

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

MEETING SUMMARY - OPEN SESSION

Friday, September 28, 2007
(9:15 am - 5:00 pm)

Saturday, September 29, 2007
(9:00 am - 12:30 pm)

Anaheim Marriott Hotel
Platinum Room #7 (Friday 9/28)
Platinum Room #10 (Saturday 9/29)
7000 West Convention Way
Anaheim, CA 92802

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy (Friday only); JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Dominique Snyder; Mark Tuft; Paul Vapnek and Tony Voogd.

MEMBERS NOT PRESENT: Kurt Melchior.

ALSO PRESENT: David Bell (Morrison & Foerster) (Friday only); Jim Biernat (Bar Association of San Francisco)(Saturday only); Carole Buckner (COPRAC Liaison)(Saturday only); George Cardona (Acting U.S. Attorney, C.D. California)(Friday only); Luke Carlson (Western State University); Stephanie Choy (State Bar Legal Services Trust Fund Office)(Saturday only); Linda Compton (CEB)(Saturday only); Randall Difuntorum (State Bar Staff); Robert Hawley (State Bar Deputy Executive Director)(Friday only); Lance Hendron (Western State University); Diane Karpman (Beverly Hills Bar Association liaison); Mimi Lee (State Bar staff)(Friday only); Michael Marcus (Board of Governors)(Friday only); Lauren McCurdy (State Bar staff); Marie Moffat (State Bar General Counsel); Prof. Kevin Mohr (Commission Consultant); Ardalan Samandari (Western State University)(Friday only); Monica Soliman (Western State University)(Friday only); and Esther Torres (Western State University)(Saturday only).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE AUGUST 24 -25, 2007 MEETING

The August 24-25, 2007 open session meeting summary was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair distributed a draft schedule of meetings for the 2007-2008 committee year. It was noted that a meeting on May 2, 2008 (the day before the 2008 Annual Ethics Symposium) was under consideration by staff and Commission leadership.

Regarding meeting management, the Chair clarified that visitors are free to offer comments on any issue arising in connection with a rule on the Commission's agenda even if it might be an issue that has not been identified by a codrafting team or any other Commission members as an "open issue" for discussion.

B. Staff's Report

Staff reported on the plans for the public hearing and noted that the Saturday segment of the Commission's meeting would be held in the same room as the public hearing.

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

A. Consideration of Rule 3-310 [ABA MR 1.7, 1.8, 1.9, 1.10, 1.11] Avoiding the Representation of Adverse Interests

At the request of interested persons, this matter was specially set by the Chair to be called at 11:30 am on September 28, 2007. The Commission considered Draft 8.1 of proposed comments to Rule 1.7 (dated 9/9/07). The Chair welcomed David Bell who was present to address this rule. Mr. Kehr led a discussion of the open issues, in particular, the issues of advanced waivers, "thrust upon" conflicts, and class action representations. The following drafting decisions were made.

(1) As an initial step, the Commission agreed that there should be some comment in the rule addressing advanced waivers (9 yes, 4 no, 0 abstain).

(2) Following discussion, the Commission considered but rejected a proposal to include a comment on "thrust upon" conflicts (3 yes, 7 no, 0 abstain).

- (3) There was no objection to the Chair deeming approved Cmt.[14] as drafted.
- (4) The last sentence of Cmt.[9] was deleted (8 yes, 0 no, 1 abstain).
- (5) In Cmt.[19], there was no objection to the Chair deeming approved the reference to advanced waivers.
- (6) The Commission considered but rejected a proposal to delete all of Cmt. [21] (4 yes, 5 no, 2 abstain).
- (7) Cmt. [21] was revised to include only the first sentence and a citation to *Raley v. Superior Court* (5 yes, 4 no, 0 abstain).
- (8) By consensus, for Cmt. [24b] the Commission adopted the first sentence of alternate [24b] that states: "Paragraph (d)(4) requires disclosure to the lawyer's client if the lawyer has been having, or when the lawyer decides to have, substantive discussions concerning possible employment with an opponent of the lawyer's client, or with. . . ."
- (9) The second sentence of alternate Cmt.[24b] was deleted (6 yes, 2 no, 1 abstain).
- (10) In Cmt. [29], the citation to Los Angeles Formal Opinion Number 471 was deleted (6 yes, 3 no, 0 abstain). It was understood that the codrafters would propose revisions for the remainder of this comment.
- (11) The Commission adopted Cmt.[33] (8 yes, 1 no, 2 abstain) as revised to read:

"[33] ~~When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are [ordinarily] not~~ by reason of such status ~~considered to be clients of the lawyer for purposes of applying part (a)(1) of this Rule. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a~~ plaintiff class of plaintiffs or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. ~~Thus, in that situation~~ the lawyer does not [typically] need to get the consent of such a person before representing a client which ~~who is adverse to that [suing the] person in an unrelated matter. Similarly, a lawyer seeking to represent a~~ [a] party opposing ~~ing [not in] a class action does not [typically] need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter~~ in order to do so."

- (12) The following sentence was added as the new first sentence of Cmt. [33]: "This Rule applies to a lawyer's representation of named class representatives." (7 yes, 0 no, 0 abstain).

(13) The following sentence was added as the new last sentence of Cmt. [33]: “A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.” (8 yes, 0 no, 3 abstain)

The codrafters were asked to implement the above changes in a revised draft. In addition, it was understood that after the public comment period the codrafters would audit the entire rule and comment to determine if any reference to “interests” needs to be modified in light of the language used in paragraph (b)(4).

[Intended Hard Page Break]

B. Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased

This rule was distributed for a 10-day ballot and during the ballot period some of the objectors expressed interest in a proposal from the Chair to send out two separate rules: a rule on the sale of an entire practice; and a rule on the sale of an area or field of practice. The Chair called for discussion of this approach. Following discussion, the Commission decided to implement the two rule approach (6 yes, 3 no, 0 abstain). The codrafters were asked to prepare the two rules for consideration at the next meeting. In particular, the codrafters were asked to account for Mr. Tuff's suggested modifications. However, the discrete aspects of the rule that have been the subject of prior votes were not to be changed when separating the current draft into two rules.

[Intended Hard Page Break]

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

The Commission considered Draft 1.1 of a possible version of RPC 3-100 in the format of MR 1.6. It was emphasized that this was a draft prepared for discussion purposes only and no action to be taken should be considered as approval or rejection of any actual rule language. Instead, the goal was to use the draft as a tool for a conceptual discussion of confidentiality rule issues. The Commission considered paragraph (a) and, after discussion, the Commission considered but rejected a proposal to completely exclude the concept of disclosures “impliedly authorized” to carry out a client’s representation (3 yes, 8 no, 0 abstain).

Next, the Commission discussed the option of including a definition or clarification of what is understood by the term “confidential information” (or “confidence,” or “confidences,” or “secrets,” or each of these terms as a collective concept). After discussion, the codrafters volunteered to attempt a definition for discussion purposes.

[Intended Hard Page Break]

D. Consideration of Rule 4.3 (Dealing with Unrepresented Person)

The Commission considered Draft 2.1 of proposed Rule 4.3 (dated 9/11/07). The Chair welcomed George Cardona who was present to address this rule. Mr. Tuft led a discussion of the issues raised in the draft by going through each sentence of the rule. The following drafting decisions were made.

(1) The first sentence of paragraph (a) was adopted as drafted (5 yes, 3 no, 0 abstain).

(2) The second sentence of paragraph (a) was adopted as revised (7 yes, 2 no, 1 abstain) to read: "When the lawyer knows or reasonably should know that the unrepresented person ~~misunderstands the lawyer's role in the matter~~ incorrectly believes that the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

(3) Regarding the third sentence of paragraph (a), the Commission decided to include the concept that not providing advice is *not* a violation of the rule and the codrafters were asked to revise the language (possibly using the approach of RPC 3-100 that emphasizes "may, but is not required to," to make clear that a mandatory duty is not being imposed). (9 yes, 2 no, 1 abstain)

(4) All of paragraph (b) was adopted as drafted (7 yes, 4 no, 0 abstain). (Note: an earlier recommendation to delete all of paragraph (b) was considered but rejected (3 yes, 10 no, 0 abstain)

(5) Regarding the comments, in response to a recommendation from Mr. Cardona the codrafters agreed to consider adding language similar to the language used by the Commission in Cmt. [20] to proposed Rule 4.2 (re "legally cognizable" confidentiality or privilege).

With the above changes, there was no objection to the Chair deeming the rule text approved. Revised comments were assigned and the codrafters expressly requested members who have issues with the current draft comments to send in recommended language to facilitate the consideration of those issues.

[Intended Hard Page Break]

E. Review of Rule 5.4 [1-310X] (Duty to Avoid Interference with a Lawyer's Professional Independence) in Consideration of the State Bar's Proposed Report Regarding Nonprofit Entity Legal Practice (Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal.4th 23)

The Commission considered a September 10, 2007 memorandum from Mr. Tuft indicating that proposed Rule 5.4 need not be modified at this time and, instead, should be sent out for public comment and reconsidered after the Supreme Court has acted upon the State Bar's Frye report. The one open issue raised in the memorandum was whether to add a new paragraph (e) stating a general prohibition against a lawyer practicing law in a non-profit setting that allows interference with professional independent judgment. Following discussion, the Commission decided to include the language of paragraph (e) in the public comment report but not in the rule itself (7 yes, 4 no, 1 abstain). The report would solicit public comment on whether that provision should be included in the rule. With this action, there was no objection to the Chair deeming the rule approved.

[Intended Hard Page Break]

F. Consideration of Rule 3-700 [ABA MR 1.16] Termination of Employment

The Commission considered Draft 3.4 of proposed Rule 1.16 (dated 8/2/07). Mr. Kehr led a discussion of the open issues. While most of the open issues concerned the comments, a few issues were raised concerning the rule text. The following drafting decisions were made.

(1) In paragraph (b)(1), it was agreed that the codrafters would include language clarifying that this cause for permissive withdrawal applies to both litigation and non-litigation representations.

(2) In paragraphs (b)(2) and (b)(3), there was no objection to the Chair deeming approved a recommendation that the phrase “criminal or fraudulent” be used in the place of the term “illegal.”

(3) There was no objection to the Chair deeming approved paragraph (b)(4) as drafted.

(4) Paragraph (b)(8) was approved as drafted (6 yes, 4 no, 0 abstain).

(5) All of paragraph (b)(10) was deleted (8 yes, 2 no, 0 abstain).

(6) The Commission considered but rejected a recommendation to replace paragraph (b)(10) with a comment addressing financial issues as good cause for permissive withdrawal (2 yes, 9 no, 0 abstain).

(7) All of paragraph (b)(11) was deleted (9 yes, 2 no, 0 abstain).

(8) The Commission considered but rejected a recommendation to delete all of paragraph (b)(12) (3 yes, 6 no, 1 abstain).

(9) Paragraph (c) was replaced with the language of RPC 3-700(A)(1) but with the addition of an express reference to “notice” (similar to MR 1.16) so that it would, in part, read: “. . . notice to or permission of a tribunal. . .” (8 yes, 2 no, 0 abstain)

(10) All of Cmt. [1a] was deleted (9 yes, 0 no, 0 abstain).

(11) Cmt. [2] was approved as revised to delete the phrase “is illegal or” (6 yes, 4 no, 0 abstain).

(12) All of Cmt. [6a] was deleted (8 yes, 1 no, 0 abstain).

(13) In the first sentence of Cmt. [10], there was no objection to the Chair deeming approved a recommendation to delete the phrase “in the recurring situation” and replace it with the phrase “when, after termination of representation for any reason, . . .”

(14) In the second sentence of Cmt. [10], the term “materials” was deleted and replaced with the phrase “client papers and property” (5 yes, 3 no, 3 abstain).

(15) In the third sentence of Cmt. [10], there was no objection to the Chair deeming approved the addition of the phrase “for example” to qualify the reference to the listed Penal Code sections.

With these changes, there Commission determined to use a 10-day ballot procedure to finalize the rule. It was understood that the issues resolved by votes were to be regarded as closed issues for purposes of the mail ballot. The Commission specifically decided to use a ballot to resolve the open issues of: whether paragraphs (b)(1) and (b)(2) should be merged into one paragraph; and whether language should be added to the rule and/or the comments covering the situation where a lawyer discovers that the lawyer’s services have been used to accomplish an illegal act (7 yes, 0 no, 2 abstain).

[Intended Hard Page Break]

G. Consideration of Rule 4-100 [ABA MR 1.15] Preserving Identity of Funds and Property of a Client

The Commission considered Draft 6 of proposed Rule 1.15 (dated 9/10/07). The Chair welcomed Stephanie Choy who was present to address this rule. Ms. Peck reported that a teleconference meeting of the codrafters was held to consider the issues raised in Mr. Tuft's August 16, 2007 memorandum. Ms. Peck led a discussion of the open issues. The following drafting decisions were made.

(1) Regarding the rule title, the Commission considered but rejected two separate recommendations to use a title different from the title used by the codrafters: "Handling of Funds and Property" (5 yes, 6 no, 0 abstain); "Safekeeping Funds and Property" (4 yes, 5 no, 1 abstain). As there was no successful action to change the title, the title used by the codrafters was retained but it was understood that a comment would explain the use of the term "entrusted" in the title.

(2) In paragraph (a) and generally throughout the rule, the Commission replaced the term "beneficiary" with the term "other person" (7 yes, 3 no, 1 abstain).

(3) The Commission considered but rejected a recommendation to delete the discussion of credit cards/handling of electronic funds in the rule text (3 yes, 7 no, 0 abstain). As a result, the codrafter's approach was retained but the codrafters volunteered to treat paragraph (e)(1) as an open issue.

(4) In paragraph (d), there was no objection to the Chair deeming approved a recommendation that the codrafters adapt the approach used in RPC 3-100 to emphasize a permissive standard (e.g., "may, but is not required to, . . .").

(5) Regarding paragraph (f), Mr. Tuft dissented to the Commission's approach of not affording an option for a client to have trust funds held outside of California. He asked that his dissent be noted for the record. Given the potential impact on access to justice, Ms. Choy observed that the State Bar IOLTA program would be concerned if this rule did not, as a general matter, require trust funds to be held in California. Ms. Peck indicated that the MJP implications of the Commission's approach would be handled in comment.

(6) In paragraph (f), there was no objection to the Chair deeming approved the replacement of the phrase "the funds owner" with the phrase "the holder of the funds."

(7) In paragraph (g)(3), the word "personal" was deleted (5 yes, 4 no, 0 abstain).

(8) For paragraphs (i) through (l), the codrafters agreed to continue to treat this language as an open issue pending efforts to clarify the language with proposed comments.

(9) In paragraph (m)(4), the codrafters agreed to delete the word "entrusted" but issues concerning "advanced fees" would be treated as open issues.

Following discussion, Ms. Peck summarized that the two primary open issues were: credit card/electronic funds in paragraph (e); and advanced fees in paragraph (m)(4), but that the rule was otherwise approved by the respective votes that were taken. The

codrafters were asked to implement the changes to the rule and to prepare a first draft of proposed comments.

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

The Commission considered Draft 3.1 of proposed Rule 1.5 (dated 9/24/07). Mr. Vapnek led a discussion of the open issues. The following drafting decisions were made.

(1) The codrafters agreed to revise paragraph (d)(1) (to be consistent with substantive California law which no longer uses the term “alimony” and which does permit some forms of contingency fees on past due support obligations).and treat it as an open issue for the next meeting.

(2) Regarding Cmt. [1a], the Commission decided to move the discussion of expenses to the rule text (5 yes, 3 no, 0 abstain).

(3) In Cmt. [2], the first two sentences initially were approved with the remainder deleted (7 yes, 2 no, 1 abstain). To replace the deleted language, the codrafters were asked to add a citation to *In the Matter of Harney* together with language indicating that sections 6147 and 6148 address expected components of a fee agreement and that the consequences of failure to comply with the sections is generally an enforceability concern (4 yes, 3 no, 4 abstain). After the foregoing consideration of Cmt. [2], the Commission decided to delete the first two sentences (6 yes, 2 no, 2 abstain).

(4) In Cmt. [2a], the word “ordinarily” was deleted (11 yes, 0 no, 0 abstain) and the phrase: “With respect to modifications. . .” was added at the start (6 yes, 3 no, 1 abstain).

(5) In Cmt. [3], only the first sentence was approved with the remainder being deleted (9 yes, 2 no, 0 abstain).

(6) In Cmt. [4], everything after the reference to rule 3-300 was deleted but the balance was approved (8 yes, 0 no, 3 abstain).

(7) The codrafters were asked to include an additional comment addressing non-refundable fees (8 yes, 0 no, 2 abstain) which clarifies the distinction between non-refundable fees and true retainer fees (8 yes, 1 no, 0 abstain).

The codrafters were asked to implement the above changes in a revised draft for the next meeting.

[Intended Hard Page Break]

I. Consideration of Recommendation of the Class Action Subcommittee

The Chair called for discussion of this matter as part of the discussion of agenda item III.A. Rule 3-310 [MR 1.7]. The Commission considered the Consultant's modified version of Mr. Voogd's proposed comment to Rule 1.7 on class action representations (Prof. Mohr's e-mail message dated September 22, 2007). Mr. Voogd summarized the codrafters' consideration of this issue and indicated that the Consultant's revised draft constituted his current recommendation. After discussion and a series of votes (see below), there was no objection to the Chair deeming approved the following language as revised Cmt. [33] to Rule 1.7.

“[33] This Rule applies to a lawyer’s representation of named class representatives. For purposes of paragraphs (a) and (c) of this Rule, an unnamed current or potential member of a plaintiff class or defendant class in a class-action lawsuit is not, by reason of that status, a client of a lawyer who represents or seeks to represent the class. Thus, the lawyer does not need to get the consent of such a person before representing a client who is adverse to that person in an unrelated matter. Similarly, a lawyer seeking to represent a party opposing a class action does not need the consent of any unnamed member of the class whom the lawyer represents in an unrelated matter in order to do so. A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those civil duties in any respect.”

The votes taken leading to the approval of the above comment were: (1) use the style “this Rule,” delete the restriction of the comment to only paragraphs (a) and (c), and replace “get” with “obtains” (8 yes, 1 no, 2 abstain); (2) delete the first sentence of the comment and move that language to be the first sentence of Cmt. [25] (7 yes, 0 no, 3 abstain); and (3) add the sentence found at line 370 of page 16 of the agenda materials (“A lawyer representing a class may owe civil duties to unnamed class members, and this Comment is not intended to alter those individual civil duties in any respect.”) to the end of the comment (8 yes, 0 no, 3 abstain).