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

MEETING SUMMARY - OPEN SESSION

Friday, July 11, 2003
(9:30 am - 4:55 pm)

VIDEO-CONFERENCE MEETING

SF–State Bar Office
180 Howard Street, Room 8-B
San Francisco, CA 94105

LA–State Bar Office
1149 So. Hill Street, Room 723
Los Angeles, CA 90015

MEMBERS PRESENT: Harry Sondheim (Chair); Karen Betzner; Linda Foy; Ed George; Stanley Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Jerry Sapiro; Mark Tuft; Paul Vapnek and Tony Voogd.

MEMBERS NOT PRESENT: JoElla Julien; and Hon. Ignazio Ruvolo.

ALSO PRESENT: Jonathan Bishop (State Bar staff); Randall Difuntorum (State Bar staff); Diane Karpman (Beverly Hills Bar Association Liaison); Lauren McCurdy (State Bar staff); Kevin Mohr (Commission Consultant); Gerald Phillips; Toby Rothchild (Access to Justice Commission Liaison); Ira Spiro (State Bar ADR Committee Liaison); and Mary Yen (State Bar staff).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM MAY 2, 2003 MEETING

The open session summary was approved, as amended. (See attached copy of revised summary.)

II. REMARKS OF CHAIR

A. Chair's Report

The Chair reported that a meeting with representatives of the ABA Joint Committee on Regulation has been scheduled for Friday, August 8, 2003. The meeting coincides with the ABA Annual Meeting in San Francisco taking place that same week. In addition to the Chair, the Commission will be represented by: Mr. Tuft; Mr. Vapnek; Mr. Mohr; and Mr. Difuntorum.

The Chair thanked those members who exchanged e-mails following distribution of the agenda. The Chair indicated that those members would be permitted to speak twice on any issue but that members who did not send an e-mail would be given only one opportunity.

B. Staff's Report

Staff reported on the status of AB 1101 (Steinberg), a bill supported by the State Bar Board of Governors. If enacted, the bill would establish an exception to an attorney's statutory duty of confidentiality permitting disclosures to prevent criminal acts of death or serious bodily harm. Staff indicated that the author has amended the bill to provide for the appointment of a special task force to develop a supporting rule of professional conduct. The task force would be appointed by the State Bar President in consultation with the Supreme Court and would include representatives from both the Commission and COPRAC.

Staff informed the Commission about a new State Bar travel program. The program effectively places a cap on travel expense reimbursements that exceed the government rate available when arrangements are made through the State Bar travel agency.

Staff also reminded members to submit reimbursement requests in time to meet the 60-day deadline. Faxes followed by mailed originals are acceptable. Requests not received by the 60-day deadline likely will not be reimbursed.

III. MATTERS FOR ACTION

A. Consideration of a "Practice of Law" Definition

Ms. Peck presented her June 29, 2003 memorandum reporting on alternatives for action on the proposal to develop a definition of the "practice of law." As set forth in this memorandum, the alternatives offered for consideration were: (1) do not attempt any definition because the task is impossible; (2) draft a definition that generally incorporates by reference the definition present in existing law (judicial decisions, rules of court, statutes); (3) draft a definition using language that closely tracks what is said in California case law; and (4) draft a definition that utilizes a "presumption model" similar to the advertising standards pursuant to RPC 1-400 and the trust account record-keeping standards pursuant to RPC 4-100. Among the points raised during the discussion of Ms. Peck's report were the following:

(1) No definition should be attempted as such an effort would be exceedingly difficult and complex and likely would result in a definition that would be challenged by the many interested stakeholders who have divergent, if not antagonistic, substantive and policy positions on the content of a definition.

(2) The Commission should not give up on its effort to strategize an approach to defining the practice of law because all possible options have not yet been thoroughly explored.

(3) Consideration should be given to drafting a comprehensive rule discussion section that would not define the practice of law but, instead, would provide thorough citations and illustrations that provide guidance on existing law.

(4) The absence of a definition has not been an insurmountable obstacle to disciplinary actions against lawyers.

(5) The D.C. definition should be reviewed to see if that definition offers any viable alternatives.

(6) No definition should be attempted because any draft would be contextual. A definition that is not bound by context would be problematic as it would be both over and under inclusive. There is no harm in leaving a concept undefined when an understanding of that concept is dependent on a specific context. "Client" and "adverse interest" are key terms that are not defined in the rules because these concepts are best interpreted when considered in a specific context. Likewise, the concept of the practice of law should not be regarded as needing a definition. Instead, consideration should be given to updating the discussion section guidance already present in the rules.

(7) The business of defining the practice of law is not appropriate for the Commission or the State Bar because philosophically that results in a situation where monopolists are setting the parameters of a monopoly. Instead, the Commission should recommend that the Board submit a recommendation to the legislature encouraging the legislature to take action.

(8) Constitutionally, it is the judicial branch and not the legislature that possesses inherent plenary power over the practice of law in California. Notwithstanding codified statutes prohibiting unauthorized practice of law, the definition of 'what is the practice of law' is a matter for the judicial branch.

(9) If the rules had a guidance section or reporters' notes, then that might be the best place for a definition.

(10) By saying that the practice of law is what is set forth in existing law, then the reference to existing "law" would be broad enough to encompass law made by the judiciary, the legislature and even the executive branch.

Following discussion, it was the consensus of the Commission that the codrafters should proceed to draft rule discussion section language providing guidance on the meaning of the term "practice of law" using case citations and statements of holdings without embellishment. The Chair asked all members to review alternative no. 4 in Ms. Peck's June 29th memorandum and to provide input to the codrafters. It was understood that the codrafters assignment includes the task of recommending which rule(s) would be the appropriate place for the new discussion section language.

B. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions

Mr. Vapnek presented his June 30, 2003 memorandum reporting on the history of the Commission's consideration of proposed new rule 1-120X and setting forth a current draft. The memorandum also included the text of MR 8.4. On behalf of the codrafters, Mr. Vapnek sought general input on further drafting. Among the points raised during the discussion were the following:

(1) The concept of moral turpitude is arcane and out-dated. Including moral turpitude in a rule of ethics would go against the majority position throughout the states.

(2) Using the term moral turpitude is inconsistent with the principle that a disciplinary rule should state clearly and specifically the conduct which is prohibited.

(3) At most, perhaps moral turpitude could be included in the discussion section to a rule in the form of a cross reference to Bus. & Prof. Code §6106.

(4) Only 2 states retain moral turpitude in their rules. Five states have the ABA Model Code which includes moral turpitude. All other states do not include moral turpitude in the text of their rules.

(5) Including moral turpitude in the text of this proposed new rule serves as a basis for recommending that following approval of the new rule by the Supreme Court, the Board of Governors should lobby the legislature to delete Bus. & Prof. Code §6106.

At this point in the discussion, the Commission considered a recommendation that moral turpitude not be included in the next draft of proposed new rule 1-120X. The Chair took a consensus vote which showed that the majority of members believed that moral turpitude should not be included in the next draft.

Next, the Chair took consensus votes on each of the subparts of MR 8.4 as follows.

MR 8.4(a) [re attempted violations] - the consensus was to leave this provision blank, possibly reserved for bringing in the relevant part of the Commission's tentatively approved proposed amended RPC 1-120.

MR 8.4(b) [re commission of a criminal act] - by a vote of 7 yes, 3 no and 1 abstention, it was decided that the concept of this subpart should be included in the next draft of rule 1-120X.

MR 8.4(c) [re dishonest conduct] - by a vote of 7 yes, 3 no and 1 abstention, it was decided that the concept of this subpart should be included in the next draft of rule 1-120X.

MR 8.4(d) [re conduct prejudicial to the administration of justice] - by a vote of 6 yes and 5 no, it was decided that the concept of this subpart should be included in the next draft of rule 1-120X.

MR 8.4(e) [re improper influence on a government agency] - by a vote of 6 yes, 4 no and 1 abstention, it was decided that the concept of this subpart should be included in the next draft of rule 1-120X.

MR 8.4(f) [re assisting judicial misconduct] - by a vote of 9 yes, 1 no and 1 abstention, it was decided that the concept of this subpart should be included in the next draft of rule 1-120X.

The Chair assigned the codrafters to prepare a redrafted rule in accordance with the above discussion.

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C. Consideration of Proposed New Rule re "Recording Time"

Mr. Voogd presented his June 23, 2003 memorandum recommending a revised draft of a proposed new rule on "recording time." As the set forth in the memorandum, the proposed new rule would be as follows:

"Rule ____. Recording Time.

A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in upon the time expended by the member. Such records shall briefly describe the services provided and shall be founded upon written or electronic notations made at or about the time of the expenditure. Copies of such records shall be provided to the client promptly upon request and shall be maintained for a period of five years."

In addition to Mr. Voogd's memorandum, members were directed to Ms. Peck's June 29, 2003 memorandum offering placement alternatives for rule language addressing "recording time." The alternatives were: (1) a new paragraph (C) in RPC 4-200; (2) a new standard to RPC 4-200 creating a presumptive violation of the rule; (3) a recommendation that the Board refer the matter to the State Bar Committee on Mandatory Fee Arbitration for consideration of an amendment to Bus. & Prof. Code §6148; (4) a recommendation that the Board refer the matter to the Judicial Council for consideration of an amendment to the California Rules of Court Standards for Judicial Administration; and (5) placement in a new "guidance" section to the RPC's. The Chair asked for a general discussion of whether the concept of the proposed new rule should be pursued. Among the points raised during the discussion were the following:

(1) Although the ABA report and other agenda materials make a compelling case for lawyer accountability issues in billing practices, it is still not clear whether the promulgation of a new RPC is the appropriate response to these issues.

(2) As a topic, billing procedures seems to fall into the category of law office management rather ethics.

(3) Assuming this would not be a stand alone rule, including this concept as an unconscionability factor under RPC 4-200 or as discussion text to that rule still seems to be out of place. The concept probably belongs in the Bus. & Prof. Code as part of the written fee agreement statute.

(4) In one sense, this issue is analogous to the question of 'how long to keep closed client files' because both are real world concerns in the practice of law that do not present an immediate satisfactory answer as a rule of professional conduct proposition.

(5) The anecdotal and other evidence of abuse should be taken as a given but implementation of a disciplinary standard as a remedy is a serious policy question.

(6) Bus. & Prof. Code §6148 addresses much of this concern and any new rule text should not be redundant of existing law.

(7) Billing fraud should be the target not billing practices.

(8) Billing fraud is covered by moral turpitude and criminal sanctions but clients are in need of protection against lazy and non-existent billing records. Absent clear and precise billing statements and records, how would a client know that they have been defrauded?

(9) An ethical obligation to generate and maintain billing statements is an appropriate topic for the rules because the concept is similar to the fiduciary trust account record-keeping standards already present in RPC 4-100.

(10) The PCLM case includes the proposition that billing records can be created after the fact.

(11) From the public's perspective, it should not be a bid deal to expect contemporaneous billing records from a professional service provider who charges by the hour. If contractors can provide a daily invoice then lawyers should be able to do so as well.

(12) The common practice of documenting billable hours to support court awarded fees is distinguishable from the instant issue because an across-the-board new rule on billing practices would intrude into the contractual relationship negotiated between nearly every attorney and client.

(13) In the legal services arena time records ordinarily are for the benefit of third-party payors rather than indigent clients.

(14) Estimated hours and rounded hours offend the general fiduciary duty of a lawyer to prefer a client's best interest over that of the lawyer's.

(15) From the perspective of State Bar prosecutorial discretion, billing issues are matters that may be diverted to fee arbitration or other civil remedies; however, if RPC 4-200 is changed from unconscionable to unreasonable fees then this could change.

(16) As a prohibition, unconscionability and RPC 4-200 are triggered by a complete failure in the billing relationship between lawyer and client. This is different from a standard intended as a general business practice guideline. Put another way, although charging an unreasonable fee can and should taint enforceability, it should not necessarily implicate discipline.

Following discussion, a consensus vote revealed that the Commission supported the concept of a “recording time” standard as a new component to be placed somewhere in the rules (rule text, discussion text, or Board adopted standard). The codrafters were asked to prepare a further draft and recommendation in accordance with the points raised in the discussion. Mr. Melchior was added as a new codrafter.

D. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs)

The Commission reviewed consensus positions reached at the prior meetings, including the consensus to retain the concepts of RPC 1-300(A) and (B) and RPC 1-310.

Based on the summary of prior consensus positions, the Commission considered a recommendation to retain the concept of RPC 1-320(A). By a consensus vote of 9 yes, 0 no, and 2 abstentions, the Commission agreed to retain the concept of RPC 1-320(A).

The Commission considered a recommendation to postpone action on RPC 1-320(B) and (C) until the discussion of RPC 1-400. There was no opposition to this recommendation.

The subcommittee sought Commission input on whether the concepts in MR 5.4(c) and (d) should be regarded as within the scope of the subcommittee's work on 'professional independence rules.' It was observed that MR 5.4(c) is analogous to RPC 1-320(B) and that MR 5.4(d) is analogous to RPC 3-310(F). It was the consensus of the Commission that the subcommittee should address both concepts with the proviso that the concept of MR 5.4(c) should be coordinated with any discussion of that concept under RPC 1-400.

The subcommittee sought Commission input on whether a possible 'professional independence rule' should be formatted as a separate rule similar to the general structure of MR 5.4. By a consensus vote of 9 yes, 1 no, and 1 abstention, the Commission agreed to pursue that format.

It was noted that MR 5.4 reflects the fact that the ABA Model Rules contain concepts that exist in California statutes and other authorities other than the Rules of Professional Conduct. The Chair asked staff to remind the Commission, once it has gone through all of the rules, to consider development of a specific recommendation that the Board consider advocating for legislative action to delete concepts present in statutes that the Commission is adding to the rules.

The subcommittee sought Commission input on whether MR 5.7 should be regarded as within the scope of the subcommittee's work on 'professional independence rules.' There was no opposition to the subcommittee making the decision as to whether to include MR 5.7 in its work.

In accordance with the Commission's discussion, the Chair assigned the subcommittee to develop a report and proposed rule amendment for the next meeting.

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

Mr. Voogd presented his June 26, 2003 memorandum setting forth a proposed amended RPC 1-311 as follows:

"**Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member.**

(A) For purposes of this rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203(d)(1), or California Rule of Court 958(d) and

(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to

perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. <u>The information contained in such notices shall be available to the public</u>. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

<u>Discussion</u>:

For discussion of the activities that constitute the practice of law, see <u>Farnham v. State Bar</u> (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; <u>Bluestein v. State Bar</u> (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; <u>Baron v. City of Los Angeles</u> (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; <u>Crawford v. State Bar</u> (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; <u>People v. Merchants</u>

Protective Corporation (1922) 189 Cal. 531, 535 [209 P. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600 [organization as client].)

Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 983 [counsel pro hac vice], 983.1 appearances by military counsel], 983.2 [certified law students], and 988 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice."

The Commission considered a recommendation to add the word "unauthorized" before the phrase "practice of law" in subparagraph (B)(6). The arguments in favor of this change included the following: (1) RPC 1-300(A) uses the phrase "unauthorized practice of law" and RPC 1-311 should be consistent; (2) absent the inclusion of the word "unauthorized," RPC 1-311 could be interpreted to be over broad and in direct conflict with other state and federal law authorizing practice of law activities (including representation before tribunals) by persons who are not members of the State Bar; (3) the scope of authorized practice of law activities has changed during the relative short period of time since RPC 1-311 was promulgated and these changes include, but are not limited to, new statutory schemes authorizing legal document assistants, unlawful detainer assistants, family law court information centers, and family law court facilitators. As to the latter argument, it was observed that the terms and conditions of the new authorized practice of law activities were crafted by the legislature and Judicial Council after RPC 1-311 but contain no explicit prohibition on the performance of the activities in association with an active member or law firm.

Members opposed to the change raised the point that the origin of RPC 1-311 reveals that it is intended to circumscribe both "authorized" and "unauthorized" practice of law activities when such activities are performed in association with an active member of the State Bar. Making the proposed change therefore would be regarded as a critical policy change. In addition, not making the change does not foreclose recently authorized activities permitted by law as such activities could be performed outside of an association with an active member.

Following discussion, the Commission considered a motion to add the word "unauthorized" to subparagraph (B)(6). The motion was defeated by a vote of 5 yes, 6 no, and 0 abstentions.

The Chair clarified that the final proposed amended rule language was before the Commission and, hearing no objection, deemed the amended rule tentatively approved subject to future action taken to update, modify or delete the first paragraph of the discussion section which sets forth case law defining the practice of law. Staff was directed to work with Mr. Mohr in preparing the rule for posting on the State Bar website.

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F. Consideration of Rule 3-600. Organization as Client

The codrafters presented their June 26, 2003 memorandum providing an overview of RPC 3-600 rule amendment issues. As set forth in the memorandum, the potential issues for consideration include: (1) the MR 1.13 amendments proposed by the ABA Task Force on Corporate Responsibility; and (2) interface issues between RPC 3-600 and the SEC rules implementing sec. 307 of the Sarbanes-Oxley Act of 2002. The Commission also considered drafting suggestions from Mr. Voogd in his memorandum dated June 26, 2003. The codrafters requested input on these issues and comments identifying any other potential issues. Among the points raised during the discussion were the following:

(1) Consideration should be given to the application of the rule, or its concept, to class action representations.

(2) The specific language of the rule should be the subject of a detailed close comparison to MR 1.13 after the ABA House of Delegates acts on the corporate responsibility proposals.

(3) Consideration should be given to the State Bar's efforts in response to AB 363 involving the application of the rule to public entities.

(4) The codrafters should offer a recommendation on mandatory v. permissive up-the-ladder reporting.

(5) Provision for outside reporting must be discussed in connection with exceptions, statutory or otherwise, to Bus. & Prof. Code §6068(e).

(6) Class action issues seem more pertinent to the conflicts rules.

Following discussion, there was a general consensus that the codrafters should offer specific recommendations on: (1) the ABA corporate responsibility proposals for MR 1.13; (2) Sarbanes-Oxley issues, if any; and (3) governmental entity issues, if any (not limited to whistleblower issues). Mr. Lamport was added as a codrafter. Ms. Karpman volunteered to assist the drafting team. Mr. Mohr was asked to prepare a side-by-side ABA comparison of rule language. Staff was asked to distribute the course book for the State Bar's 2003 Annual Ethics Symposium.

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G. Consideration of Proposed New Rule Regarding Good Faith Reliance on the Advice of Counsel

The Commission considered a recommendation for a proposed new rule submitted by Mr. Melchior, in consultation with the Chair. Mr. Melchior's recommendation presented the following discussion draft.

> "Rule X-XXX. Good faith reliance on advice of counsel.
>
> A member seek the advice of another attorney on any question which arises in the course of a client engagement. No discipline shall be imposed and no adverse action taken against the member if his or her action is taken upon the advice of such other attorney, given after full and adequate disclosure to such attorney of all facts [and circumstances[?]] relevant to the consultation.
>
> This Rule does not relieve the member of civil liability under otherwise established rules of law.
>
> *Comment:* It is not the intent of this rule to allow a member a free pass for any conduct which would clearly result in disciplinary or civil liability if there had been no such consultation; but it is the purpose of this Rule to encourage members to seek confidential, privileged consultation within the scope of a client engagement where a matter of professional difficulty appears."

Mr. Melchior explained that this proposal originated from an APRL discussion with Charles Kettlewell. Following brief comments from remaining members present, it was agreed that Mr. Melchior would work with Mr. Sapiro to further develop the proposal for consideration by the Commission.