

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

**MEETING SUMMARY - OPEN SESSION**

**Friday, June 9, 2006**  
(9:15 am - 5:00 pm)

**Saturday, June 10, 2006**  
(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; Robert Kehr; Stanley Lamport; Raul Martinez (Saturday); Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo (Saturday); Jerry Sapiro; Sean SeLegue; Mark Tuft; Paul Vapnek; Tony Voogd (Friday) (L.A.)

**MEMBERS NOT PRESENT:** (all members attended either both days or one day of the meeting)

**ALSO PRESENT:** Chris Ames (Assistant Attorney General); Jonathan Arons (BASF); Jim Biernat (BASF/COPRAC Liaison); Prof. Carole Buckner (Western State/COPRAC Liaison) (L.A.); Randall Difuntorum (State Bar staff); Harold Friedman (Alameda County Public Defenders Office); Audrey Hollins (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison) (by phone); Mimi Lee (State Bar staff); Lauren McCurdy (State Bar staff); Suzanne Mellard (COPRAC Liaison); Kevin Mohr (Commission Consultant); Laura Morgan (Cooper White & Cooper); Chris Munoz (BASF) (Saturday); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Peter Stern (T&E Executive Committee); 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 draft action summary for the February 3, 2006 was deemed approved as amended. Consideration of the April 7 & 8, 2006 summary was postponed.

**II. REMARKS OF CHAIR**

**A. Chair's Report**

The Chair addressed the following four administrative matters: (1) Members were reminded to prepare assignments with enough lead time so that codrafters have adequate time to work on the matter before the deadline for submission to staff; (2) As some items were received late, they would be postponed to the next meeting; (3) Members were informed that the Board of Governor's Committee on Regulation,

Admissions, and Discipline would consider the request for public comment on the first group of draft rules on June 16, 2006; and (4) Regarding the Commission's meeting schedule, the meeting planned for September 1<sup>st</sup> will be held in San Francisco and the meeting planned for July 28, 2006 has been changed from a two-day meeting to a one-day meeting.

## **B. Staff's Report**

Staff made available copies (hard copies and discs) of the Board Committee memorandum requesting public comment authorization. Staff reported that proposed new Rule of Professional Conduct 3-410 (re insurance disclosure) is also being considered by the Board Committee on June 16, 2006 and that the drafting suggestions submitted by the Commission's subcommittee would be handled as early public comment.

## **III. MATTERS FOR ACTION**

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

Mr. Kehr summarized the codrafters' report on the differences between RPC 4-210 and MR 1.8(e). The Chair called for a general discussion of the rule amendment issues presented in the report. Among the points raised during the discussion were the following:

(1) The larger context policy issue, that is only partly addressed by both the California rule and the ABA rule, is the concern about mercantilism pressures on the legal profession with regard to clients and the funding of cases. The book "Eat What You Kill: The Fall of a Wall Street Lawyer" by Milton C. Regan is a good example of how this problem impacts the legal profession.

(2) If a lawyer has funds and a client does not, there should not be a huge problem where that lawyer is willing to give the client the needed money or assume certain client expenses.

(3) Assistance to clients is an access to justice concern and the rule should balance this interest against the likelihood of abuses.

(4) Assuming that solicitation is one of the evils that the rule is intended to prohibit, that problem goes away after retention of a lawyer by a client and the only remaining issue appears to be conflicts.

(5) Even after retention, the problem of kickbacks and other financial arrangements can harm the lawyer-client relationship.

(6) Drafting a rule that sets differing standards for the same conduct using a pre and post retention trigger may not be a desirable line to draw.

(7) If the rule consists primarily of solicitation and conflicts issues then one approach would be to migrate those components to the respective rules and see what is left.

Following discussion, the codrafters were asked to prepare a first draft of a proposed amended rule.

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

Mr. Melchior presented a May 23, 2006 report on RPC 4-300 indicating that while there is no ABA counterpart, there are standards in the California Probate Code that must be addressed. A recommendation to retain the current rule was considered but there was no consensus in favor of that approach (5 yes, 6 no, 2 abstain). The Chair called for a discussion of the threshold policy issue of conformance to the Probate Code. Among the points raised during the discussion were the following:

(1) There is need for the strict prophylaxis that is present in the rule but absent in the Probate Code. Most probate sale procedures do not enjoy the protection or oversight of a judicial sale. The scrutiny given by a probate examiner is not the same as the scrutiny that is given by an adverse party or a judge. This results in the personal representative and the lawyer possessing the actual authority to approve a sale. In the absence of true adversarial procedures or judicial oversight, a prophylactic rule is the best policy.

(2) COPRAC's historical position was to support a rule that is stricter than the Probate Code and, to the extent conformance was needed, to lobby for statutory changes.

(3) California common law makes clear that the Supreme Court possesses inherent plenary authority over the regulation of lawyer conduct but the presence of differing standards is a trap for the unwary lawyer.

(4) In terms of Court supremacy, there might be a difference for this particular subject since it is the probate court that is making a determination consistent with applicable provisions in the Probate Code.

(5) A strict rule prohibition is too far afield from the permissive Probate Code approach. Consideration should be given to taking a RPC 3-300 approach in the rule as this may be an acceptable compromise position. For example, in Family Law Code § 2033, statutory provisions govern a family law attorney's real property lien and state that a lawyer must comply with RPC 3-300.

(6) The RPC 3-300 approach has never been the acceptable policy position in the rules. Starting with former rule 8 through former rule 5-103 and maintained in RPC 4-300, the policy has been a flat prohibition and this is because of the great vulnerability of the client in these situations. The protection of vulnerable clients should not be relaxed without a good reason to do so.

(7) If any rule is retained, there at least needs to be a cross reference to the Probate Code to deal with the trap concern.

(8) A different compromise approach would be to expressly except probate sales but retain the status quo for foreclosure, receiver, trustee or other judicial sales (which can be described as "bid sales" where lawyer is trying to get a low price purchase).

Following discussion, the Commission considered a recommendation to adopt Mr. Melchior's proposed language at page 8 of the agenda materials together with a new comment referring to rule 3-300 (1.8.1). There was no support for this approach (1 yes, 7 no, 2 abstain). The codrafters were asked to prepare a redraft that attempts to maintain the status quo, strict prohibition for all sales other than sales that fall under the permissive Probate Code provisions. In addition, Ms. Yen was asked to check with OCTC to determine if the discipline system has ever dealt with the differing standards and Mr. Sapiro was asked to see if Probate practice guides or other books in California address this issue.

[Intended Hard Page Break]

**C. Consideration of Rule 4-400 [ABA MR 1.8(c)] Gifts from Clients**

Mr. Ruvolo presented draft 1.1 of proposed rule 1.8.3 (4-400) dated May 23, 2006 and led a discussion of outstanding issues. Following discussion, there was no objection to using the Commission's 10-day ballot procedure to approve the rule. The disposition of the various issues and drafting decisions is summarized below.

(1) In paragraph (a)(1), the Commission considered a recommendation to delete the word "substantial" (despite the fact that the ABA counterpart includes the word "substantial") but there was no consensus to make this change (3 yes, 8 no, 0 abstain).

(2) In paragraph (b), to respond to the issue of inconsistency with the scope of the relevant Probate Code provisions, the codrafters were authorized to modify the language to track the Probate Code ("related by blood or marriage") (7 yes, 2 no, 0 abstain).

(3) In paragraph (b), the language was modified to incorporate the phrase: "registered domestic partner or equivalent in other states" (6 yes, 4 no, 1 abstain).

(4) In Cmt. [1], the codrafters were authorized to track the ABA language by using the term "induce" rather than "accept" (8 yes, 2 no, 0 abstain). Also in Cmt. [1], the codrafters were authorized to explore replacing the word "modest" with the phrase "of nominal value."

(5) In Cmt. [2], the language was modified to replace the concept of "detached advice" with the concept of "independent advice from another lawyer" (10 yes, 0 no, 0 abstain). Also in Cmt. [2], delete the last sentence (which is a sentence found in the current RPC) but note in the rule history/court filing that this deletion is for brevity and not intended as a substantive change (9 yes, 0 no, 1 abstain).

The codrafters were asked to implement the above changes and submit the redraft to staff to conduct the 10-day ballot procedure.

[Intended Hard Page Break]

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

The Commission considered draft 2 (dated February 9, 2006) of proposed rule 1.8.1 (3-300). Mr. Lamport summarized the prior consideration of the rule text and led a discussion of issues raised concerning the proposed comments. The following drafting decisions were made.

(1) In Cmt. [1], the last line was modified to use the phrase “a pecuniary” interest (7 yes, 4 no, 0 abstain).

(2) In Cmt. [2], the last line was modified to end with: “to the lawyer’s clients” (6 yes, 3 no, 1 abstain).

(3) There was no objection to deeming Cmt. [3] approved as drafted.

(4) In Cmt. [4], the first sentence was revised to read: “An ownership, possessory, security or other pecuniary interest adverse to a client arises when a lawyer acquires an interest in a client’s property that is or may become detrimental to the client, even when the lawyer’s intent is to aid the client.” (8 yes, 1 no, 2 abstain). The citation to *Hawk v. the State Bar* also was retained.

(5) In Cmt. [4], the second sentence was revised to read: “An adverse pecuniary interest arises, for example, when the lawyer’s personal financial interest conflicts with the client’s interest in the property; when a lawyer obtains an interest in a cause of action or subject matter of litigation or other matter the lawyer is conducting for the client; or when the interest can be used to summarily extinguish the client’s interest in the client’s property.” (7 yes, 2 no, 0 abstain). The citation *Fletcher v. Davis* also was retained.

(6) In Cmt. [4], it was understood that the last sentence served as a placeholder until further progress is made on the conflicts rules.

(7) In Cmt. [5], there was no objection to changing the word “owned” to “owed,” and no objection to combining Cmt. [5] with most of Cmt. [4] so that the last sentence of Cmt. [4] would become Cmt. [5] for now.

(7) In Cmt. [6], the first three sentences were deleted with the remainder revised to read: “~~Therefore, the~~ This Rule would not apply where the lawyer and client each make an investment on terms offered to the general public or a significant portion thereof. For example, the Rule is not intended to apply where A, a lawyer, invests in a limited partnership syndicated by a third party B, and A’s client, makes the same investment. Although A and B are each investing in the same business, A did not enter into the transaction “with” B for the purposes of the Rule.” (7 yes, 3 no, 0 abstain). It was understood that the codrafters were free to modify this language to make it clearer.

Following discussion, the codrafters were asked to implement the above changes in a revised draft. The Chair specifically asked that the codrafters consider adding proposed headings for relevant portions of the comments.

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

Mr. Vapnek presented a memorandum on the background of RPC 4-200. It was indicated that the primary difference with the ABA counterpart was that the MR 1.5 refers to “unreasonable fees” while RPC 4-200 refers to “unconscionable fees.” It also was noted that some of the factors listed in the rules were different. The Chair called for a discussion of the primary difference of an “unreasonable fee” standard v. an “unconscionable fee” standard. Among the points raised during the discussion were the following.

(1) Over forty states have adopted a version of MR 1.5. Only a handful have not.

(2) In California the unconscionable fee standard has been the policy since the 1930's. See *In re Goldstone* (1931) 214 Cal. 490 [6 P.2d 513].

(3) Consideration should be given to a two-tier rule that uses “reasonableness” as the normative standard but clarifies that only an “unconscionable” fee may subject an attorney to discipline. A consensus vote showed little support for this approach (3 yes, 8 no, 0 abstain).

(4) Any variance from the limited, historical unconscionable fee standard poses the risk that the State Bar discipline will become embroiled in fee disputes that are better handled by the mandatory fee arbitration system.

(5) The unreasonable fee standard also poses the risk that every fee claim action will be met with a rule violation defense. Such a result would not be a good one for the overburdened courts or the fee arbitration system.

(6) The credibility of the Commission and the State Bar will be subject to attack if the ABA's majority rule on the regulation of fees is rejected without a well articulated public protection rationale.

(7) While the precise word used in the rule has some importance in terms of perception, for actual disciplinary purposes, the factors and criteria arguably have greater significance.

(8) A problem with moving to the unreasonable fee standard is that there is much case law in California on the unconscionable fee standard and this may be one situation where California needs to have a necessary departure from the ABA.

(9) The 1985 COPRAC report suggests that the Department of Justice had anti-competitive concerns with an “unreasonable fee” standard and suggested that the proper standard was an “excessive fee.”

(10) An unreasonable fee standard would be misleading to the public to the extent that it created a false impression that the discipline system had the resources to undertake all of the matters that currently flow through the mandatory fee arbitration system.

Following discussion, the Commission considered a recommendation to retain the unconscionable fee standard found in RPC 4-200(A) and not amend the rule to track the

ABA rule. (It was understood that the factors in paragraph (B) would remain open for discussion.) This recommendation was approved as the drafting instructions to the codrafters (6 yes, 5 no, 0 abstain). A Commission member asked that the record of the meeting state that the “unreasonable fee” standard was considered but rejected. The codrafters were asked to implement the above changes in a revised draft. Staff was asked to find a copy of the Department of Justice letter referenced in the 1985 COPRAC report.

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## **F. Proposed Rule 5.4 [Rule 1-310X]. Professional Independence of a Lawyer**

Mr. Tuft presented a May 26, 2006 memorandum addressing the recent Supreme Court decision in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 and its impact on the Commission's proposed new rule 5.4. It was observed that the Commission's proposed new rule would be helpful to the State Bar's consideration of the larger regulatory and UPL issues that have been referred to the State Bar for study as an integral part of the *Frye* decision. It also was noted that the proposed new rule deals only with the conduct of lawyers while the *Frye* decision primarily implicates the direct regulation of non-profit corporations that are engaged in practice of law activities.

The Commission considered a recommendation to postpone any and all work on proposed rule 5.4 until after completion of the State Bar study. A consensus vote showed little support for this approach (1 yes, 7 no, 1 abstain).

In recognition of the fact that the proposed rule had been previously approved by the Commission prior to the Supreme Court's issuance of *Frye*, the Chair called for discussion of only those aspects of the rule raised by codrafters or in Commission member comments in response to the codrafters' recommended changes. The following decisions were made in approving the codrafters' recommendation.

(1) Cmt. [6] was approved as drafted (8 yes, 0 no, 1 abstain).

(2) New Cmt. [5] was approved as drafted (6 yes, 2 no, 1 abstain).

(3) After the above votes, the Commission considered a recommendation to combine Cmt. (6) and new Cmt. [5]. This change was accepted (5 yes, 4 no, 0 abstain).

(4) There was no objection to a recommendation to postpone consideration of the codrafters' new paragraph (e) until after the State Bar's *Frye* study.

(5) There was no objection to including, as a placeholder, a cross reference to MR 6.3.

With these changes, there was no objection to deeming the rule approved. The codrafters were asked to submit a final version to staff for sharing with the State Bar's *Frye* committee. In addition, to avoid member and public confusion, a request was made to clarify in any public comment draft of proposed rule 5.4 that the rule is a separate matter from the State Bar's overarching *Frye* study (7 yes, 1 no, 2 abstain).

[Intended Hard Page Break]

**G. 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]

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

Mr. Mohr presented a May 25, 2006 memorandum identifying rule amendment issues concerning the duty of confidentiality. It was noted that the ABA Model Rules include confidentiality exceptions in rules other than MR 1.6. The Chair called for a general discussion of the issues identified by the codrafters and, in particular, the codrafters' request for feedback on whether there are other issues. Among the points raised during the discussion were the following.

(1) The AB 1101 experience is precedent for a cooperative effort among the Legislature, the Supreme Court and the State Bar. Any Commission work on this matter should account for the need for continued cooperation. While this is not a substantive issue, it is an important process and communication issue.

(2) The substantive issue of "implied authority" is a good example of a topic that technically is not a confidentiality exception issue but nevertheless should be coordinated with the statutory duty of confidentiality.

(3) The Commission's energies are best directed to the substantive merits of confidentiality issues. The Board of Governors through its legislative staff are the appropriate persons for managing communication and coordination issues with both the Legislature and the Supreme Court. The Board of Governors' recent position in opposition to AB 1612 was based on a concern about piecemeal reform of confidentiality and it reflects the Board's recognition of the complexity of confidentiality regulation in California.

The Chair indicated that discussion of the codrafters' issues would continue at a future meeting.

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

Matter carried over.

[Intended Hard Page Break]

**J. 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 May 22, 2006 memorandum providing a draft of comments for proposed rule 1.7 and summarizing concerns raised by Mr. Tuft about the differences between the proposed rule and the approach to conflicts used in the Model Rules. Mr. Tuft noted that his concerns should not be construed to be an “either or” choice between RPC 3-310 and MR 1.7. The Chair welcomed Richard Zitrin, former COPRAC Chair, who concurred with Mr. Tuft’s views and addressed the Commission on the benefits of developing a proposed rule that tracks the ABA conflicts rules. Following discussion of Mr. Zitrin’s observations and Mr. Tuft’s concerns, the Commission considered a recommendation to continue with the current approach of adapting the current California conflicts rules to a Model Rule format rather than using the Model Rules as the baseline for drafting language and analyzing conflicts issues. The Commission agreed with this recommendation (8 yes, 2 no, 1 abstain).

Next, the Chair called for discussion of the codrafters’ proposed rule comments and the following drafting decisions were made.

(1) Cmt.[5a] was deleted (6 yes, 2 no, 3 abstain) due to a concern that it was a vague and incomplete discussion of the concept of conflicts that cannot be waived.

(2) There was no objection to the Chair’s request that the codrafters consider whether the comments should be revised to more clearly define what is meant by the concept of “directly adverse.”

(3) The last sentence of Cmt.[7] was deleted (6 yes, 3 no, 1 abstain).

(4) There was no objection to using Cmt. [12] as a placeholder until the codrafters develop a report and recommendation on the concept of “thrust upon” conflicts (see *Gould v. Mitsui Mining* (N.D. Ohio 1990) 738 F.Supp. 1121).

(5) There was no objection to a recommendation that the codrafters do further drafting to clarify in relevant comments that “multiple representations” do not have to be “joint representations” under the terminology used in the proposed rule.

(6) There was no consensus to delete line 170 to 177 of Cmt. [18] (5 yes, 5 no, 0 abstain).

(7) There was no objection to a recommendation that the codrafters do further drafting on Cmt. [19] to clarify the issue of advance consent and revocation of consent.

The codrafters were asked to implement the drafting decisions discussed in a revised draft. The Chair indicated that discussion of the comments would continue at the next meeting.

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

The Commission considered Draft 9 of proposed amended rule 2-100 dated May 22, 2006. Mr. Martinez summarized the prior consideration of the rule and highlighted the fact that the Commission had recently received of numerous written comments from prosecutors throughout California and the California Attorney General expressing concerns about the proposed change from “party” to “person” that is present in the Commission’s current draft rule.

The Chair welcomed Assistant Attorney General Chris Ames who indicated that Ron Reiter and Chris Carpenter were unavailable to attend. The Chair also welcomed Harold Friedman of the Alameda County Public Defender’s Office and invited him to offer comments. Mr. Ames addressed the Commission on the concerns raised in the written comments submitted by the Attorney General and the various district attorney offices. Mr. Melchior advised the Commission that he had a lunch meeting with Mr. Carpenter and that these issues were discussed. Mr. Ames explained that his expertise was in consumer protection and related various examples of consumer fraud investigations that would be adversely impacted by the change from “party” to “person.” The Chair called for a discussion of these concerns and among the points raised were the following.

- (1) To respond to the concerns raised, consideration should be given to developing compromise language to clarify that lawful investigatory practices are not intended to be impaired by the change from “party” to “person.”
- (2) The use of the term “person” in ex parte contact rules is the majority rule throughout the country. The ABA worked with the Department of Justice on investigatory issues with ABA Ethics 2000’s proposed MR 4.2 and ended-up with a “communications authorized by law or court order” exception to the rule.
- (3) The State Bar court’s decision in the *Dale* case is a correct interpretation of the rule and the Commission should not change from “party” to “person.” An economic analysis of the lawyer conduct at issue suggests that the burden should be on the lawyer for a represented person to exercise client control rather than on every attorney conducting an informal investigation to act at their peril in dealing with non-parties.
- (4) Any clarification made by the Commission must deal with the fact that government lawyers participate in the investigation of civil prosecutions as well as criminal prosecutions. For example, investigatory contact is needed to ascertain whether there is compliance with civil injunctions against unlawful acts. Prosecutors have a duty to monitor compliance with injunctions that could be easily frustrated by the Commission’s proposed rule.
- (5) The State Bar has previously explored the approach of crafting a detailed and specific RPC 2-100 exception for investigatory activities and that approach has proven to be problematic due to situational factors, including recognition of the fact that pre-indictment is a critical time period for the role of defense attorney and that a prosecutor controls time lime form making formal charges.

(6) The current rule as interpreted by the Attorney General's published opinion and all of the relevant case law developed over time establish an acceptable status quo and equilibrium. Any change in the rule language poses a great risk of undermining existing authorities and creating an immense disciplinary chilling effect on the conduct of prosecutors.

(7) Broad exceptions to the rule could swallow the prohibition as it applies in prosecutorial settings. Defendants and defense counsel need the protection afforded by the rule as a complement to constitutional protections.

Following discussion a motion was made to delete paragraph(c)(4) [re non-custodial pre-indictment contacts] but a superceding motion to table was made. The Chair called for discussion of the motion to table and it was observed that deferring action has the benefit of giving time to the prosecutors and other interested persons to develop compromise language for the rule. Upon vote, the motion to table was passed (9 yes, 2 no, 1 abstain). In light of this action, the Chair made the following requests of the interested persons: (1) submit draft language by June 30, 2006 (it was understood that any such submission could include a clear statement of a preference for the status quo); and (2) rather than submitting boilerplate written comments, inquire with colleagues in other jurisdictions who are under MR 4.2 and provide input on their experience.

[Intended Hard Page Break]

**L. Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re Impaired Clients) [ABA MR 1.14].**

The Commission considered Draft 7 of proposed new rule 1.14 in a codrafter memorandum dated May 24, 2006. Ms. Foy presented the draft rule indicating that the direction of the latest draft had received input and support from interested parties. The Chair welcomed Peter Stern, Trust & Estates Section Liaison, who reported that the section was encouraged by the Commission's work on a rule and that the section has decided not to pursue a confidentiality legislative proposal in the current legislative session. The Chair called for a discussion of codrafters' issues raised in the memorandum and the Commission member issues raised in e-mail messages. The following drafting decisions were made.

(1) In Cmt. [1], the codrafters agreed to revise the fourth sentence with regard to the reference to a "severely incapacitated person."

(2) In Cmt. [2], the codrafters agreed to work with Mr. Sapiro in preparing a revised draft clarifying the steps that a lawyer must/may take before taking protective action under the new rule. It was understood that both Mr. Sapiro's and Mr. Kehr's suggestions would be considered.

(3) In Cmt. [3], there was consensus that this is a drafting issue and there was no objection to the codrafters using Mr. Kehr's suggestions (in notes 3 & 4 of his June 5, 2006 e-mail message) to revise the comment.

(4) In Cmt. [4], the codrafters indicated that this was placeholder language and agreed to review examples to be provided by Mr. Sapiro in revising the comment. A recommendation was made to modify the last sentence to read "may, but is not required to, seek guidance. . . ." There was no consensus to make this change (3 yes, 7 no, 1 abstain).

(5) There was a consensus to add to Cmt. [4], or in another place, the concept that a lawyer is permitted to seek guidance concerning an impaired client only in ways that are consistent with the duty of confidentiality or that fit evidentiary privilege exceptions, such as Evidence Code § 952 (8 yes, 1 no, 1 abstain).

(5) For Cmts. [5], [6], & [7], and also as a global style matter referred to staff and Mr. Mohr, codrafters to be consistent when stating that a rule or a rule paragraph is not applicable or "not intended" to be applicable to a specified situation. Also, the codrafters agreed to reconsider Cmts. [5] & [6] in light of Mr. Sapiro's concerns that the language is overbroad as to the representation of minors and criminal defendants.

(6) In Cmt. [7], there was a consensus to delete the reference to RPC 3-600 (9 yes, 0 no, 2 abstain).

Following discussion, the codrafters were asked to implement the drafting decisions discussed in a revised draft. The Chair indicated that discussion of the comments would continue at a future meeting.

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**M. 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]

## **N. Consideration of Rule 3-700 [ABA MR 1.16] Termination of Employment**

The Commission considered a revised draft of proposed rule 1.16 presented by Mr. Kehr. The Chair invited Harold Friedman of the Alameda County Public Defender's Office to address the Commission on his concerns that Prop. 115, implemented in the Penal Code, reflects a public policy that certain information should not be shared with defendants. Mr. Friedman emphasized that the statutory law makes it a crime for an attorney to release certain information and if the rule is not clarified by an express exception then defense attorneys, in particular public defenders with limited staff and funding, would be under a time-consuming and staff intensive burden of redacting documents in an attempt to comply with both the State Bar disciplinary rule and the Penal Code. The Chair called for discussion of the exception language suggested by Mr. Friedman in his June 5, 2006 letter.

Following discussion, a recommendation was made that the codrafters use the concept of Mr. Friedman's suggested language to revise paragraph (e)(1) along the lines of the following:

(1) Subject to any protective order, ~~or non-disclosure agreement~~ order or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all the client papers and property.

It was understood that the codrafters would also add a rule comment with specific references (listed in Mr. Friedman's suggested paragraph (f)) to Penal Code §§ 1054.2 and 1054.10, and possibly to Penal Code § 1054.2(b) concerning private investigators appointed to assist a pro per party) (12 yes, 0 no, 0 abstain). It was also understood that the proposed rule 1.4 drafting team would consider adding a similar clarification to proposed rule 1.4 as part of the post public comment revisions.

Next, the Chair called for a discussion of the issues identified in the codrafters' revised rule and the following drafting decisions were made.

(1) The Commission considered a recommendation to add the permissive withdrawal trigger of MR 1.16(b)(4) (re repugnant matters, unreasonably difficult clients, and clients who act contrary to advice) but there was no consensus to make this change (2 yes, 8 no, 2 abstain).

(2) There was no objection to a recommendation that the codrafters do further research and make a recommendation on whether RPC 3-700(c)(1)(e) should be included in the proposed rule. Background information is needed on why the trigger is limited only to representations involving matters not pending before a tribunal.

(3) In paragraph (b), there was a consensus to address the overlapping concepts in (b)(2) and (b)(3) by combining them into a single subparagraph (5 yes, 3 no, 3 abstain).

(4) Paragraph (b)(6) was adopted as drafted (8 yes, 3 no, 1 abstain). There was no consensus to change the language of this subparagraph to use an "informed consent" standard rather than the existing phrase "client knowingly and freely assents."

(5) Regarding the formulation of the triggers for withdrawal, the Commission considered a recommendation that the current rule's "laundry list" approach be retained and not changed to a generalized statement of permissive withdrawal. There was consensus to use the "laundry list" approach (10 yes, 1 no, 1 abstain).

(6) There was a consensus to include the concept of subparagraph (b)(7) as drafted (7 yes, 2 no, 2 abstain) but it was understood that the codrafters may do further drafting to clarify the "good faith belief" standard as an objective or subjective test.

(7) To maintain the concept of an "other good cause" trigger for permissive withdrawal, there was a consensus to include MR 1.16(b)(7) in the place of proposed subparagraph (b)(11) (6 yes, 4 no, 0 abstain).

Following discussion, the codrafters were asked to implement the drafting decisions discussed in a revised draft. The Chair indicated that discussion of the comments would continue at a future meeting.

[Intended Hard Page Break]

**O. Consideration of Concept of Law Firm Discipline**

Matter carried over.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]