

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

**MEETING SUMMARY - OPEN SESSION**

**Friday, September 26, 2008**

(9:15 am - 5:00 pm)

**Hyatt Regency Hotel - Oaktree Room**

1 Old Golf Course Road

Monterey, CA 93940

**Saturday, September 27, 2008**

(8:00 am - 12:30 pm)

**Portola Hotel - Ironwood I & II**

2 Portola Plaza

Monterey, CA 93940

**MEMBERS PRESENT:** Harry Sondheim (Chair); Linda Foy (Saturday only); JoElla Julien; Robert Kehr; Stan Lamport; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Mark Tuft; and Paul Vapnek.

**MEMBERS NOT PRESENT:** Raul Martinez; Jerry Sapiro; Dominique Snyder (leave of absence); and Tony Voogd.

**ALSO PRESENT:** Jim Biernat (Bar Association of San Francisco liaison); Jeff Bleich (State Bar President) (Friday only); Sheryl Bratton (Public Law Section Ex. Comm.); George Cardona (Acting U.S. Attorney, C.D. California); Randall Difuntorum (State Bar Staff); Michael Judge (Los Angeles Public Defender) (Friday only); Judy Johnson (State Bar Executive Director) (Friday only); Diane Karpman (Beverly Hills Bar Association liaison) (Saturday only); Mimi Lee (State Bar Staff) (Friday only); Michael Marcus (Board liaison) (Saturday only); Lauren McCurdy (State Bar staff); Prof. Kevin Mohr (Commission Consultant); Ann Ravel (COPRAC liaison) (Friday only); Toby Rothschild (Access to Justice Commission & LACBA liaison); Mary Yen (State Bar Office of General Counsel); and Jan Zabriskie (Dept. of Justice) (Friday only).

**I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE AUGUST 29-30, 2008 MEETINGS**

The draft summary was deemed approved.

**II. REMARKS OF CHAIR**

**A. Chair's Report**

The Chair reported on the Commission's MCLE program held on Thursday, September 25, 2008. It was noted that the program had approximately 110 in person attendees and 90 off-site internet participants via simultaneous webcast.

**(2) Staff's Report**

Staff reported that Board member Richard Frankel was appointed as the new chair of the Board's Regulation, Admissions and Discipline committee. Staff also reported that the existing Board liaisons (Rex Heinke; William Hebert; and Michael Marcus) would continue to be the Commission's liaisons for the new Board year.

**III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES DISTRIBUTED FOR PUBLIC COMMENT (BATCH 3)** (Note: All of the items listed below are a continuation of the agenda set for the Commission's August 29 - 30, 2008 meeting.)

[Items A & B were handled at the Commission's August 29 - 30, 2008 meeting.]

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

Matter carried over.

(Intended Hard Page Break)

#### **D. Rule 1.13 Organization as Client [3-600]**

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 1.13 [3-600]. Ms. Lamport led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) In paragraph (a), there was no objection to the Chair deeming approved the revisions recommended by LACBA (substitute "duly authorized" for "highest authorized"; substitute "constituents" for "officer, employee, body or constituent") and by SCCBA (substitute "other constituent" for "constituent"). It was understood that these revisions would include conforming changes to Cmt. [1] & [2].

(2) In paragraph (b), there was no recommendation to make the revisions recommended by OCTC.

(3) There was no objection to the Chair deeming approved a recommendation to add a cross reference to Rule 5.2 at the end of Cmt. [7], as a clarification of paragraph (b)'s application to a subordinate lawyer (i.e., "For the responsibility of a subordinate lawyer in representing an organization, see also Rule 5.2.").

(4) In paragraph (b), the codrafters' recommendation to reject the SCCBA's proposed deletion of the "reasonably should know" standard was deemed approved.

(5) In paragraph (b), the first sentence, the phrase "in a manner" was added after "representation" and before "that the lawyer knows" (5 yes, 3 no, 1 abstain). This change was made to respond to a comment from the SCCBA.

(6) In paragraph (b), the codrafters' recommendation to reject the OCBA's proposal to restore the concept of "urging reconsideration of the matter" was deemed approved.

(7) In paragraph (b), the codrafters agreed to attempt to develop a possible revision to address the OCBA and COPRAC comments seeking guidance on the standard to be used by a lawyer in determining "the best lawful interest" of a client organization.

(8) In paragraph (b), the codrafters' recommendation to reject COPRAC's proposal to provide clarification of the concept of "substantial injury" was deemed approved.

(9) As a global stylistic matter (including paragraph (c)'s reference to section 6068), there was no objection to the chair deeming approved a recommendation that the term "subdivision" be omitted when citing to code sections (i.e., use "6068(e)(1)" not "6068, subd. (e)(1)").

(10) In paragraph (c), the codrafters' recommendation to reject a Commission member's suggestion to substitute "confidentiality of information" for "confidential information" was deemed approved.

(11) In paragraph (d), the codrafters' recommendation to reject the SCCBA's proposed revisions was deemed approved.

(12) In paragraph (d), there was no objection to the Chair deeming approved a Commission member's recommendation to move the comma from before "and" to after "and."

(13) In paragraph (e), to respond to OCBA and LACBA comments expressing concern that more guidance is needed on a lawyer's obligation inform the organization's highest authority about a termination or resignation, a straw vote was taken on the concept of including more guidance. The straw vote was 8 yes, 2 no, 0 abstain. Subsequently, a straw vote was taken on the specific approach of including a comment along the lines of MR 1.13 Cmt. [8]. The straw vote was 6 yes, 2 no, 2 abstain and the following language was suggested for consideration by the codrafters: "In the situations described in (d) and (e) the lawyer shall assure that the organizations highest authority is informed of the circumstances."

(14) In paragraph (e), the phrase "unless the lawyer reasonably believes that it is not in the best lawful interests of the organization to do so" was deleted (6 yes, 4 no, 0 abstain). It was understood that the codrafters would revise this paragraph and that the MR 1.13 formulation would be considered.

(15) In paragraph (f), the first sentence, there was no objection to the Chair deeming approved the substitution of "the organization" for "an organization."

(16) In paragraph (f), in response to a comment from the SCCBA, there was no objection to the Chair deeming approved the substitution of the phrase "mistakenly believes" for "is under the mistaken belief."

(17) In paragraph (f), a recommendation to add "personally" after "he or she" was considered, but there was insufficient support to approve this change (5 yes, 5 no, 0 abstain).

(18) Paragraph (g) was revised (9 yes, 0 no, 0 abstain) as follows:

"If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by ~~an appropriate official~~ a duly authorized constituent or body of the organization other than the individual who is to be represented, ~~or by the shareholders.~~"

(19) In Cmt. [1], the first sentence, the phrase "This Rule applies" was substituted for "This Rule is intended to apply" (8 yes, 0 no, 2 abstain). Also, a new second and third sentence ("This rule also applies to governmental organizations. See Comment [13].") was added (8 yes, 0 no, 2 abstain).

(20) In Cmt. [3], there was no objection to the Chair deeming approved various minor edits (see page 68 of the agenda materials). Also, in the second sentence, the word "however" was moved to the beginning of the sentence.

(21) In Cmt. [3], the last sentence was revised (9 yes, 0 no, 0 abstain) as follows:

"If the organization's consent to the dual representation is required by any of these Rules, the consent shall be given by ~~an appropriate official~~ a duly authorized constituent or body of the organization other than the individual who is to be represented, ~~or by the shareholders.~~"

(22) In Cmt. [3], the third sentence was replaced with: "The lawyer may not disclose to such constituent information relating to the representation except to the extent permitted by [Rule 1.6.]" (7 yes, 2 no, 0 abstain). Also, it was suggested that global search be conducted to conform the use of the phrase "information relating to the representation."

(23) In Cmt. [4], a recommendation to delete the comma after “organization” in line 12 was considered but rejected (2 yes, 5 no, 1 abstain).

(24) In Cmt. [4], the codrafters’ recommendation to reject the SCCBA’s proposed deletions of “reasonably should know” and “including ones entailing serious risk” was deemed approved.

(25) In Cmt. [5], the last sentence, substitution of brackets for parentheses was deemed approved.

(26) In Cmt. [8], to respond to an OCBA comment, the following changes were made (7 yes, 1 no, 0 abstain):

~~“Under Paragraph paragraph (b) also makes clear that, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law, whenever it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner.”~~

Subsequently, the phrase “whenever it is reasonably necessary” was deleted (4 yes, 2 no, 2 abstain). A recommendation to restore “as necessary” was considered but rejected (2 yes, 5 no, 2 abstain). It was noted that this comment is the counterpart to MR 1.13 Cmt. [5] and a recommendation to reconsider the issue of not following the precise MR language was approved (8 yes, 0 no, 0 abstain). Upon reconsideration, the Commission decided to use the exact MR language of MR 1.13 Cmt. [5] for Cmt. [8] (8 yes, 2 no, 0 abstain).

(27) In Cmt. [9], the following codrafters’ recommendations were deemed approved: (1) replace the reference to “1.8” to “1.6;” (2) revise the first sentence to read: “Even in circumstances where a lawyer is not obligated to proceed in accordance with paragraph (b). . . .;” and (3) replace “the next higher authority” with “a higher authority” and delete “referral.”

(28) In Cmt. [13], the following sentence was added as the new first sentence of the comment (6 yes, 0 no, 4 abstain): “In representing governmental organizations, it may be more difficult to define precisely the identity of the client and the lawyer’s obligations.”

(29) In Cmt. [14], replace the phrase “internal organizational policies” with the phrase “internal rules and procedures” (8 yes, 0 no, 1 abstain). It was understood that the phrase “considering and establishing” also would be changed to “establishing.” A recommendation to delete the introductory “Although” clause was considered but rejected (2 yes, 6 no, 1 abstain).

With these changes, there was no objection to the Chair deeming the rule approved subject to a 10-day ballot that is to be limited to the changes that require further drafting.

**E. Rule 1.16 Declining or Terminating Representation [3-700]**

The Commission considered Draft 5.1 (8/2/08) of proposed Rule 1.16. Mr. Kehr led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) In paragraph (e), by acclamation, the phrase "papers and property" was changed to "materials and property" and the phrase "whether in tangible, electronic or other form" was added after "physical evidence."

(2) Given the above revisions, the following conforming amendment to proposed Rule 3.7 (e)(1) was deemed approved:

"Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all the client ~~papers materials and property~~. "Client ~~papers materials and property~~" includes correspondence, pleadings, deposition transcripts, ~~expert's experts'~~ reports and other writings, exhibits, ~~and physical evidence, whether in tangible, electronic, or other form, and~~ other items reasonably necessary to the client's representation, whether the client has paid for them or not; and"

It was understood that the codrafters could consider moving the definition "materials and property" to a global definition rule when that rule is considered.

(3) The non-substantive edits in Mr. Sapiro's August 22, 2008 email (see pages 46 - 47 of the email compilation) were deemed approved.

(4) Any remaining codrafters' recommendation in the August 12, 2008 post-public comment memorandum was deemed approved.

With these changes, there was no objection to the Chair deeming the rule approved. The codrafters were asked to implement the revisions and submit a final version to staff.

(Intended Hard Page Break)

## F. Rule 1.17.1 Purchase and Sale of a Law Practice [2-300]

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 1.17.1 [2-300]. Mr. Kehr led a discussion of the codrafters' recommendations and the open issues. The following drafting decisions were made.

(1) In paragraph (b)(1)(i), Mr. Kehr spoke against an OCTC suggestion to delete the phrase "might have the right to act in his or her own behalf" because a corporation does not have *pro se* litigant options. As there was no motion to implement the OCTC suggestion, the Chair deemed it rejected.

(2) In paragraph (b)(1) (ii), the SCCBA suggestion to change 90-days to 30-days was deemed rejected but the suggestion to change "if" to "to the extent" was deemed approved.

(3) In paragraph (b)(1)(ii), a recommendation to enhance a seller's disclosure to clients was considered but rejected (1 yes, 4 no, 1 abstain). It was noted that Cmt. [13] adequately handles this issue.

(4) In Cmt. [7], the following revisions in response to an OCTC comment were deemed approved:

~~"This rule~~ Rule is not intended to create a contract by estoppel between the purchaser and any client. If the purchaser acts to protect the interests of a client ~~following the 90-day period described as permitted by paragraphs (b)(1) or (2),~~ but has not entered into a written fee agreement with the client, ~~or does so during the 90-day period as described in paragraph (b),~~ the purchaser might be entitled to payment on a quantum meruit basis."

(5) In the title/heading that appears after Cmt. [8] and before Cmt. [9], the deletion of the word "ethical" was deemed approved.

(6) In Cmt. [12], the addition of "if able" after "seller" and before "must continue" was deemed approved.

(7) In Cmt. [15], the word "only" in the second sentence was deleted and the phrase "unless that sale includes all or substantially all of the seller's practice" was added at the end (5 yes, 1 no, 2 abstain).

(8) In Cmt. [15], in response to a BASF concern about inconsistency with paragraph (e) of the rule, the second clause of the first sentence of Cmt. [15] was deleted (4 yes, 3 no, 1 abstain).

With these changes, there was no objection to the Chair deeming the rule approved. The codrafters were asked to implement the revisions and submit a final version to staff.

(Intended Hard Page Break)

**G. 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]. The Chair called for an initial discussion of whether there should be any rule at all on a partial sale of a law practice. Before a resolution of this threshold issue, a motion to table discussion was approved (6 yes 1 no 0 abstain). The Chair indicated that this matter would be considered for the next meeting.

(Intended Hard Page Break)

[Items H & I were handled at the Commission's August 29 - 30, 2008 meeting.]

**J. Rule 3.5 Impartiality and Decorum of the Tribunal [5-300, 5-320]**

The Commission considered a September 15, 2008 report on the public comments received on proposed Rule 3.5 [5-300, 5-320]. The Chair indicated that all of the codrafters' recommendations were deemed approved as there were no objections. Mr. Vapnek called attention to a minor issue posed in paragraph (c) and, following brief discussion, a recommendation to delete the word "or" before "other court personnel" was deemed approved. A suggestion was made to also add the word "binding" before "arbitration" but there was no support to make this change.

With these changes, there was no objection to the Chair deeming the rule approved. The codrafters were asked to implement the revisions and submit a final version to staff.

(Intended Hard Page Break)

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

The Commission continued the discussion, that began at the Commission's August meeting, of a August 13, 2008 report on the public comments received on proposed Rule 4.2 [2-100]. The Chair welcomed the following visitors who were present to address this matter: George Cardona; Michael Judge; and Jan Zabriskie. Each visitor was given an opportunity to address the Commission. Mr. Kehr led a discussion of the codrafter's recommendations and the open issues. The following drafting decisions were made.

(1) Regarding the visitors' recommendation that the Commission consider including in the rule, not just in the comments, an express exception for communications arising from law enforcement investigations that clearly permits all investigations not prohibited by current RPC 2-100, the Chair called for a straw vote. The straw vote was 4 yes, 3 no, 0 abstain and the Chair assigned the codrafters to consider this approach.

(1) Regarding the visitors' concern that the Commission's proposed exception for communications with public officers is too broad and improperly negates needed client protection for represented governmental agencies in litigated disputes, the Chair asked the codrafters to consider possible changes that might be responsive to the concerns. It was noted that the Commission's proposed exception is a reflection of the standard in current RPC 2-100.

Following discussion, a redraft of the relevant portions of the proposed rule was assigned for the next meeting. Members who voted in favor of exploring these revisions were asked to send proposed language to the codrafters.

(Intended Hard Page Break)

## **L. Rule 4.3 Dealing with Unrepresented Person [n/a]**

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 4.3 [n/a]. Mr. Tuft led a discussion of the codrafters' recommendations and the open issues. The following drafting decisions were made.

(1) In response to some of the public comments, including a SDCBA comment, a recommendation to not adopt the proposed rule was considered but rejected (4 yes, 5 no, 0 abstain). Mr. Melchior asked that his dissent (to the Commission's decision to continue with the proposed rule) be noted for the record.

(2) In paragraph (a), the codrafters' recommendation, in response to a SDCBA comment, to delete, in the third sentence, the phrase "or have reasonable probability of being [in conflict]" was deemed approved.

(3) In Cmt. [3], the following revision of the first sentence was deemed approved: "Paragraph (a) distinguishes between the situation in which a lawyer knows or reasonably should know that an unrepresented person has interests that are adverse to those of the lawyer's client and the situation in which the lawyer does not have that actual or presumed knowledge."

(4) In Cmt. [3], the following new fourth sentence was added (6 yes, 2 no, 1 abstain): "This rule also does not prohibit a lawyer from stating a legal position on behalf of the lawyer's client." In the last sentence, the phrase "the client's legal position or" was added before the word "terms" (8 yes, 0 no, 1 abstain). In addition, the codrafters were asked to use the concept of "a lawyer does not give legal advice by. . ." rather than "this rule does not prohibit" (8 yes, 0 no, 1 abstain).

(5) In Cmt. [3], a recommendation to delete the language concerning the "experience and sophistication of the unrepresented person" was considered but rejected (4 yes, 5 no, 0 abstain).

(6) In Cmt. [5], in the place of the current language, the codrafters were asked to use language along the lines of the following: "Para. (b) does not prohibit a lawyer from seeking to obtain information from an unrepresented person through the use of discovery in litigation or interrogation at trial." (7 yes, 1 no, 1 abstain). On this point, the Chair asked the codrafters to include Mr. Cardona on the next draft.

(7) In Cmt. [6], in response to a COPRAC comment, the second sentence was deleted (5 yes, 4 no, 0 abstain).

(8) In Cmt. [6], the phrase "private or governmental" was added before "covert" (6 yes, 2 no, 1 abstain) Also, the phrase "is not intended" was changed to "does not violate."

With these changes, there was no objection to the Chair deeming the rule approved subject to a 10-day ballot that is to be limited to the changes that require further drafting (i.e., Cmt.[3] and [5]).

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

The Commission considered an August 12, 2008 report on the public comments received on proposed Rule 5.4 [1-310, 1-320, 1-600]. Mr. Tuft led a discussion of the codrafters' recommendations and the open issues. The following drafting decisions were made.

(1) In Cmt. [1], the codrafters were asked to include an explanation of what is meant by the term "indirectly" in the introductory clause of paragraph (a) (6 yes, 3 no, 0 abstain). The codrafters were asked to consider the following concept for this language:

"The phrase "share legal fees directly or indirectly" does not prohibit lawyers or law firms from paying to an employee, who is not a lawyer, a salary, an hourly wage, employee benefits or a periodic bonus even though the compensation is paid out of revenues generated by collecting fees for legal services. Similarly, this the phrase does not prohibit lawyers or law firms from compensating a third party for providing administrative services to the lawyer or law firm even though such compensation is paid out of revenues generated by collecting fees for legal services. This is the case whether or not the fees are attributable to a specific matter or matters. The lawyer and law firm, however, may not agree with a non-lawyer employee or third party to calculate such person's compensation as a percentage of the lawyer's or law firm's revenues. See Rule 7.2(b)(5)."

(2) In Cmt. [1], a motion to table the consideration of the last sentence was considered but rejected (4 yes, 5 no, 0 abstain).

(3) In Cmt. [1], the last sentence, the word "calculate" was changed to "base" and the codrafters were asked to consider revising the last sentence and the penultimate sentence, in part, to address issue of using a non-lawyer collection agency. There was no objection to the Chair deeming this action approved.

(4) In paragraph (a), the codrafters agreed to consider revising (a)(1) to give flexibility on the issue of a decedent attorney who has no heirs.

(5) In paragraph (b), the LACBA comment to add "organization" was deemed rejected.

(6) In paragraph (c), the LACBA comment to delete "direct and regulate" was deemed approved.

(7) In paragraph (c), the codrafters were asked to consider improving the grammar so the substance of the comment is more directly stated (4 yes, 3 no, 1 abstain).

(8) In paragraph (e), the codrafters were asked to consider sharing the language with the State Bar lawyer referral services staff.

(9) In paragraph (f), the codrafters were asked to consider deleting or revising the phrase "to practice law unlawfully."

(10) In Cmt. [5], the codrafters were asked to consider the placement of this comment.

Following discussion, the codrafters were asked to implement all of the changes in a revised draft.

**IV. MATTERS FOR ACTION - CONSIDERATION OF RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT** (Note: All of the items listed below are a continuation of the agenda set for the Commission's August 29 - 30, 2008 meeting.)

[Item A was on the Commission's August 29 - 30, 2008 agenda but was postponed by the Chair.]

**B. Consideration of Rule 3-310(D) [ABA MR 1.8(g)] Avoiding the Representation of Adverse Interest (aggregate settlements)**

Matter carried over.

(Intended Hard Page Break)

**C. Consideration of Rule 3-310, Discussion paragraph #6 re imputation [ABA MR 1.8(k) and MR 1.10] Avoiding the Representation of Adverse Interest (consideration of the concept of imputed conflicts)**

The Chair called for a discussion of procedure and methodology for addressing the various rules that involve the concepts of imputation and/or ethical walls (a.k.a. screening). Following discussion, the Commission determined to explore an option of presenting the concept and broad issues of imputation and/or screening to the public for comment as part of Batch 4 (6 yes, 4 no, 0 abstain). The new subcommittee would be led by the Commission Consultant with the following members Mr. Kehr, Mr. Tuft, Justice Ruvolo, Ms. Peck, Mrs. Julien, and Mr. Sapiro.

(Intended Hard Page Break)

[Item D was on the Commission's August 29 - 30, 2008 agenda but was postponed by the Chair.]

**E. Consideration of Rule 3-310 [ABA MR 1.11] Avoiding the Representation of Adverse Interest (special conflicts for government officers and employees)**

Matter carried over.

(Intended Hard Page Break)

**F. Consideration of ABA MR 1.18 Duties to Prospective Client**

Matter carried over.

(Intended Hard Page Break)

**G. Consideration of Rule 3-310 [ABA MR 1.12] Avoiding the Representation of Adverse Interest (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral)**

Matter carried over.

(Intended Hard Page Break)

[Item H was handled at the Commission's August 29 - 30, 2008 meeting.]