

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

*DRAFT MEETING SUMMARY - OPEN SESSION*

**Friday, July 24, 2009**  
(9:15 am - 5:00 pm)

**Saturday, July 25, 2009**  
(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; Stan Lamport (by telephone); Raul Martinez; Kurt Melchior; Ellen Peck (by telephone); Hon. Ignazio Ruvolo; Jerry Sapiro; Dominique Snyder (by telephone); Mark Tuft; Paul Vapnek; and Tony Voogd.

**ALSO PRESENT:** Cydney Batchelor (State Bar Office of Trial Counsel); Carol Buckner (COPRAC Liaison) (Saturday, by telephone); Randall Difuntorum (State Bar staff); Robert Hawley (State Bar Deputy Executive Director); Rex Heinke (State Bar Board of Governors); Diane Karpman (Beverly Hills Bar Association Liaison); Mimi Lee (State Bar staff); Dianne Jackson McLean (COPRAC Liaison) (Friday); Howard Miller (State Bar Board of Governors) (by telephone); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison) (by telephone); and Mary Yen (State Bar Office of General Counsel).

**I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE MAY 8 & 9, 2009 MEETINGS**

The draft action summary was deemed approved.

**II. REMARKS OF CHAIR**

**A. Chair's Report**

The Chair welcomed Board of Governor representatives: Rex Heinke; Michael Marcus; and Howard Miller (State Bar President Elect). The Chair reported on the State Bar's plans to prioritize the work of the Commission. Among the plans discussed were: revising the meeting schedule to set monthly two-day meetings by videoconference (with the exception of an in-person meeting at the 2009 State Bar Annual Meeting in San Diego); providing lap top computers for Commission member use at every meeting; increasing staff support; and offering shared document projection during meetings to facilitate drafting by committee, as needed.

It was also reported that a new Board Committee would be launched at the start of the 2009 – 2010 Board year. The new Board Committee would provide direct oversight for the Commission’s work, including issuing rules for public comment and considering adoption of rules following review of public comment. It was announced that Governor Marcus will be serving as the chair of the new Board Committee. Regarding State Bar staffing, it was noted that senior management for the Office of Professional Competence has been transferred from the State Bar General Counsel to State Bar Deputy Executive Director Robert Hawley. Mr. Hawley indicated that he fully supported the work of the Commission and that he would be available to consider any resource augmentations that might be needed to prioritize the completion of the Commission’s work.

To expedite the Commission’s work, the Chair described several new procedures including: (1) asking staff to prepare agenda items using the relevant Model Rule language for any assignment that is not timely submitted; (2) actively limiting meeting debates by seeking a vote once there has been one Commission member speaker pro and one Commission member speaker con on most issues (but this is not intended to limit the input of meeting visitors); and (3) requiring all rule drafts – regardless of the stage in the process – to be submitted in a Model Rule comparison chart format.

Governor Miller thanked the Commission members for their hard work and commitment to prioritizing the completion of the rule amendment project.

## **B. Staff’s Report**

In accordance with the new plans for monthly two-day meetings by videoconference, staff distributed a draft 2009 – 2010 meeting schedule and the Commission members were asked to review and report their respective availability. Member availability was tallied and it was determined that there would be a quorum for all of the scheduled meetings. Members who cannot make a meeting were asked to coordinate responsibility for assignments with their codrafters.

Staff also explained how to access the Commission meeting materials using the Adobe Acrobat program on the provided State Bar lap top computers. It was noted that the latest version of the PDF files for each agenda item contains bookmarks and email compilations.

## **III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET CIRCULATED FOR PUBLIC COMMENT**

### **A. Consideration of Rule 6.5 (Nonprofit and Court-Annexed Limited Legal Services Programs)**

Matter carried over.

## B. Consideration of Rule 1.9 (MR 1.9) Duties to Former Clients [Rule 3-310(E)]

The Commission considered Draft 3.3 (7/2/09) of proposed Rule 1.9. Mr. Tuft led a discussion of open issues identified in a redline/strikeout draft comparing the proposed rule to the prior draft, Draft 2.4 (4/18/09). The following drafting decisions were made:

(1) In paragraph (a) and the entire rule, the term “person” would be retained to track the Model Rules but a new comment would be added to address whether that term encompasses artificial persons such as corporate clients and to clarify that a person who is a client ordinarily means a *current* client (8 yes, 1 no, 0 abstain).

(2) In paragraph (b)(2), a recommendation to add a reference to Bus. & Prof. Code §6068(e) was considered but rejected (4 yes, 7 no, 1 abstain).

(3) In paragraph (c)(1), adding “current” to describe “client” was deemed approved.

(4) For the entire rule and comments, the Chair noted that the deletion of the phrase “or require” in reference to laws concerning a lawyer’s disclosure of confidential client information is a tentative decision that will be treated as an open issue when the rule returns from public comment.

(5) In Cmt. [1], the second sentence, substituting “or” for “and” was deemed approved. With this change, Cmt. [1] was approved (7 yes, 0 no, 5 abstain).

(6) In both Cmt. [1] and Cmt. [2], the codrafters were asked to modify relevant language on the purpose of the rule so that the concept of “a substantial risk” to confidentiality/loyalty is the key rather than the idea of any clear detrimental impact to those duties (9 yes, 0 no, 3 abstain).

(7) In Cmt. [2], all of the language was generally adopted (6 yes, 1 no, 5 abstain) but it was understood that the codrafters would: change “transaction” to “matter” in the last line; modify the references to “First” (as there is no “second”) and “is intended to;” and possibly implement the concept of “foreseeably will” rather than “may” or “could.”

(8) In Cmt. [3], all of the language was generally adopted (8 yes, 3 no, 3 abstain) but it was understood that the end of the comment would be revised as follows: “. . .however, paragraph (a) would not ordinarily apply if the lawyer later defends a tenant of the completed shopping center in resisting eviction for nonpayment of rent if there is no substantial relationship between the zoning and eviction matters.”

(9) In Cmt. [4], next to last line, the word “An” was substituted for “The” and with that change the comment was adopted (10 yes, 2 no, 1 abstain).

(10) Consideration of Cmt. [5] was deferred to permit the codrafters to make recommendations on the issues raised (i.e, the issue of “materiality” of information and the issue of the “substantial risk” concept).

(11) Cmt. [6], [7], and [8] were sent back to the codrafters for further consideration given the revisions made to the rule and the other comments.

The codrafters were asked to implement the above changes in a revised draft, in comparison chart form, to be considered at the Commission’s next meeting.

**C. Consideration of Rule 1.11 Special Conflicts of Interest for Former and Current Officers and Government Employees [Rule 3-310]**

The Commission considered a memorandum from Mr. Sapiro dated 7/7/09 on proposed Rule 1.11. Mr. Sapiro led a discussion of the open issues and the following drafting decisions were made:

(1) In paragraph (b), the term “knowingly” was retained (9 yes, 3 no, 2 abstain). Also in paragraph (b), changing “disqualified” to “prohibited” was deemed approved and the phrase “lawyers in” was deleted (10 yes, 3 no, 0 abstain).

(2) In paragraph (b), the language of MR 1.11(b) generally was adopted but with the phrase “the firm promptly” deleted at the end (11 Yes, 2 no, 0 abstain).

(3) In paragraph (b)(1), the language of MR 1.11(b)(1) generally was adopted but “prohibited” was substituted for “disqualified” (13 yes, 1 no, 0 abstain). It was understood that the components of what constitutes an adequate screen would remain an open issue to address in this rule or in a terminology section or both.

(4) In paragraph (b)(2), the language of MR 1.11(b)(2) was adopted (including retention of the passive voice) (12 yes, 1 no, 1 abstain).

(5) Upon further consideration, paragraph (b)(1) and (2) of the language developed by the codrafters was deleted (12 yes, 0 no, 1 abstain).

The codrafters were asked to implement the above changes in a revised draft, in comparison chart form, to be considered at the Commission’s next meeting.

(Intended Hard Page Break)

**D. Consideration of Rule 1.6 [MR 1.6] Confidentiality of Information**

1) Consideration of Discussion Draft Rule

The Commission discussed the threshold issue of whether it should proceed with consideration of a rule in light of the results of the Commission's deliberations on the discussion draft. A recommendation to cease consideration of a rule was rejected (4 yes, 8 no, 0 abstain). The Chair indicated that discussion would continue at the next meeting and requested preparation of a MR comparison chart.

2) Consideration of Issue Referred by the California Law Revision Commission

This item was specially set for discussion for 1:30 pm on Friday, July 24, 2009. The Chair welcomed attorney Paul Hoffman who attended by telephone to address the Commission regarding this matter. Mr. Hoffman explained the concerns presented to the California Law Revision in connection with amendments to the statutory attorney-client privilege, including the specific issue of demands for files of a deceased client when there is no trustee for the decedent estate to waive privilege or the duty of confidentiality. Following discussion, the Chair asked Mr. Hoffman to review the Commission's discussion draft of a possible confidentiality rule to see if it might address the concerns.

(Intended Hard Page Break)

**E. Consideration of MR 1.2 [No RPC counterpart] Scope of Representation and Allocation of Authority Between Lawyer and Client**

The Commission considered Draft 1 (7/6/09) of proposed Rule 1.2. Ms. Snyder led a discussion of open issues identified in a redline/strikeout draft comparing the proposed rule to MR 1.2. It was noted that paragraph (d) of the proposed rule was the Commission's previously approved Rule 1.2.1 that was developed as a part of the Batch 1 public comment proposals. The following drafting decisions were made:

(1) Paragraph (a) was adopted (12 yes, 1 no, 0 abstain). It was noted that the language is identical to the language of MR 1.2(a).

(2) Paragraph (b) was deemed approved as there were no objections to the language prepared by the codrafters.

(3) Paragraph (c) was adopted (13 yes, 0 no, 0 abstain). It was noted that the language was identical to the language of MR 1.2(a).

(4) The Commission considered but rejected a recommendation to treat Rule 1.2.1 as a separate standalone rule rather than including it as paragraph (d) of Rule 1.2 (6 yes, 6 no, 1 abstain).

(5) In paragraph (d), the first line, the language was reverted back to the language of MR 1.2 (9 yes, 2 no, 1 abstain).

(6) A recommendation to collapse paragraphs (d)(1) and (d)(2) into a single paragraph to track the structure of MR 1.2 was considered but rejected (3 yes, 8 no, 1 abstain).

(7) In paragraph (d)(1), a recommendation to delete the phrase "or a violation of any law, rule, or ruling of a tribunal" was considered but rejected (3 yes, 9 no, 0 abstain).

The codrafters were asked to implement the above changes in a revised draft, in comparison chart form (including recommendations on the rule comments), to be considered at the Commission's next meeting.

(Intended Hard Page Break)

**F. Consideration of MR 2.1 [No RPC counterpart] Advisor**

As no materials were received, this matter was not called for discussion.

(Intended Hard Page Break)

**G. Consideration of Rule 2.3 [No RPC counterpart] Evaluation for Use by Third Persons**

As no materials were received, this matter was not called for discussion.

(Intended Hard Page Break)

#### **H. Consideration of MR 8.5 [Rule 1-100(D)] Disciplinary Authority; Choice of Law**

The Commission considered Draft 1 (7/7/09) of proposed Rule 8.5. Mr. Melchior led a discussion of open issues identified in a MR comparison chart comparing the proposed rule to MR 8.5. The following drafting decisions were made:

(1) In paragraph (a), the language of MR 8.5(a) was adopted (10 yes, 3 no, 0 abstain). It was understood that the phrase “this jurisdiction” would be replaced with “California.”

(2) In paragraph (b), the introductory language, the language of MR 8.5(b) was deemed approved.

(3) In paragraph (b)(1), the language of MR 8.5(b)(1) was adopted (10 yes, 3 no, 0 abstain).

(4) In paragraph (b)(2), the safe harbor concept (in the last sentence) was deleted (12 yes, 0 no, 1 abstain). With this change, the language of paragraph (b)(2) was deemed approved.

The codrafters were asked to implement the above changes in a revised draft, in comparison chart form (including recommendations on the rule comments), to be considered at the Commission’s next meeting.

(Intended Hard Page Break)

**IV. MATTERS FOR ACTION – CONSIDERATION OF COMPARISON TABLES FOR RULES PREVIOUSLY DISTRIBUTED FOR PUBLIC COMMENT (BATCHES 1 THROUGH 3) AND SUBSEQUENTLY REVISED**

**A. Rule 1.4 (MR 1.4) Communication [3-500, 3-510]**

The Commission considered Draft 1 (4/25/09) of a proposed Rule 1.4 comparison chart comparing the proposed rule to MR 8.5. Justice Ruvolo led a discussion of the open issues and the following drafting decisions were made:

(1) In the introduction and the explanation, the codrafters agreed to use a consistent reference to both the existing California rule (RPC 3-500) and statute (Bus. & Prof. Code §6068(m)) on client communication when explaining that the proposed rule conforms to existing law.

(2) In paragraph (a)(1) of the proposed rule, restoring the stricken phrase “as defined in [Rule 1.0(e)]” was deemed approved. Also, the codrafters were asked to add the concept of “written disclosure” to be consistent with the Commission’s proposed Rule 1.7 which does not require informed consent for all conflicts (12 yes, 1 no, 0 abstain).

(3) In paragraph (a)(2), the next to last line of the explanation, moving up the word "only" in that sentence so that it falls directly after the word "objectives" was deemed approved. In the second sentence, substituting “it” for “is” was deemed approved and using the complete reference to the Garner Style Manual at the very end was deemed approved. The codrafters also agreed to add to the explanation a statement that the phrase “in the representation” is added to the MR language because that conforms to the standard in Business and Professions Code §6068(m).

(4) In paragraph (a)(4) of the proposed rule, the language was reverted back to the language of MR 1.4(a)(4) (“promptly comply with reasonable requests for information”) (7 yes, 6 no, 0 abstain).

(5) In paragraph (a)(5) of the proposed rule, substituting the phrase “about significant documents relating to the representation” for the phrase “as required by paragraph (a)(3)” was deemed approved. Also, the codrafters agreed to add a comment adapted from proposed Rule 1.16 and based on Los Angeles County Bar Association Formal Op. No. 509 (re a lawyer’s ability to release information restricted by law).

(6) In paragraph (a)(6), substituting the phrase “consistently uses” for “has consistently used” at the end of the explanation was deemed approved.

(7) Regarding the order of the comments in the comparison chart, the codrafters agreed to revise the order to best show the relationship to the MR 1.4 comments.

(8) In Cmt. [1] of the proposed rule, deleting the word “an” and adding the phrase “a criminal” in the third sentence was deemed approved. Also, the codrafters were asked to add the concept of “advantages and disadvantages” regarding communications about a client’s opportunity to utilize ADR (8 yes, 5 no, 0 abstain).

(9) In Cmt. [3] of the proposed rule, adding the phrase “but is not limited to” after the word “including” was deemed approved.

(10) A recommendation to add a version of MR 1.4 Cmt. [4] was considered but rejected (5 yes, 6 no, 1 abstain).

(11) The first sentence of MR 1.4 Cmt. [5] was added (9 yes, 4 no, 0 abstain).

(12) In Cmt. [8] of the proposed rule, deleting the last sentence was deemed approved.

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. Rule 7.3 (MR 7.3) Direct Contact with Prospective Clients [1-400]**

The Commission considered Draft 7.3 (5/31/09) of proposed Rule 7.3 in a redline/strikeout draft showing changes to Draft 6 (7/2/07). The Commission Consultant led a discussion of three versions of the rule (Version A, B and C). Following discussion, the Chair called for straw votes to ascertain Commission member consensus on a preferred version. The straw votes demonstrated a preference for Version C (9 yes, 3 no, 1 abstain) and there was no objection to deeming that version approved. The codrafters were asked to adapt the previously prepared MR comparison chart to accommodate Version C of the proposed rule.

(Intended Hard Page Break)

**C. Rule 7.6 (MR 7.6) Political Contributions to Obtain Government Legal Engagements or Appointments by Judges [No RPC counterpart]**

The Commission considered Draft 1 (5/2/09) of a proposed Rule 7.6 comparison chart reflecting the Commission's July 2004 decision to not recommend a California version of MR 7.6. Following discussion, the Commission reconsidered the prior action and decided to explore a possible California version of MR 7.6 (7 yes, 3 no, 2 abstain). The Chair asked Mr. Martinez, Mr. Sapiro and the Commission Consultant to prepare a recommended rule for consideration as a part of the Commission's Batch 6 public comment proposals.

(Intended Hard Page Break)

V. **MATTERS FOR ACTION – CONSIDERATION OF BATCH 1 RULES PRIOR TO FORMATTING IN A COMPARISON TABLE**

A. **Rule 5.6 (MR 5.6) Restrictions on Right to Practice [1-500]**

The Commission considered Draft 4 (7/6/09) of proposed Rule 5.6. Ms. Foy led a discussion of open issues identified in a redline/strikeout draft comparing the proposed rule to MR 5.6. Following discussion, including review of earlier public comment received on the proposed rule, the Commission reconsidered its prior rejection of MR 5.6 and decided to replace the current draft with MR 5.6 (10 yes, 0 no, 1 abstain). For the comments, the codrafters agreed to revise the second sentence of Cmt. [1] to include a citation to *Howard v. Babcock* (1993) 6 Cal.4th 409 together with language from that decision indicating that certain reasonable restrictions on departing partners do not violate the rule.

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)

**VI. MATTERS FOR ACTION – CONSIDERATION OF BATCH 3 RULES FOLLOWING DISTRIBUTION FOR PUBLIC COMMENT**

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

The Commission considered Draft 6.1 (1/1/09) of proposed Rule 1.5 in a redline/strikeout draft showing changes to Draft 5.1 (6/6/08). Mr. Vapnek led a discussion of the open issues and the following drafting decisions were made:

(1) In paragraph (b), the first sentence, the phrase “would constitute” was substituted for the word “constitute” (6 yes, 5 no, 3 abstain).

(2) In paragraph (c)(11), the language was completely revised to read “whether the client gave informed consent to the fee” (9 yes, 4 no, 1 abstain).

(3) All of paragraph (d) was deleted and the phrase “or expense” was added at the end of paragraph (a) (9 yes, 1 no, 4 abstain). Subsequently, the phrase “in house” was added so that the end of paragraph (a) reads “or in house expense” (6 yes, 5 no, 2 abstain). It was understood that the deletion of paragraph (d) would require renumbering of paragraphs (e), (f) and (g).

(4) The above revisions were further considered and the following refinements were made: paragraph (c) was revised to delete the word “fee” and instead refer to the “conscionability of a fee or in house expense” and delete “fee;” paragraph (c)(11) was revised to refer to a client’s informed consent to a “fee or expense;” and in paragraph (c)(1) the phrase “or in house expense” was added (8 yes, 4 no, 2 abstain).

(5) In paragraph (e), an issue was raised as to whether family law matters should be specified and the codrafters agreed to do further research.

(6) A recommendation to delete all of paragraph (f) was considered but rejected (3 yes, 7 no, 2 abstain).

(7) In paragraph (f), the word “true” was added to qualify “retainer” (8 yes, 1 no, 4 abstain).

(8) In paragraph (f)(2), the second line was revised to read “which may be paid in whole or in part in advance” (11 yes, 0 no, 2 abstain), the phrase “placed prominently in bold 12 pt print” in the third sentence was deleted (11 yes, 0 no, 2 abstain), the phrase “or fixed” in the first line was deleted (8 yes, 0 no, 5 abstain), and all of the language concerning the form of an agreement that would satisfy the rule was deleted (10 yes, 0 no, 3 abstain).

(9) In paragraph (f)(3), the phrase “and shall take reasonable and prompt action to resolve the dispute” was deleted (9 yes, 0 no, 5 abstain). Subsequently, the codrafters were asked to move the remainder of paragraph (f)(3) to the rule comments (9 yes, 2 no, 3 abstain).

(10) All of paragraph (g) was deleted (8 yes, 1 no, 4 abstain).

(11) All of Cmt. [2] was deleted (9 yes, 0 no, 4 abstain).

(12) All of the Cmt. [3] was deleted (3 yes, 8 no, 3 abstain).

(13) A recommendation to delete all of Cmt. [4] was considered but rejected (4 yes, 8 no, 2 abstain).

(14) A recommendation to delete all of Cmt. [6] was considered but rejected (4 yes, 5 no, 5 abstain).

(15) A recommendation to delete the first sentence of Cmt.[6] was considered but rejected (1 yes, 9 no, 3 abstain).

(16) In Cmt. [7], the last sentence, the word “past” was before “due” (6 yes, 2 no, 5 abstain). Also, everything after “Paragraph (e)(1)” at the very beginning of the comment through “This provision” at the start of the second sentence was deleted (8 yes, 1 no, 4 abstain). It was understood that the comma after “support” in the second sentence would also be deleted.

(17) The codrafters agreed to review Cmt. [10] to ascertain whether the concept “in house expenses” should be added.

(17) Cmt. [11] and [12] were deemed approved.

(18) In Cmt. [13], deleting the phrases “availability retainer” and “engagement retainer” in the first sentence was deemed approved. It was understood that the word “true” would be added in the third sentence to clarify the term “retainer” and that the codrafters would audit the entire rule to assure that this is done consistently. Also, in the last sentence, substituting “should” for “must” was deemed approved.

(19) Cmt. [14] was deemed approved (including the underlined language recommended by the codrafters).

(20) In Cmt. [15], the first sentence, adding a comma after “(f)(2)” and before “and” was deemed approved. Also deleting the phrase at the end of the first sentence that begins “including obtaining” through “signed by the client,” was deemed approved and changing the reference to “trust account” to “client trust accounts” was deemed approved.

(21) In Cmt.[17], the codrafters agreed to review the language to ascertain what changes are needed to conform to the changes made to the rule.

The codrafters were asked to implement the above changes in a revised draft, in comparison chart form, to be considered at a future meeting.

(Intended Hard Page Break)

**B. Rule 1.17 Purchase and Sale of Geographic Area or Substantive Field of a Law Practice (previously considered as Rules 1.17.1 and 1.17.2) [2-300]**

The Commission considered Draft 1.1 (1/6/09) of proposed Rule 1.17 (merging the rules previously considered as proposed Rules 1.17.1 and 1.17.2) in a redline/strikeout draft showing changes to Draft 4.1 (9/29/08). Mr. Sapiro led a discussion of the open issues and the following drafting decisions were made:

(1) In the introductory language before paragraph (a), reverting the language back to the language of MR 1.17 but the retaining the clarification specifying both a “substantive field” and a “geographic area” was deemed approved. Also, the phrase “only if” was substituted for “if” (8 yes, 3 no, 1 abstain).

(2) In paragraph (c)(1)(A) and (2)(a), substituting the phrase “form or format held by the lawyer” for “held by the lawyer in any form or format” was deemed approved.

(3) In paragraph (d), the first sentence, deleting the phrase “or sale” after the word “purchase” was deemed approved.

(4) With these changes, the proposed rule text was adopted, subject to the preparation of a comparison chart redraft that should include recommendations on the rule comments (7 yes, 5 no, 0 abstain).

The codrafters were asked to implement the above changes in a revised draft, in comparison chart form (including recommendations on the rule comments), to be considered at the Commission’s next meeting.

(Intended Hard Page Break)

**IV. MATTERS FOR ACTION – RULES CIRCULATED FOR 10-DAY BALLOT**

**A. Consideration of Rule 1.12 Former Judge, Arbitrator, Mediator, or other Third-Party Neutral [Rule 3-310]**

This item was not called for discussion as it was announced that the proposed rule had been approved by 10-day ballot.