

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

MEETING SUMMARY - OPEN SESSION

Friday, November 8, 2002
(10:00 am - 12:30 and 1:30 - 4:45 pm)

Los Angeles - State Bar Office
1149 So. Hill Street, Room 723
Los Angeles, CA 90015
(213) 765-1000

MEMBERS PRESENT (in Los Angeles, unless otherwise noted): Harry Sondheim (Chair); Ed George; Hon. Ignazio Ruvolo (San Francisco); JoElla Julien; Ellen Peck; Stanley Lamport; Kurt Melchior; Jerry Sapiro; Mark Tuft (San Francisco); Paul Vapnek; and Tony Voogd.

MEMBERS NOT PRESENT: Karen Betzner; Linda Foy; and Raul Martinez.

ALSO PRESENT (in Los Angeles, unless otherwise noted) : Kevin Mohr (Commission Consultant); Randall Difuntorum (San Francisco), Audrey Hollins (San Francisco), and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM OCTOBER 11, 2002 MEETING

The open session summary was approved.

II. REMARKS OF CHAIR

A. Report on Public Hearing

Members were asked to take note of the written submissions received after the public hearing from Carol Langford and Scott Wylie. Members also were informed that upon receipt from the court reporter service, a draft transcript would be distributed to leadership for review. Staff was asked to consider options, other than a court reporter (such as audio taping or video recording) for memorializing future public hearings. Regarding efforts to enhance public input on the Commission's work, Mr. Sondheim asked the members to e-mail specific suggestions to Mr. Difuntorum.

B. Report on the Committee on Professional Responsibility's Comment to the ABA Task Force on Corporate Responsibility

Mr. Mohr reported that COPRAC's Vice-Chair, Sean SeLegue, would present COPRAC's comment to the ABA Task Force on Corporate Responsibility at its November 11, 2002 public hearing at Stanford Law School. It was noted that the Securities and Exchange Commission (SEC) had acted to approve proposed rules implementing section 307 of the Sarbane-Oxley Act but that the rules had not yet been published by the SEC. Mr. Difuntorum indicated that COPRAC would be considering this matter further, in open session, at its November 22, 2002 meeting in Los Angeles.

[Intended Page Break]

III. MATTERS FOR ACTION

A. **Consideration of Rule 1-110. Disciplinary Authority of the State Bar**

The Commission considered a proposed amended RPC 1-110 developed by Mr. Lamport and Mr. Voogd. After discussion, the Commission approved unanimously the following proposed rule text:

“A member shall comply with the terms and conditions attached to any agreement made in lieu of discipline, disciplinary probation, and public or private reprovals.”

Regarding a proposed rule Discussion section, some members believed that no discussion was needed given the clarity of the proposed amended rule text. Other members believed that a discussion section was needed to cross-reference other important and related law.

For the first sentence of the proposed rule Discussion section, the following text was approved by a vote of 6 yes, 3 no and 1 abstain:

“Other provisions also require a member to comply with conditions of discipline.”

For the second sentence of the proposed rule Discussion section, the following text was approved by a vote of 7 yes, 1 no and 1 abstain:

“(See e.g. Bus. & Prof. Code §6068(k) & (l); Cal. Rule of Court 956(b).)”

Regarding the reference in this language to Rule of Court 956(b), staff was asked to facilitate a communication to appropriate Supreme Court staff concerning the need to amend the rule of court to correct the existing erroneous citation to repealed RPC 9-101.

For the proposed rule title, the following text was approved by a vote of 5 yes, 1 no and 2 abstain:

“Compliance with Conditions of Discipline and Agreements in Lieu of Discipline”

Staff and Mr. Mohr were asked to work with the co-drafters to finalize the approved language and explanation for posting in the Commission’s area at the State Bar website.

B. Consideration of Rule 1-100. Rules of Professional Conduct, In General

Mr. Sondheim briefly summarized previous Commission discussions on RPC 1-100(A) and acknowledged each member's contribution to the materials collected for this agenda item. He indicated that he would begin with a concept discussion and then turn attention to Mr. Tuft's October 29, 2002 draft (hereinafter "10/29 Draft"), as the starting point for crafting amendment language. The 10/29 Draft is set forth below:

"Rule 1-100. Purpose and Function of the Rules of Professional Conduct.

(A) The following rules are intended to protect the public, the interests of clients, and the administration of justice and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these rules shall be binding upon all members of the State Bar and all other lawyers practicing law in California. A willful violation of any of these rules shall be the basis for discipline as provided by law.

Discussion:

The Rules of Professional Conduct are rules of the Supreme Court of California regulating attorney conduct through discipline. See *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 593-597 [79 Cal.Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal.4th 409, 418 [25 Cal.Rptr.2d 80]. The rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to Bus. & Prof. Code § 6076 and 6077."

As to concept, the Commission considered whether to delete the existing idea of "public protection" from RPC 1-100(A). Following discussion, there was no motion to make such a change.

Turning to rule language issues, the following points were considered.

(1) Regarding the first sentence of the 10/29 Draft, the Commission considered whether the word "intended" should be changed to "adopted." Among the points made in favor of this change was the point that the word "adopted" precisely tracked the action taken by the Board of Governors pursuant to statute. Among the points made in opposition to this change was the point that the change posed a risk of confusion based on the absence of an express statement of the "intent" of the rules. A vote taken to ascertain consensus revealed 7 members in favor of the change to "adopted" and 4 members who preferred to retain the word "intended." Subsequently, Mr. Sapiro suggested the alternative of using

the phrase “the purposes of the following rules are. . . .” In support of this alternative, it was indicated that the California Supreme Court in *Chambers v. Kay* makes assertions about the “purpose” of the rules. The vote to adopt the alternative was 11 yes and none opposed.

(2) Regarding the format of the proposed sentence that identifies the purposes/intent of the rules (i.e., “to protect the public,” etc...), the Commission considered whether to use a single paragraph or to separate-out each stated purpose as an individual, enumerated subparagraph (a.k.a., an “outline format”). Among the points made in support of the one paragraph format used in the 10/29 Draft was the point that a complete reorganization of RPC 1-100 would not be required, as would be the case if an outline format were adopted. Among the points made in support of a new outline format was the point that such a format would create a visual emphasis on each individual purpose. Upon vote, there were 6 in favor of a new outline format, 4 in favor of the single paragraph format and 1 abstention.

(3) Regarding the proposed statement of the purpose of the rules as it pertains to client protection, the Commission considered whether the language should be changed to refer to the “interests of clients.” Among the points made in support of the phrase “interests of clients” (or “client’s interests”) was the point that a client’s special interest in an attorney-client relationship is distinct from any public interest in general lawyer compliance with the rules, and this distinct interest warrants explicit recognition in RPC 1-100(A). Among the points made in opposition were the following two points: (i) using the phrase “interests of clients” to state the rule’s protection afforded to clients would not parallel the similar notion in RPC 1-100(A) of “protection of the public” and this different phrasing might cause confusion about the protection, if any, afforded to the “public interest”; and (ii) a new concept of protection afforded to the “interests of clients” may raise the unintended issue of the allocation of authority among a lawyer and a client (i.e., a misinterpretation that the new language means that the rules confer on a lawyer the authority to decide what is in a client’s best interest). Following discussion, it was indicated that the Commission may want to include the phrase “interests of clients” for the purpose of eliciting public comment and generating a record for further deliberation. Upon vote, there were 7 in favor of, and 4 opposed to, using the phrase “interests of clients.”

In connection with an eventual posting on the State Bar website, staff was asked to ensure that the informal explanation of amendments includes a mention of the Commission’s desire for comment on the addition of the phrase “interests of clients.”

(4) Regarding a proposal to have no reference whatsoever to client protection (or interests of clients), a motion was made that garnered no second.

(5) Regarding the proposed statement of the purpose of the rules as it pertains to “respect and confidence in the legal profession,” the Commission considered whether this phrase should be replaced with the phrase “to promote the integrity of the legal profession.” Among the points in support of this change was the point that genuine respect and confidence will follow, if the rules truly promote the integrity of the legal profession. Among the points made against this change was the point that case law already cites to “respect and confidence in the legal profession” as a key purpose of the rules and a change in RPC 1-100(A) likely would entail an awkward explanation. It was noted that the preamble to the California Code of Judicial Ethics uses the phrase “confidence in our legal system.” Upon vote, there were 7 in favor of keeping the phrase “respect and confidence,” 3 in favor of substituting with “integrity,” and 1 abstention.

(6) Regarding the proposed statement of the purpose of the rules as it pertains to the “administration of justice,” the Commission considered whether this phrase should be changed to “to promote the administration of justice.” This change was regarded as a clarification of the meaning of the language used in the 10/29 Draft. Upon vote, there were 7 in favor of the change, 2 opposed and 1 abstention.

(7) Regarding the proposed statement of the purpose of the rules as it pertains to protection of the “administration of justice,” the Commission considered whether to add the phrase “to protect the integrity of the legal profession.” Among the points made in favor of the addition was that together, the two phrases embody the concept of having respect for, and preserving the integrity of, the legal system as a whole. Upon vote, there were 11 in favor of this change and no opposition. Mr. Mohr was asked to review the ABA Model Rules to see if there is any similar language identifying the purpose and function of those rules.

(8) Regarding the proposed statement of the purpose of the rules as it pertains to protection of the “administration of justice,” the Commission considered a proposal to modify this phrase by adding the word “fair.” Among the points made in support of this change was the point that case law often refers to the principle of the “fair administration of justice.” Among the points made in opposition was the point that the word “fair” might appear to be redundant in context of this rule which addresses promoting justice. Upon vote, there were 4 in favor of, and 7 opposed to, adding the word “fair.”

(9) Regarding a proposal to change the order of the new enumerated subparagraphs so that the “respect and confidence in the legal profession” subparagraph came before the subparagraph addressing “integrity of the legal system” and “the administration of justice,” no motion was made.

(10) Regarding the second sentence of the 10/29 Draft, the Commission considered a proposal to add two commas to so that it would read:

“These rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these rules, shall be binding upon all members of the State Bar. . . .”

There was no opposition to this proposal and the change was deemed adopted by unanimous consent.

(11) Regarding the second sentence of the 10/29 Draft, as modified with the two commas, and reserving any decision on the inclusion of the last phrase (“and all other lawyers practicing in California”), the Commission voted to approve the sentence by a vote of 8 yes, 2 no and 1 abstention.

(12) Regarding the third sentence of the 10/29 Draft, the Commission considered a proposal to revise it to read:

“A member may be disciplined for a wilful violation of any of these rules.”

Among the points made in support of this change was the point that use of the word “may” avoids potential confusion about State Bar trial counsel prosecutorial discretion to pursue discipline. Among the points made in opposition to this change was the point that the proposed rule language may cause mischief if it does not precisely track the statutory language found in Bus. & Prof. Code §6077 (“For a wilful breach of any of these rules. . . .”). Upon vote, there were 10 in favor of, and 1 opposed to, making this change to the third sentence of the 10/29 Draft.

(13) Regarding the 10/29 Draft Discussion section, the Commission considered a proposal to move the concept of the first sentence of the Discussion section into the text of the rule, possibly in a new paragraph (B). Among the points made in support of this change was the point that the RPC 1-100 text, as opposed to the Discussion section, must be explicit as to the disciplinary function of the rules, otherwise there will be debate about the applicability of the rules as disciplinary standards. Among the points made in opposition was the point that language has already been adopted for the rule text that covers regulation of attorney conduct through discipline and the objective of the 10/29 Draft, in part, was to move text out of the rule and into the Discussion section so that

RPC 1-100(A) would be tightly focused on the public policy “purposes” of the rules. Upon vote, the Commission decided to move the concept of the first sentence of the 10/29 Draft discussion section into the text of the rule, by a vote of 6 yes, 4 no, and 1 abstention.

In accordance with the above discussion, Mr. Sondheim asked staff to work with Mr. Mohr to finalize a draft for distribution to the Commission members with an explanation stating that the language has been tentatively adopted and requesting that comments be exchanged prior to the next meeting.

The 10/29 Draft, as modified in accordance with the discussion, is set forth below:

“Rule 1-100 Purpose and Function of the Rules of Professional Conduct
[Rule title not yet determined.]

(A) The purposes of the following rules are:

- (1) To protect the public;
- (2) To protect the interests of clients;
- (3) To protect the integrity of the legal system and to promote the administration of justice; and
- (4) To promote respect for, and confidence in, the legal profession.

(B) These rules regulate attorney conduct and are enforceable through discipline. These rules, together with any standards adopted by the Board of Governors pursuant to these rules, shall be binding upon all members of the State Bar. A member may be disciplined for a wilful violation of any of these rules.”

For the Commission’s next meeting, members were asked to use the tentatively adopted language, or any proposed modification thereof, in drafting proposals for amending the third and fourth paragraphs of current RPC 1-100(A) [re: rules “not exclusive”; and rules “not intended to create new civil causes of action”]. In order to evaluate a member’s RPC 1-100(A) proposal in the context of the entire rule, members were encouraged to also include proposed amendments of current RPC 1-100(C) [Purpose of Discussions], (D) [Geographic Scope of the Rules], and (E) (re: “rules may be cited and referred to as. . .”). It was understood that consideration of RPC 1-100(B) [Definitions] would be postponed.

C. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120

Matter carried over.

[Intended Page Break]

D. Consideration of Rule 1-300. Unauthorized Practice of Law

Mr. Sondheim indicated that this matter would be taken-up at the Commission's next meeting. Mr. Sondheim assigned Mr. Martinez to work with Mr. Melchior and Ms. Peck to consider all materials previously distributed on this rule, to develop a recommendation on possible amendment issues and, if determined appropriate by the codrafters, to submit a draft of a proposed amended rule. It was noted that this rule is related to RPC 1-311 but Mr. Sondheim decided that the codrafters should not be obligated to address RPC 1-311 at the next meeting.

[Intended Page Break]

E. Consideration of Rule 1-310. Forming a Partnership With a Non-Lawyer

Matter carried over.

F. Consideration of Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member

Matter carried over.