

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

MEETING SUMMARY - OPEN SESSION

Friday, September 9, 2005
(9:15 am - 5:00 pm)

San Diego Marriott Hotel and Marina
Orlando Room
333 West Harbor Drive
San Diego, CA 92101
(619) 234-1500

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Sean SeLegue; Mark Tuft; and Tony Voogd.

MEMBERS NOT PRESENT: Paul Vapnek.

ALSO PRESENT: Manuela Albuquerque (League of Calif. Cities); Carol Buckner; Randall Difuntorum (State Bar Staff); Larry Doyle (State Bar Chief Legislative Counsel); David Goldberg (Latham & Watkins); Janet Green (State Bar Board of Governors); Robert Hawley (State Bar Deputy Ex. Dir.); Paul Hokokian (State Bar Board of Governors); Diane Karpman (Beverly Hills Bar Association Liaison); Meg Lodise (Trust & Estates Section Ex. Comm.); Barry Matulich; Lauren McCurdy (State Bar Staff); Marie Moffat (State Bar General Counsel); Kevin Mohr (Commission Consultant); Gerald Phillips; Toby Rothschild (Access to Justice Commission Liaison); Robert Sall (COPRAC Liaison); Sheldon Sloan (State Bar Board of Governors); Dominique Snyder (COPRAC Advisor); Peter Stern (Trust & Estates Section Ex. Comm.); and Dorothy Tucker (State Bar Board of Governors).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE JULY 22 & 23, 2005, MEETING

The open session summary from the July 22&23, 2005 meeting was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reminded members to arrive timely at the start of the meeting and to remain in the meeting room at least until a quorum is achieved and the meeting is called to order.

The Chair requested that all members promptly submit expense reimbursement forms to staff to facilitate consideration of the Commission's budget and the prospect of having a two-day meeting in October and an in person, rather than video, meeting in December.

The Chair led a brief discussion about options for seeking public comment on a first batch of tentatively approved draft rules. Among the points raised were the following.

- (1) Consideration should be given to including rule 1-100 in the first batch.
- (2) The Commission's process, especially the transparency and accessibility of the Commission's work, should be explained to public commentators.
- (3) There should be advance notice to anticipated commentators, such as local bar ethics committees, that a formal request for public comment is going to be issued.
- (4) The public comment period should be longer than 90-days and should include public hearings.
- (5) The Commission should find out what restrictions are imposed on the public comment process.
- (6) Consideration should be given to seeking and accepting public comment using an internet website blog.
- (7) As the process will be implemented in batches, there should be an understanding that "late" comment will likely receive the same consideration as comment that is timely submitted.

B. Staff's Report

Staff reported that Assembly Bill No. 1529, the State Bar dues bill, was passed by the Senate and enrolled to the Governor.

Staff also reported that incoming Board of Governor John McNicholas will serve as COPRAC's and the Commission's liaison. In addition, it was noted that Board of Governor Paul Hokokian will serve as the chairperson for the Board's Committee on Regulation, Admissions and Discipline.

III. MATTERS FOR ACTION

A. Consideration of Rule 5.4. Professional Independence of a Lawyer (aka Rule 1-310X)

The Commission considered draft 9.1 of proposed rule 5.4 dated 8/25/05 and presented by Mr. Tuft. Mr. Tuft summarized the changes implemented per the Commission's direction at the July meeting. Attention was called to a September 4, 2005 e-mail message from Mr. Kehr and to two August 12, 2005 e-mail messages from Mr. Rothschild.

In response to Mr. Rothschild's comment that proposed Cmt. [8] was unclear, there was a consensus to strike Cmt. [8] in accordance with the recommendation of the codrafters (6 yes, 0 no, 4 abstain). In response to Mr. Rothschild's comment that the issue addressed in proposed Cmt. [6] may be impacted by the anticipated California Supreme Court decision

in Frye v. THC, there was no objection to the Chair's suggestion to include a notation in the web posting that Cmt. [6] will be revisited once the Supreme Court's Frye decision is published.

Next, the Commission considered Mr. Kehr's comments. There was a consensus to modify Cmt. [3] along the lines of Mr. Kehr's suggested language so that Cmt. [3] would focus a law corporation's right to be free from a trustee's improper influence rather than on the given terms of a specific trust instrument that might be subsequently changed (7 yes, 0 no, 5 abstain). Regarding the reference to "registered domestic partner" in the first sentence of Cmt. [3], there was a consensus to delete the modifying term "registered" (6 yes, 4 no, 3 abstain). Upon further consideration, there was a consensus to re-work this sentence to use only a general reference to any nonlawyer trustee (6 yes, 4 no, 3 abstain). With this further change, the first sentence of Cmt. [3] would state: "A lawyer's shares of stock in a professional corporation may be held by the lawyer or nonlawyer trustee of a revocable living trust. . . ."

Regarding the second sentence of Cmt. [3], there was a consensus to delete the entire sentence (9 yes, 1 no, 1 abstain) and to modify paragraph (a)(2) of the rule to state simply that "any payment authorized by rule 1.17" is permitted (7 yes, 3 no, 1 abstain).

Before proceeding to tentatively approve the rule, the Chair permitted consideration of non-substantive drafting suggestions. To be grammatically correct, it was suggested that proposed paragraph (a) be modified to use parallel construction by adding the word "with" so that it states: "A lawyer or law firm shall not share legal fees directly or indirectly with a person who is not a lawyer, or *with* an organization that is not authorized to practice law." While some members were not certain whether this change involved an unintended substantive change, three members favored the revision and there was no opposition (3 yes, 0 no, 10 abstain). Similarly, there was a consensus to modify proposed paragraph (a) (1) to state: "The payment of money or other consideration at once or over a reasonable period of time after the lawyer's death to the lawyer's estate or to one or more specified persons pursuant to an agreement *between* a lawyer *and either* the lawyer's law firm or another lawyer in the firm" (6 yes, 1 no, 4 abstain).

With these changes, there was no opposition to deeming the proposed rule tentatively approved. Staff was asked to work with the consultant to incorporate the changes approved and to post the draft rule on the State Bar website.

[Intended Hard Page Break]

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

Matter carried over.

[Intended Hard Page Break]

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

Following consideration of a request from Ms. Albuquerque, this agenda item was specially set for 2:30 p.m. by the Chair. To accommodate Mr. Rothschild, who had a conflict at 2:30 p.m., the Chair invited Mr. Rothschild to present his written comments and to answer Commission member questions as part of the Chair's 9:30 a.m. oral report. During this brief discussion, Mr. Rothschild indicated that legal services organizations often have an interest in litigation involving governmental agencies. Although the legal services organization might not be a party, it would still want direct access to public officials to discuss the subject matter of the litigation. Mr. Rothschild emphasized that a requirement to obtain the consent of the agency's lawyer would inhibit the ability of a legal services organization lawyer to engage in public interest lobbying related to litigated matters.

At the specially set time, the Chair welcomed Ms. Albuquerque and Mr. Goldberg to the meeting. The Chair invited each visitor to address the Commission and answer questions. Before beginning with Mr. Goldberg, the Chair summarized the earlier brief exchange with Mr. Rothschild and asked staff to provide both Ms. Albuquerque and Mr. Goldberg with a copy of Mr. Rothschild's written comments.

Mr. Goldberg presented an August 26, 2005 letter from Latham & Watkins that enclosed draft rule amendments dated August 19, 2005. Among the points raised during the discussion with Mr. Goldberg were the following: (1) Latham & Watkins has been actively working with many other law firm stakeholders; (2) in accordance with the Chair's request at the July Commission meeting, Latham & Watkins representatives and other law firm stakeholders met by conference call with Ms. Albuquerque in an effort to address various policy and drafting issues but has not had an adequate opportunity to review Ms. Albuquerque's latest draft language; and (3) the limitation in the proposed language that specifies only monetary damages claims can be revised to encompass other types of litigated matters but any actual changes to the language of the August 19th draft must be vetted by others prior to endorsement. Mr. Goldberg thanked the Commission for the opportunity to speak and looked forward to further cooperative efforts to revise the rule.

Before turning to Ms. Albuquerque, the Chair welcomed Board of Governor Sheldon Sloan and invited Governor Sloan to address the Commission. Governor Sloan expressed his personal perspective that the rule should not be changed unless there is demonstrated empirical evidence of the precise problems caused by the rule and the frequency and scope of any such problems. The Chair thanked Governor Sloan for visiting with the Commission and noted that members of the Board of Governors will have their first official role in addressing rule revision issues when the Commission goes to the Board's Regulation, Admissions and Discipline Committee to request public comment authorization on a first batch of rule amendments.

Ms. Albuquerque presented her August 31, 2005 letter including draft language for a revised paragraph (C)(1). Among the points raised during the discussion with Ms. Albuquerque were the following: (1) a good faith effort was made to comply with the Chair's request to work out a compromise but it has been difficult to get definitive feedback from the land use and administrative law stakeholders; (2) there is a dearth of case law addressing the right to petition government as a public policy exception to ethical rules prohibiting ex parte

contact in litigated matters with governmental agencies and at least one authority suggests that such access is not a constitutionally mandated exception; (3) the use of the phrase “affiliated with a governmental entity” in proposed (C)(1) can be refined as it is not intended to expand the scope of the rule’s prohibition beyond persons already covered by paragraph (B); (4) Mr. Rothschild’s concerns about communications aimed at abandoning a litigate matter is a drafting issue that can be tweaked; and (5) the on-going sharp practices and real prejudice suffered by governmental clients is a longstanding problem first raised with COPRAC a few years before the Commission was reactivated by the State Bar and, upon recommendation of State Bar staff, the League of California Cities and Public Law Section has cooperatively awaited the work of the Commission to resolve the very real problems with the existing rule that are commonly experienced by the public lawyer population of the bar. Ms. Albuquerque thanked the Commission for the opportunity to continue working on rule 2-100 and expressed appreciation for the special set agenda scheduling implemented at her request.

The Chair next called for discussion by the Commission members about the issues raised by the visitors and their suggested rule amendment language. Among the points raised during this discussion were the following.

(1) The language of existing RPC 2-100(C)(1) raises four key issues of concern that the Commission must address: (i) it is construed as an invitation to engage in ex parte communications, in part due to the fact that it is different from the approach used by the ABA in the Model Rules; (ii) it is conducive to sharp practices that offend the purposes of the prohibition; (iii) it exacerbates the issue of improper exploitation of privileged information recently highlighted by the *Snider* decision; and (iv) to the extent that the exception allows more ex parte communication than is required by constitutional law, it subjects public and private clients (and their lawyers) to differing levels of public protection with no justification.

(2) It is unclear whether a rule is a proper place to codify an issue of evidentiary admissibility and privilege. Even if you conclude that it is a proper place, the better approach would be to state that issues of admissibility and privilege are matters for the courts to handle.

(3) The draft language suggested by the League of California Cities is too narrow in its effort to prevent improper the use of information gained in an ex parte communication. The trigger for the restriction the on use of information should simply be whether the information obtained is confidential and privileged.

(4) The existing standard for “who is a party” for purposes of RPC 2-100(B)(2) should not be changed given the extensive interpretative case law that has been published. The approach taken in the Latham’s draft maintains the (B)(2) status quo and builds upon it by parroting this familiar standard as the test for whether an ex parte contact with a public official in a litigated matter is permissible. The only component needed to make Latham’s draft work for all of the key issues of concern is to add something that addresses improper use of privileged information. Also, it should not be overlooked that the Latham’s draft includes a separate exception for permitting contact with public boards, committees and bodies.

(5) The fact that there has been much case law on RPC 2-100(B) suggests that the standard is not working and is subject to contrary interpretations. The Commission should develop rule language that is clear and accessible to all practitioners and should not draft cryptic standards that are only understood by ethics experts or sophisticated practitioners in specialized fields.

(6) In states that follow the ABA, there is no evidence of a chilling effect on the right to petition government.

(7) Although the California Constitution may have some unique features, there is no authority, other than RPC 2-100(C)(1) itself, that mandates absolute access to public officers unfettered by any time, place or manner restriction.

(8) RPC 3-600 also offers guidance on the issue of “who” is a client in an agency context.

(9) If the evidentiary remedy for abuse of privileged information is included in this rule or the rule discussion commentary, then consideration should be given to noting other civil consequences such as disqualification.

(10) There is common ground between the drafts submitted by the interested groups. If more compromise and agreement can be achieved and the language simplified, then the result would be a rule that is helpful and more precise despite being different from the ABA or any other state.

(11) Consideration should be given to following the ABA for the rule text but including an expanded discussion commentary that gives examples that help practitioners understand the basic concept of what might be regarded as in and out of the exception. This discussion could also refer to rule 4.3 and explain the connection to that rule. However, convoluted tests and attempts at exhaustive lists should be avoided as they will not help average practitioners.

(12) The origin of this rule is a bright-line “no contact” prohibition. The future of this rule seems to be heading in the direction of saying that certain contact is conditionally permitted so long as the content of the conversation is regulated and the use of information obtained restricted. This regulatory approach seems unworkable for a disciplinary rule.

(12) The universe of circumstances that might implicate the (C)(1) exception goes beyond litigated land use and administrative law matters and any attempt at an all inclusive rule will be incomplete and likely will have unintended consequences for areas that are not the focus of the stakeholder expertise or input.

Following discussion, the Chair took a straw vote to ascertain Commission consensus for next steps. The straw vote revealed an even split on a proposal to proceed by working from the language submitted by the visitors. Accordingly, the Chair asked the visitors to submit redrafts to Mr. Martinez, the lead codrafter, within the next 10-days following the meeting. The Commission members were assigned to provide drafting suggestions building upon the visitor’s drafts or to submit an alternate draft along the lines of the ABA approach (“communications authorized by law or by court order” with an explanation in the commentary). It was understood that at least Mr. Tuft and Mr. Voogd would be exploring

the ABA approach. By having drafts of both concepts on the table for the next meeting, the Chair expressed hope that the Commission would take definitive action on how to amend the (C)(1) exception.

[Intended Hard Page Break]

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

This agenda item was specially set for 11:00 a.m. by the Chair. The Chair announced that this item would start with consideration of proposed rule 1.14 and finish with discussion of the Trust & Estates Section's new legislative proposal no. 2006-07. The Chair also welcomed Meg Lodise and Peter Stern of the Trusts and Estates Section Executive Committee.

The Commission considered draft 2.1 of proposed rule 1.14 in a memorandum dated August 28, 2005 and presented by Ms. Foy. Ms. Foy summarized the changes implemented after the Commission's discussion at the July meeting. The changes noted were: a revised rule title adapted from the MR 1.14; deletion of language permitting a conservatorship option; clarification of the phrase "diminished capacity" as relating to an ability to make adequately considered decisions; reference to Bus. & Prof. Code §6068(e) with a notation indicating anticipated amendments; citation to Probate Code §811 as a basis for determining a client's incapacity; and addition of discussion commentary, patterned after RPC 3-100, to address constitutional issues in criminal matters. The Chair called for discussion of comments on draft 2.1 received from Mr. Kehr, Mr. Sapiro, and Mrs. Julien. Among the points raised during the discussion were the following.

(1) While it might be convenient to include the probate code language in the rule or discussion commentary, the statutory language may change and the better approach is to refer to the sections and not excerpt them.

(2) Consideration should be given to drafting original definition language for the rule text that is based upon the probate code but is not identical.

(3) If the probate code is to be adapted or incorporated by reference, then consideration should be given to using Probate Code §812 addressing a person's ability to make a decision. This is preferable to Probate Code §811 because the standards in §811 are intended to be used by a court with the benefit expert psychiatric testimony while the standards in §812 address factors that a lawyer may be able to evaluate based on personal observations.

(4) As evidenced by the holding in *Moore v. Anderson Zeigler* (2003) 109 Cal.App.4th 1287, there is an inherent conflict when a duty is imposed upon a lawyer to question the testamentary capacity of a client.

(5) The incorporation of a definition could be accomplished in a less rigid fashion by qualifying the assessment as being "a condition of type" described in the probate code.

(6) The proposed rule has two very distinct components that raise independent issues. Paragraph (a) involves a client's capacity to make decisions and lawyers duty to maintain, as far as reasonably possible, a normal client-lawyer relationship. Subparagraph (b)(i) deals with diminished capacity in the representation and an assessment of a lawyer's ability to carry out a client's instructions. Consideration should be given to employing a definition section only for subparagraph (b)(i).

(7) The proposed rule should not be over-intellectualized. There is an ongoing client harm problem that requires a decisive rule authorizing protective action by lawyers. The Commission should not lose sight of the basic function of the rule.

(8) The ground work for this rule remains incomplete until criminal defense issues are fully understood and addressed. Input likely is available from the Criminal Justice and Juvenile Justice sections. If a thorough inquiry into criminal defense issues is not made, then the rule should be expressly limited to a civil context. However, such a limitation might be unworkable given the duty imposed by *Nichols v. Keller*.

(9) The concept of Probate Code §812 as the triggering definition is an overbroad approach. This rule should be limited to the most extreme cases where a client is completely unable to make decisions. The ABA formulation of “significantly impaired” seems to be a more precise description of the trigger for permissive lawyer action.

(10) The ACTEC materials may be of assistance in deciding upon the right terminology.

(11) Trust and estates practitioners are very familiar with the criteria used in Probate Code §811 and useful guidance is imparted by directing lawyers to that language in the probate code.

(12) Although trust and estates practitioners possess the experience needed to understand and readily apply the probate code criteria, the rule must be drafted in a way that will make it accessible to all lawyers.

Following discussion, the Chair took a straw vote to give guidance to the codrafters in preparing a next draft. The straw vote showed a consensus to include a cross-reference to the probate code in the rule (8 yes, 2 no, 0 abstain). The codrafters were encouraged to consider the terminology concerns that were raised and to try to harmonize the terminology in the rule with whatever statutory language is incorporated by reference.

The Chair next turned to the Trust and Estates Section new legislative proposal no. 2006-07. It was emphasized that the Commission’s effort to address the issue of impaired clients remains a work in progress and is evolving with each draft. The Chair expressed concern that a statutory proposal likely is premature because the terms of the statute may conflict with the ultimate terms of a recommended rule. The Chair invited representatives of the Trust and Estates Section to offer comments on the new proposal.

Representatives of the Section addressed the Commission and answered questions. It was indicated that the legislative process operates on a timetable that would allow the statutory language to be amended as the Commission’s rule draft progresses. It was noted that some form of a statutory change is a foregone conclusion in light of the AB 1101 model that requires complementary changes in the law. Concern was expressed that a rule draft might be finalized and followed by a great delay in pursuing the legislative part of the process. Preference was expressed for working in tandem, simultaneously on both fronts, so that the important public protection can be effectuated on an expedited basis.

Visitors from State Bar executive staff also were afforded an opportunity to make comments. It was indicated that the charge given to the Commission contemplates completion of a

comprehensive recommendation based, in part, upon the inherent inter-related nature of the Rules of Professional Conduct. It was emphasized that the Commission should not feel pressured by legislative deadlines to rush its process or take a piecemeal approach to addressing issues that have broad implications. However, it was also noted that plans should be made to coordinate rule proposals that might involve statutory changes. The Commission was advised that rule amendment proposals involving statutory changes require strategic planning before presentation to the Supreme Court.

Following these comments, the Chair summed up his impression that there was Commission member consensus and that it was too soon to begin a legislative process on the narrow issue of an impaired client statute. The Chair thanked the representatives for their continued input to the drafting team.

[Intended Hard Page Break]

E. Consideration of Rule 1-100. Rules of Professional Conduct, in General

The Commission considered draft 3 of proposed rule 1.0 dated September 2, 2005 and presented by Mr. Tuft. In addition to draft 3 of proposed rule 1.0, the Commission also considered a September 2, 2005 memorandum addressing the non-disciplinary applications of the RPC's. Mr. Tuft began with a status report summarizing the work that transpired since the Commission last discussed this matter. Mr. Tuft summarized a meeting that was held on April 11, 2005 with representatives of the Committee on Professional Liability Insurance and an appearance at an open session meeting of COPRAC on September 8, 2005. Mr. Tuft noted that he had received informal drafting suggestions from COPRAC but that draft language had not been submitted by any other interested person. After the status report, the Chair called for discussion of the outstanding drafting issues raised by Mr. Tuft's memoranda and by Mr. Sapiro in a September 6, 2005 e-mail. The following drafting decisions were made.

(1) Regarding Cmt. [5], the Commission agreed with a recommendation to hold in abeyance any MJP issues, choice of law issues, and issues concerning the extra-territorial application of the RPC's, until the Commission considers MR 5.5 and MR 8.5. (7 yes, 0 no, 2 abstain). It was understood that the web posting of proposed rule 1.0 would note this caveat.

(2) Regarding subparagraph (b)(2), the Commission agreed with a recommendation to use the word "is" rather than "may be" in describing the RPC's as a "basis for discipline" (7 yes, 0 no, 2 abstain).

(3) The use of the noun "state" in subparagraph (b)(1) led to a discussion of whether that word should be a capitalized or lowercase word. As the RPC's currently use a lowercase format, there was no objection to the stylistic decision to use lowercase throughout all of the RPC's.

(4) Regarding the word "willful" in subparagraph (b)(2) and Cmt. [4] explaining the interpretation of "willful," the Commission agreed with a recommendation that the word "willful" should be retained and that Cmt. [4] also should be kept (9 yes, 0 no, 0 abstain). In addition, the Commission determined that Cmt. [4] should be modified to clarify that some rules have a mens rea component (7 yes, 2 no, 1 abstain). Ms. Peck volunteered to assist the codrafters in implementing this modification.

(5) Regarding the alternatives for a brief or an expanded version of proposed Cmt. [2], the Commission agreed with a recommendation to pursue the concept of the expanded version (8 yes, 0 no, 0 abstain).

A redraft implementing the above drafting decisions was requested for the next meeting.

[Intended Hard Page Break]

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

The Commission considered a September 2, 2005 memorandum containing a proposed amended RPC 2-300. A separate memorandum from Mr. Melchior expressing dissents to the proposed concept of a sale of an area of practice (geographic area and substantive field) also was considered. Mr. Sapiro summarized the aspects of the draft that were implemented based on the action taken by the Commission at its June and July, 2005 meetings. The Chair called for discussion of the codrafters' issues footnoted in the memorandum. The following drafting decisions were made.

(1) There was no objection to using the codrafters' proposed amended rule title derived from the title of MR 1.17.

(2) There was no objection to the stylistic decision to spell the term "goodwill" as one word as opposed to two words.

(3) The Commission agreed with a recommendation to modify the rule to clarify to whom a sale is made (i.e., a lawyer or a law firm) (6 yes, 2 no, 3 abstain).

(4) The Commission agreed with a recommendation to modify the rule to add the concept of a restriction limiting permitted sales to only those sales made directly by a selling lawyer and not by a third-party intermediary (9 yes, 2 no, 0 abstain). It was understood that the objective of this change would be to institute a prophylactic prohibition against potential client harm arising from a commercialization of sales and secondary markets for law practices and areas of practice.

(5) The Commission agreed with a recommendation to explore the addition of an exigent circumstances exception to the general restrictions against re-entry to practice after a sale (6 yes, 3 no, 1 abstain). An example offered was the situation where a lawyer sells a practice to accept a government appointment but later wishes to return to practice once the appointment has ended. It was understood that this aspect of the proposed rule may need to be coordinated with RPC 1-500.

Discussion of this item was ended by the Chair to move to the special set discussion of Item III.C Rule 2-100. The codrafters were asked to prepare a redraft implementing the drafting decisions and also attempting to address the issue of the rule's language oriented to apply to both law firms and individual lawyers. It was suggested that the rule should focus on individual lawyers by changing the language to refer to "an individual lawyer and a lawyer as a member of law firm. . . ."