" in the next line, deleting the phrase "respect to the" and substituting the phrase "if the lawyer receives;" in the ninth line of the introduction, deleting the word "by" and substituting "from;" two lines later, inserting the word "requires" and deleting the word "has;" in paragraph (b), deleting the word "and" substituting "or;" and, at line 25, deleting the word "and" and substituting the word "or.")

(7) In response to Mr. Tuft's January 12, 2009 email, Cmt. [2] was deemed deleted.

The codrafters were asked to implement the above changes in a revised draft for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule.

(Intended Hard Page Break)

B. Consideration of Rule 1.15 [Rule 4-100] Safekeeping Property

At the Commission's October 31, 2008 meeting this rule was deemed approved following a 10-day ballot. However, the codrafters were assigned to present the rule in the format of a MR comparison table. The Commission considered a draft table and the following drafting decisions were made.

(1) There was no objection to the Chair deeming approved the following revision of the rule title: "Safekeeping Property: Handling Funds and Property of Clients and Other Persons." It was observed that this version of the title the MR title but adds additional clarifying language that gives better notice to lawyers about the scope of the rule.

(2) In the Introduction, second paragraph, second sentence, the codrafters agreed to replace the word "cannot" with the phrase "does not work well" or some similar revised language.

(3) The explanation of paragraph (a) was deemed approved.

(4) The explanation of paragraph (b) was deemed approved.

(5) For the explanation of paragraph (c), the codrafters agreed to revise it to clarify that the additional language is taken from the current RPC.

(6) For the explanation of the MR 1.15(c) and proposed paragraphs (d) and (e), the codrafters agreed to revise it to specifically state why the MR language was rejected and why the additional rule paragraphs are a better approach.

(7) For the explanation of paragraph (f), the lead drafter agreed to consider email comments from the codrafters (that were not sent to the full Commission) and to include a revised explanation for 10-day ballot approval.

(8) The explanation of paragraph (g) was deemed approved.

(9) For the explanation of paragraph (h), the lead drafter agreed to consider email comments from the codrafters (that were not sent to the full Commission) and to include a revised explanation for 10-day ballot approval.

(10) The explanation of the deletion of MR 1.15(e) was deemed approved.

(11) The explanation of paragraph (l) was deemed approved.

(12) The explanation of paragraph (m) was deemed approved with the addition of a statement that the language tracks the current RPC.

The codrafters were asked to implement the above changes in a revised draft for submission to staff to conduct a 10-day ballot. There was no objection to the Chair deeming the proposed rule approved subject to the outstanding drafting that will be implemented in the 10-day ballot version of the rule. It was noted that the rule paragraphs will not be renumbered until

submission to RAD so the Commission members can easily compare the 10-day ballot version to current meeting draft. The Chair further explained that all previously approved rules will need to be approved following placement into the new MR comparison table format.

(Intended Hard Page Break)

C. Consideration of Rule 3.3 [Rule 5-200] Trial Conduct

Matter carried over.

(Intended Hard Page Break)

D. Consideration of Rule 3.6 [Rule 5-120] Trial Publicity

Matter carried over.

(Intended Hard Page Break)