

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

MEETING SUMMARY - OPEN SESSION

Friday, October 28, 2005
(9:15 am - 5:00 pm)

Saturday, October 29, 2005
(9:00 am - 5:00 pm)

LOCATION ON FRIDAY, OCTOBER 28, 2005:
SF–State Bar Office
180 Howard Street, 4th Floor
San Francisco, CA 94105

LOCATION ON SATURDAY, OCTOBER 29, 2005:
Nossaman Guthner Knox et al
50 California Street, 34th Floor
San Francisco, CA 94111

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

MEMBERS NOT PRESENT: Kurt Melchior.

ALSO PRESENT: Carol Buckner; Steven Churchwell (DLA Piper Rudnick) (Saturday); Randall Difuntorum (State Bar Staff); Diane Karpman (Beverly Hills Bar Association Liaison); Louis Leonard (Latham & Watkins) (Saturday); Lauren McCurdy (State Bar Staff) (Friday); Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & Los Angeles County Bar Association Liaison); Robert Sall (COPRAC Liaison); Dominique Snyder (COPRAC Advisor) (Friday); and Peter Stern (Trust & Estates Section Ex. Comm. Liaison).

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE SEPTEMBER 9, 2005, MEETING

The open session summary from the September 9, 2005 meeting was deemed approved.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair emphasized that the Commission's deliberations are enhanced when members make the effort to share comments on the e-list prior to the meeting. The Chair noted that members who post such messages may be given additional opportunities to speak at the meetings.

B. Staff's Report

Staff reported that the Board of Governors, at its October 21 & 22, 2005 meetings, considered Trust & Estates Legislative Proposal No. 2006-07 and determined not to include it in the State Bar's 2006 legislative package. Staff indicated that the Board considered a written comment submitted by Elder Law & Advocacy expressing concerns about the legislative proposal. Staff was asked to distribute a copy of the written comment to the Commission members.

1. Consideration of 2007 Workplan and 2005 Accomplishments

Staff presented a working draft of the Commission's 2007 Workplan and 2005 Accomplishments report. The Commission authorized leadership to finalize the reports for submission to the Board Committee on Regulation, Admissions, and Discipline. Members were asked to provide comments and suggested edits to the reports by November 17th. In particular, members were asked to consider possible new initiatives for the 2007 Workplan.

III. MATTERS FOR ACTION

A. Consideration of a Methodology for Seeking Official Public Comment

The Chair led a discussion about public comment process issues. As background, the Chair recalled that the original Commission distributed the entirety of its recommendations as a single, comprehensive 120-day public comment package and that this approach garnered criticism from certain commentators, such as local bar ethics committees, who believed that the package was overwhelming and not conducive to submission of thoughtful input.

The Chair also noted that earlier this year Commission leaders and staff appeared before the Board's Regulation, Admissions and Discipline committee (RAD) and gave a status report on the work of the Commission. In making this report, RAD was informed that the Commission was planning to seek public comment in groups, not as a whole, and the RAD members did not object.

After the Chair's introductory remarks, Commission members were asked to offer suggestions for how to conduct the public comment process. Among the points raised during this discussion were the following.

(1) Before resolving the process issues associated with a public comment methodology, the Commission should take some time to clarify its understanding about the status of its "tentatively approved" rule drafts and the process that will be used to advance those drafts to the status of officially approved rules for inclusion in a Board submission for public comment. Some "tentatively approved" rules may need more work than others to garner Commission consensus as a final draft. Perhaps a consent agenda or a 10-day ballot procedure could be used to determine which "tentatively approved" rules warrant extensive deliberation and refining.

(2) Some lead-time, perhaps as long as 45-days, should precede the start of the official public comment period in order to give local and speciality bar associations time to organize subcommittees and otherwise prepare to act on the proposals.

(3) The Commission's process for considering the comments submitted and the Commission's time-line for further public comment batches should be set forth in the very first public comment package.

(4) It is inadvisable to implement a process that offers only a one time opportunity to comment on portions of the proposed rules but does not permit consideration of the entirety of the Commission's recommendations as a complete, integrated work product.

(5) To address concerns that the proposed amendments need to be evaluated as a whole, consideration should be given to circulating a final, comprehensive public comment request on all of the rules after each batch has been separately distributed. There likely will be rules that are materially revised by the Commission in response to the initial comments received and a final, comprehensive public comment distribution will facilitate the public's consideration of those changes.

(6) Efforts must be made to assure that public comment from non-lawyers is solicited.

(7) If public comment is sought using batches, then the Commission should explore whether the Board and the Supreme Court might be interested in taking action on each batch as public comment on each batch is completed. This may be preferred over the option of waiting to act on a single, large Commission report and recommendation covering the entirety of the proposed rule amendments.

(8) Ideally, a proposed terminology section would accompany the entirety of the rules but for public comment purposes, any batch of rules should include the definitions of any terms that would be covered in a terminology section.

(9) To conserve meeting time, Commission officers and staff should develop a concrete, comprehensive public comment plan and time-line so that the Commission can take a vote on something specific.

Following discussion, the Chair stated that leadership would draft a plan to be considered by mail ballot or by placing the draft plan on the agenda as a consent item. Commission members were assigned to e-mail to leadership and staff suggestions for the plan as well as any issues of concern by November 15, 2005.

[Intended Hard Page Break]

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

The Commission considered draft 4 of proposed rule 1.0 dated October 17, 2005. Mr. Tuft summarized the status of the draft noting revisions implemented in accordance with the Commission's discussion at its September 9, 2005 meeting. The Chair called for discussion of the issues raised in the drafter's notes, Mr. Kehr's October 23, 2005 e-mail message, and Mr. Sapiro's October 25, 2005 e-mail message. The following drafting decisions were made.

(1) Regarding the codrafter's recommendation to delete the fourth sentence of Cmt. [2] (stating: "Therefore a violation of a rule does not in itself give rise to a cause of action for enforcement of a rule or for damages caused by a failure to comply with a rule."), the Commission, by consensus, retained the sentence in the comment.

(2) Regarding the last sentence of Cmt. [2] (stating: "The rules should be interpreted with reference to the purposes stated in paragraph (a)."), the Commission deleted it (4 delete, 2 retain, 2 abstain).

(3) Regarding Cmt. [3], the Commission agreed with a codrafter recommendation to adopt this comment to make clear that the rules of other jurisdictions or bar associations are not binding on California lawyers (4 yes, 0 no, 4 abstain).

(4) Regarding Cmt. [4], the Commission revised it to state: "Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. See *Phillips & B&P Code* § 6077." (9 yes, 0 no, 1 abstain.)

(5) Regarding Cmt. [5], the Commission agreed with a codrafter recommendation to include a note stating that Cmt. [5] is a place-holder as the Commission will consider this comment at the time it considers MR 5.5 and MR 8.5.

After consideration of these issues, the Chair called for a vote to tentatively approve proposed rule 1.0. The Commission tentatively approved the rule, as revised in accordance with the Commission's discussion (7 yes, 1 no, 0 abstain).

[Intended Hard Page Break]

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

The Chair welcomed Peter Stern, liaison from the Trust and Estates Executive Committee. The Commission considered an October 17, 2005 memorandum containing a revised proposed rule 1.14 presented by Ms. Foy. Ms. Foy indicated that the draft implemented revisions discussed at the Commission's last meeting and noted that a comment has been added to state that the rule does not apply to representation of criminal defendants and minors. The Chair called for discussion of the recommendation to exclude criminal defendants and minors from the rule. Among the points made during the discussion were the following.

(1) The language excluding criminal defendants and minors should be in the rule text and not just in the comments.

(2) Persons who are subject to an existing conservatorship also should be excluded.

(3) Rather than referring to criminal defendants, minors, and conservatees, the proposed exclusion should express the concept that the rule is not intended to apply to any situation in which the rights of a client are at issue and there is a claim of diminished capacity. This approach covers relevant situations, such as a deportation matter, that may not fall into the categories of criminal matters, representation of minors, or conservatorships.

(4) If there are too many identified exclusions, then the rule may become useless.

(5) Exclusions are needed to limit instances of lawyer substitute judgment.

(6) This rule should not be drafted to permit substitute judgment by a client's lawyer, instead it should simply allow the lawyer to make a disclosure that can start the process of consideration of possible protective action. The process protects the client's rights and exclusions would leave categories of clients at risk.

(7) The exclusions are intended to permit established procedures to go forward. For example, in a criminal matter there are procedures for a lawyer to handle the issue of a defendant's competency to stand trial. This rule should not impact those situations.

(8) In addition to the exclusions, the rule should be limited to situations where a lawyer is acting to prevent a client from being victimized and not just in response to an assessment of an impairment. The rule should also address fundamental conflicts of interest issues and deal with the allocation of authority among lawyer and client.

After discussion, the Commission gave the codrafters the following drafting instructions: (1) parallel Cmt. [4] & [5] with the language used in RPC 3-100 ("may but is not required to"); (2) in para. (b), delete the concept of a lawyer's permissive ability to "take reasonably protective action" (6 yes, 3 no, 2 abstain); and (3) revise para. (b) to link the triggers by a causality connection. A redraft was assigned consistent with the Commission's discussion.

[Intended Hard Page Break]

D. Consideration of Rule 1-300 [ABA MR 5.5, MR 5.3] (Unauthorized Practice of Law; Multijurisdictional Practice of Law) (Including consideration of discussion section re “definition of the practice of law” in rule 5.5 and proposed rule 5.3.1 [1-311])

The Commission considered draft no. 6.2 of proposed rule 5.5 (dated March 2, 2005) presented by Mr. Mohr. Mr. Mohr summarized the background of this rule noting the codrafter recommendation that the California rules attempt to track the ABA approach notwithstanding that California has adopted MJP Rules of Court. The Chair called for a discussion of the issues raised in the codrafters’ endnotes. The following drafting decisions were made.

- (1) Regarding the proposed rule title, the Commission agreed with a codrafters’ recommendation to track the title of MR 5.5 (6 yes, 1 no, 1 abstain).
- (2) By consensus, the Commission agreed with a codrafters’ recommendation to use the phrase “lawyer admitted to practice law in California” instead of the term “member” throughout the rule.
- (3) The Commission agreed with a codrafters’ recommendation to use the term “assist” rather than “aid” throughout the rule as the term “assist” is used in MR 5.5 (8 yes, 0 no, 0 abstain). Conforming changes to the proposed comments were deemed approved.
- (4) The Commission modified para. (a)(1) to read: “practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or” (7 yes, 1 no, 0 abstain).
- (5) The Commission modified para. (a)(2) to read: “assist a person or entity in the performance of an activity that constitutes the unauthorized practice of law.” (7 yes, 0 no, 1 abstain)
- (6) Para. (a)(2) was further modified to substitute “organization” for “entity” (5 yes, 2 no, 1 abstain) and the codrafters were asked to flag this term for possible reconsideration once a terminology section is drafted. Conforming changes to the proposed comments were deemed approved.
- (7) To conform to the language used in Rule of Court 966(c), the Commission modified para. (b)(1) to read: “establish or maintain a resident office or other systemic or continuous presence in California for the practice of law, or” (7 yes, 0 no, 1 abstain).
- (8) The beginning of para. (b) further modified to start with the phrase: “Except as authorized by these Rules or other law, . . . ” (5 yes, 2 no, 1 abstain).
- (9) There was no objection to the Chair’s action to deem Cmt. [1] and Cmt. [2] approved by consensus.
- (10) For implementation by the codrafters, the following language was approved as a substitute sentence for the last sentence in Cmt. [3]: “This rule does not prevent a lawyer from counseling lawyers or non-lawyers on how to proceed in their own matters.” (6 yes, 0 no, 2 abstain).

(11) Regarding the issue of “ghost-writing” and limited scope representation issues, the codrafters were asked to prepare proposed language for the comment.

Following discussion, a redraft of proposed rule 5.5 was assigned. Consideration of proposed rules 5.3 (re nonlawyer assistants) and 5.3.1 (RPC 1-311) was carried over to the next meeting.

[Intended Hard Page Break]

E. Consideration of Rule 1.8.1 (Rule 3-300). Avoiding Interests Adverse to a Client

Matter carried over.

[Intended Hard Page Break]

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

The Commission considered an October 18, 2005 draft of proposed rule 1.7 presented by Mr. SeLegue. Mr. SeLegue explained that the draft rule reflected the Commission's prior decision to adapt the existing California conflicts rules to the ABA Model Rule format and structure. Mr. SeLegue indicated that the proposed commentary was an initial effort by some of the codrafters as a first attempt at considering the ABA comments and introducing some proposed new language. The Commission discussed the codrafters' approach to drafting a California version of MR 1.7. Among the points raised during the discussion were the following.

(1) Proposed Cmt. [7] and [8] are intended to explain the use of the word "directly" to modify an adverse representation.

(2) It is unclear why different standards of adversity are articulated for joint client conflicts ("interests of clients potentially/actually conflict" under 1.7(b)) and concurrent client conflicts (representation of one client "directly adverse" to another client 1.7(a)). The conflicts rules should be drafted with the goal of making the standards accessible to practicing lawyers. If the differing standards are used then they must be explained.

(3) Although in ABA terms a joint representation scenario conceptually falls into the category of a "materially limited" conflict, the standard used by the codrafters in proposed 1.7(b) is the RPC 3-310(C) standard. This is because California law and California lawyers already regard joint representation conflicts as a distinct type of conflict.

(4) In making a recommendation on the standard to use for concurrent client conflicts, the codrafters should consider the discussion of adversity in *GATX/Airlog Co. v. Evergreen Int'l. Airlines, Inc.* (N.D. Cal. 1998) 8 F. Supp. 2d 1182. As a policy matter the finding of adversity, direct or otherwise, does not necessarily have to be determinative as to whether a lawyer's conduct should be labeled a conflict.

(5) Case law and COPRAC opinions can be construed to support the proposition that a standard of direct adversity might be too high of a standard for joint client representations. Any joint representation likely will raise issues of contrary instructions, competing claims to file materials and other similar issues. While these issues could rise to the level of direct adversity, the approach used in RPC 3-310(C), and perpetuated in proposed 1.7(b), is to view such issues as triggering a "potential conflict" that requires informed written consent, without conducting an additional inquiry into the presence or absence of direct adversity. This, alone, is a basis for addressing joint representation conflicts in a separate para.(b) and not lumping them together with other concurrent client conflicts in 1.7(a).

After discussion, the following drafting decisions were made.

(1) Regarding proposed 1.7(b), the Commission approved this provision as a separate section of the rule separately addressing joint client conflicts (6 yes, 1 no, 1abs).

(2) Regarding 1.7(a), the drafting team was asked to consider the suggestion to add the phrase "in a different matter." Also, the Commission asked that 1.7(a) be revised to avoid an overlap with 1.7(b) (6 yes, 0 no, 2 abstain).

(3) Regarding proposed 1.7(c), the Commission approved this provision with the understanding that this standard is a “direct adversity” concept (6 yes, 0 no, 2 abstain).

(4) Regarding proposed 1.7(d), the Chair asked members to provide input to the codrafters on the concept of whether this standard should continue to be a situational rule that attempts to list all scenarios that require client disclosure or if it should be changed into something similar to the ABA’s material limitation rule. Members who wish to continue the situational approach must send e-mail messages to the codrafters indicating additions or other modifications to the list of scenarios that trigger disclosure (i.e., modifying the “party or witness” trigger to cover transactional matters).

(5) Regarding the proposed commentary, the codrafters indicated that they would consider the AB 2069 language in the RPC 3-310(C) discussion and also possible language to clarify the ambiguous overlap with the rules requiring communication of significant developments.

A redraft was assigned in accordance with the foregoing discussion.

[Intended Hard Page Break]

G. Consideration of ABA MR 3.2. Expediting Litigation

The Commission considered an October 24, 2005 draft of proposed rule 3.2 presented by Mr. Voogd. Mr. Voogd summarized the status of the draft indicating the recommendation that the substance of MR 3.2 be adopted. Mr. Voogd commented that given the Commission's action to pursue a California version of MR 1.2 (Communication), he withdraws his suggestion to add a new comment to rule 3.2 stating: "A lawyer shall consult with his or her client before seeking or granting an extension of time where such extension may delay resolution of the matter or otherwise prejudice the client." Mr. Voogd also called attention to an October 25, 2005 message from Mr. Sapiro stating reasons why the Commission should not adopt MR 3.2. The Chair called for discussion of the codrafters' recommendation to adopt the substance of MR 3.2. Among the points raised during the discussion were the following.

(1) MR 3.2 is a hortatory rule that does not work as an actual disciplinary rule. It contains a "reasonable care" standard that is not an appropriate test for a disciplinary rule.

(2) MR 3.2 will be used as an excuse for lawyers to reject reasonable requests for a continuance and will foster uncivil behavior among lawyers on the pretext of a professional responsibility to "expedite litigation."

(3) The controlling factor in MR 3.2 is the express condition that the lawyer's efforts to expedite litigation be "consistent with the interests of the client." This means that the rule will not undermine a lawyer's discretion to grant a reasonable request for a continuance. Often, a lawyer will agree to an opposing counsel's request for a continuance with the expectation that it will garner reciprocal courtesies that will benefit the client. This rule has not led to uncivil behavior in the states that have adopted it.

(4) It is not clear how the concept of "the interests of the client" applies to a situation where objectively the client should abide with their lawyer's desire to expedite litigation but subjectively the client instructs the lawyer to prolong or delay the litigation.

(5) This rule should be read together with MR 1.2 (re allocation of authority among client and lawyer) and 1.3 (diligence) in order to appreciate fully the dynamics of the lawyer-client relationship in any situation that triggers a lawyer's concern about expediting litigation.

(6) As evidenced by the cases found in the annotated MR's, the focus of MR 3.2 is exceptional dilatory practices that harm the administration of justice. It should not be read to invade the normal course of litigation.

(7) The hortatory language undermines any exclusive focus on dilatory practices. If adopted, the rule should be re-written to be a precisely stated disciplinary rule.

(8) If adopted, the rule could become an arrow in a judges quiver used to control counsel through the threat of a Bar referral of a perceived violation.

(9) Realistically, if this rule is used in the Bar discipline system, then it would be in egregious circumstances such as the all too common scenario where a lawyer signs-up a client and then does nothing until the day before the statute runs.

(10) This rule may be problematic because conceptually it creates parity between the interests of a client and the interests in the administration of justice. If a judge or an opposing counsel claims a violation of the rule, then should a lawyer be allowed to refute that claim by using confidential information concerning the client's demands to delay the litigation. This rule could place lawyers at odds with their own clients.

(11) Consideration should be given to the D.C. and Nebraska variations of MR 3.2. The D.C. variation provides that: "(a) In representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another. . . . (b) A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The Nebraska variation employs a different approach stating that: "In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Following discussion, the Chair called for a vote on the codrafters' recommendation to adopt proposed rule 3.2. The vote was tied: 5 yes, 5 no (including the Chair), and 1 abstain. As the rule was not adopted, the codrafters were asked to attempt a redraft that accounts for the concerns expressed by the members, in particular the suggestion to consider the D.C. and Nebraska variations.

[Intended Hard Page Break]

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

The Commission considered draft no. 1.1 of proposed rule 1.13 (dated September 2, 2005) presented by Mr. Lamport. Mr. Lamport summarized the status of the rule reporting on codrafter conference calls conducted since the Commission's last meeting. Mr. Lamport explained that the draft represents the codrafters' recommendations on open issues that were assigned after the last discussion by the full Commission. Regarding para. (a), the Commission voted on a suggestion to add the word "other" to modify "constituents" but there was no majority support to make this change (4 yes, 4 no, 2 abstain). Mr. Voogd objected to any and all departures from MR 1.13 on the basis that corporate representations are an interstate regulatory issue. Focusing on proposed paragraph (b), the Chair called for a discussion of the issues raised in the codrafters' endnotes. The following drafting decisions were made concerning proposed paragraph (b).

(1) The Commission agreed with a codrafters' recommendation to number each of the identified types of misconduct that trigger a response by the lawyer for the organization (7 yes, 1 no, 1 abstain).

(2) The Commission agreed with a codrafters' recommendation to use the phrase "lawyer representing an organization" rather than the MR 1.13 phrase "lawyer for an organization" (5 yes, 2 no, 2 abstain).

(3) By consensus, the Commission added the term "acting" in the second line of para. (b) so that the relevant phrase reads: ". . . person associated with the organization is *acting*, intends or refuses to act in a matter. . . ."

(4) The Commission agreed with a codrafters' recommendation to track MR 1.13 and use the phrase "in a matter related to the representation" (7 yes, 1 no, 2 abstain). It was observed that the ABA chose to use this phrase due to concerns arising from the Sarbanes-Oxley Act's attempted move toward unlimited lawyer accountability for corporate misconduct. For the rule commentary, the codrafters indicated that they would draft language to address a lawyer's permissive ability to respond to organization misconduct that is unrelated to the lawyer's representation of the organization.

(5) The Commission approved the use of the phrase: "that the lawyer knows or reasonably should know is a violation of law" (9 yes, 0 no, 1 abstain).

(6) The Commission approved the use of the phrase: "reasonably imputable to" (6 yes, 1 no, 2 abstain).

(7) The Commission approved the use of the phrase "proceed as is reasonably necessary in the best lawful interest" (4 yes, 2 no, 3 abstain). This would track the MR 1.13 language. In addition, the codrafters volunteered to draft a comment clarifying that the rule does not authorize a lawyer to substitute their judgment for the client's determination as to what is in the organization's best interest.

(8) Regarding paragraph (c), the Commission agreed with a codrafter recommendation to use the phrase: "In taking *any* action" rather than: "In taking action" (6 yes, 2 no, 1 abstain).

(9) Regarding paragraph (d), the Commission considered modifying the first line to read: "If, despite the lawyer's good faith efforts to comply with paragraph (b)," but there was not a majority of members in favor of this change (2 yes, 5 no, 2 abstain).

Following discussion, the Chair stated that consideration of the remaining issues will continue at the next meeting. The codrafters were asked to implement the changes discussed.

[Intended Hard Page Break]

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

The Chair welcomed Louis Leonard of Latham & Watkins and Steve Churchwell of DLA Piper Rudnick. The Commission considered an October 10, 2005 e-mail message from Mr. Martinez sent to Manuela Albuquerque and Estela de Llanos suggesting the following proposal for addressing contacts with represented governmental clients in proposed amended rule 2-100:

- “(c) This rule shall not prohibit:
- (1) Communications with government officials and representatives who have the authority to redress the grievances of the lawyer's client, including a matter in which a lawsuit has been filed or a formal claim has been presented and the purpose of the communication is to address settlement of the particular lawsuit or claim.
 - (2) Communications with a public board, committee or body.”

The Commission also considered an alternate version of paragraph (c) prepared by Mr. Tuft and distributed via the Commission's e-list on October 24, 2005 to the members of the Commission, interested persons and liaisons. This draft, set forth below, included proposed new paragraphs (d) and (e), as well as a version of paragraph (c) based upon MR 4.2 and in consideration of certain state variations and the Restatement sec. 101.

- “(c) Paragraph (a) of this rule is not intended to prohibit :
- (1) Communications with a public board, committee or body ; or
 - (2) Communications with a public official [officer] [or employee] of a governmental organization, except in negotiation or litigation of a specific claim in which the governmental organization or its officials are a party and where the act or omission of the public official [officer] [or employee] forms the basis for the claim ; or
 - (3) Communications initiated by a person seeking advice or representation from an independent lawyer of the person's choice; or
 - (4) Communications otherwise authorized by law or court order.
- (d) When communicating on behalf of a client with any person pursuant to paragraph (c)(2), a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

- (e) In any communication permitted by this rule, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive."

(In addition to these proposals, Mr. Rothschild shared a draft that was under consideration by the land use/administrative law group. This draft, originally prepared by Manuela Albuquerque on September 22, 2005 and subsequently modified, but not officially approved by Lathams & Watkins representatives, was copied and distributed to the Commission members at the meeting.) The Chair called for a discussion of the proposals from Mr. Martinez and Mr. Tuft emphasizing that the issue of contact with represented governmental clients has been on the Commission's agenda for multiple meetings and that a resolution is needed in order to allow the Commission to finalize its work on rule 2-100 and to move on to other rules. Among the points raised during the discussion were the following.

(1) The express California exception permitting contact with represented governmental clients has been in the RPC's since 1928. As this predates the modern, well-developed law concerning a person's constitutional right of access to government officials, an inference can be made that California's historical policy should not be attributed solely to the implementation of constitutional rights.

(2) The express exception should be continued but specific concerns should be addressed, namely: protection of privileged information; unfair discovery tactics; and deceptive contacts by lawyers representing adversaries of governmental parties. The changes made to the rule to address these concerns must be clear and straight-forward as courts characterize this rule as a "bright-line" rule.

(3) Consideration should be given to having proposed (c)(2) precisely track (b)(2) by including the concepts of the subject matter of the communication, imputed statements, and admissions, so that governmental clients are treated the same as non-governmental clients with regard to the rule's definition of a "party."

(4) Another approach would be to address government employees in (b)(2) but keep public officials in (c)(2).

(5) An attempt should be made to include a definition of a "public official" or "public officer" whichever term is used.

(6) In considering the scope of the term "public official," the Commission should review Government Code sec. 1090 and authorities interpreting that provision in order to account for the distinctions drawn between a public official and an employee. To see how the distinction can be confused, refer to *Chapman v. Superior Court* (6/15/2005) 29 Cal.Rptr.3d 852.

(7) The proposed new paragraphs (d) (re deceptive tactics) and (e) (re privileged information) could be added to the rule even if the public officer exception in paragraph (c) is unchanged.

(8) The addition of proposed new paragraphs (d) and (e) may have the unintended effect of impairing criminal prosecutor involvement in pre-indictment contacts with represented

targets, and also law enforcement undercover/sting operations. Case law, as well as the Commission's proposed new "authorized by court order" exception adapted from MR 4.2 generally would permit such activities. To address this concern, one option is to add a comment clarifying that new paragraph (e) does not trump (c)(3).

(9) Regarding proposed new (e), the phrase "shall not seek" is too undefined for purposes of a bright-line disciplinary rule. A lawyer initiating ex parte contact permitted by paragraph (c) might inadvertently get a response that suggests a violation of (e) on the part of the lawyer even if that was not the lawyer's intent.

(10) Proposed new (e) in Mr. Martinez's June 15, 2005 draft (requiring that only truthful representations may be made by an organization's lawyer concerning that lawyer's representation of employees and other constituents of the organization) should be accompanied by a comment that cross references the multiple representation conflicts rules.

After discussion, the following drafting decisions were made.

(1) Regarding proposed (c)(1) (Mr. Tuft's 10/24/05 draft), the Commission added "public official" and approved the language with this modification (8 yes, 0 no, 0 abstain).

(2) Proposed (c)(2) (Mr. Tuft's 10/24/05 draft) was deleted by consensus.

(3) Regarding proposed (c)(3) (Mr. Tuft's 10/24/05 draft), with the understanding that the relevant draft comment in Mr. Martinez's June 15, 2005 draft would be added, the Commission approved this provision (5 yes, 4 no, 0 abstain).

(4) Proposed (c)(4) (Mr. Tuft's 10/24/05 draft) was approved by consensus.

(5) Regarding proposed (d) (Mr. Tuft's 10/24/05 draft), the Commission replaced the phrase "pursuant to paragraph (c)(2)" with the phrase "as permitted by this rule" and approved the language with this modification (7 yes, 1 no, 0 abstain).

(6) Regarding proposed (e) (Mr. Tuft's 10/24/05 draft), subject to minor revisions in accordance with the points raised during the discussion, the Commission approved this provision (8 yes, 0 no, 0 abstain).

(7) Regarding proposed (e) (Mr. Martinez's 6/15/05 draft), the Commission approved the addition of this language as a new paragraph (f) (7 yes, 1 no, 0 abstain).

With the rule text resolved by the above votes, the Chair asked members to send the codrafters input on the draft comments. The codrafters were asked to implement the approved changes to the text and to reconcile the draft comments.

[Intended Hard Page Break]

J. Consideration of ABA MR 5.7. Responsibilities Regarding Law-Related Services (no California counterpart)

The Commission considered an October 7, 2005 memorandum from Mr. Kehr presenting a proposed new rule 5.7. Mr. Kehr summarized the prior consideration of this item explaining that the draft rule seeks to codify case law standards presently applicable to lawyers rendering dual services and fiduciary law related services and also that the rule accounts for a lawyer's general duty of honesty and integrity. The Chair called for a discussion of the issues posed in the memorandum. Among the points raised during the discussion were the following.

(1) The draft rule imposes lawyer duties on the provision of fiduciary services without any anchor to specific facts and this renders the scope of the rule over-broad and likely inconsistent with existing case law depending upon the facts and circumstances.

(2) The draft rule, like any rule, is articulated in general terms; however, it specifically includes paragraph (f) as a mechanism to avoid lawyer duties in the provision of fiduciary services. This approach focuses on the reasonable expectations of the recipient of the fiduciary services.

(3) If the goal of the rule is to alert lawyers to areas of disciplinary exposure arising from case law principles, then that component of the draft rule is better suited for a comment as opposed to the black letter rule.

(4) The draft rule should clarify that California's definition of "law related services" is a departure from the ABA's definition. Consideration should be given to tracking the description of non-legal services stated in State Bar Formal Op. No. 1995-141.

(5) If a lawyer's conduct as a third party neutral is regarded as a "law related service," then the draft rule overlaps with proposed rule 1-720 and clarification is needed.

(6) The meaning of the phrase "at the same time" in paragraph (b) is problematic if the concept is to trigger the rule only at times when active provision of dual services is occurring. This "same time" concept should be modified or clarified in a comment.

After discussion, the Chair asked the codrafters to consider moving the concepts of paragraphs (e) and (f) out of the rule text and into the comment. The codrafters also were asked to consider a possible cross-reference to rule 1-720 and to coordinate with Mr. Ruvolo and the 1-720 codrafters. With the understanding that these outstanding issues are to be addressed in the next draft and that further modifications may be needed to implement these issues, the Commission approved the concept of paragraphs (a) through (d) (7 yes, 1 no, 0 abstain) and there were no objections to proposed Cmts. 1, 2, 3, 5 and 6.

[Intended Hard Page Break]

K. Consideration of Rule 3-400 [ABA MR 1.8(h) & MR 1.2(c)] Limiting Liability to Client

The Commission considered a first draft of a proposed amended RPC 3-400 distributed at the meeting by Mr. Vapnek. Mr. Vapnek summarized the draft indicating that his recommendation is to continue the substance and language of the current rule with a clarifying modification to paragraph (B) that replaces the reference to “client” with “a client or former client.” It was suggested that paragraph (B) should be changed further to make clear that the obligation to inform a client in writing to seek the advice of an independent lawyer is not required when the client or former client is represented by an independent lawyer who is handling the settlement. With these changes, the Commission tentatively approved the draft rule (6 yes, 1 no, 0 abstain) subject to a 10-day ballot to approve the addition of relevant comments from MR 1.8 (i.e., Cmts. [14] and [15]).

[Intended Hard Page Break]

L. Consideration of Rule 2-400. Prohibited Discriminatory Conduct in a Law Practice

The Commission considered an October 17, 2005 draft of proposed rule 9.1. Ms. Peck presented the draft rule indicating that it implements the votes taken at the Commission's June 10, 2005 meeting. Specifically, it was noted that the draft does not expand the scope of the rule beyond situations involving the management and operation of a law firm. The Chair called for a discussion of the drafters' notes and the following drafting decisions were made.

(1) The Commission approved a change in the rule title to "Prohibited Discrimination in Law Practice Management and Operation" (7 yes, 0 no, 1 abstain).

(2) By consensus, the Commission moved the definition section of the rule to be the first paragraph of the rule.

(3) By consensus, the Commission deleted the reference to "socio-economic status" as the codrafters could not find any law characterizing that status as protected.

(4) The Commission directed the codrafters to revise the first two sentences of Cmt. [3] (re applicability of the rule to both perpetrators, such as associates, and managers) (9 yes, 0 no, 0 abstain).

(5) By consensus, the Commission approved Cmt. [3] (re ancillary business services).

(6) Regarding the references to Bus. & Prof. Code sec. 6068(a), by consensus the Commission deleted the reference in Cmt. [4] but retained the reference in Cmt. [3].

(7) Regarding proposed rule 8.4, the Commission approved paragraph (d)(2) (5 yes, 3 no, 1 abstain).

(8) The Commission considered but there was no majority support to delete the "peremptory challenge" references in the comment to 8.4 and 1.120X.

The Chair asked the codrafters to implement these changes and submit the rule for tentative approval through a 10-day ballot.

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M. Consideration of Rule 3-500 [ABA MR 1.4] Communication

The Commission considered an October 17, 2005 draft of proposed rule 1.4. Mr. Ruvolo summarized the codrafters' recommendation that the substance of RPC 3-500 be restructured to the MR 1.4 format and that the MR 1.4 subparts not found in RPC 3-500 be included. Mr. Ruvolo also indicated that the draft adds a definition of a "significant development" implemented in response to the Ethics Hotline comments. The relationship between MR 1.2 and MR 1.4 also was summarized. The Chair stated that a drafting team would be assigned for MR 1.2. The Chair called for a discussion of the drafters' notes and the following drafting decisions were made.

(1) The Commission modified 1.4(a)(1) by deleting the word "written" and approved the language as modified (9 yes, 1 no, 0 abstain).

(2) The Commission rephrased the language in 1.4(a)(2) to state: "means by which to accomplish the client's objectives in the representation" and approved the revised language (8 yes, 1 no, 1 abstain).

(3) The Commission modified 1.4(a)(3) by deleting the phrase "employment or" and approved the language as modified (8 yes, 0 no, 2 abstain).

(4) In 1.4(a)(4), the Commission replaced the reference to subsection (2) with a reference to subdivision (3) and approved the paragraph as modified (9 yes, 1 no, 0 abs).

(5) The Commission approved 1.4(a)(5) as drafted (10 yes, 0 no, 0 abstain).

(6) The Commission approved 1.4(b) as drafted (8 yes, 2 no, 0 abstain).

The Chair asked the codrafters to prepare a revised draft of the rule as modified and indicated that all members should send comments to the codrafters on the proposed comments to the rule.

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N. Consideration of Rule 3-510 [ABA MR 1.2(a)] Communication of Settlement Offer

The Commission considered an October 17, 2005 draft of proposed rule 1.4.1. Mr. Ruvolo summarized the codrafters' recommendation that the substance of RPC 3-500 be maintained as a stand-alone rule but renumbered as rule 1.4.1 to be adjacent to the ABA's general rule on communication. It was indicated that MR 1.2 deals with settlement decisions in the context of the standards governing allocation of authority among client and lawyer. It was also indicated that the codrafters were interested in Commission input on the issue of whether the rule should continue to mandate that all written settlement offers in civil cases be communicated to clients. Following discussion, the Commission made the following drafting decisions:

(1) The Commission asked the codrafters to incorporate the draft rule into proposed rule 1.4 as new paragraph (c) (7 yes, 1 no, 3 abstain).

(2) The Commission added the term "written" to (a)(2) to maintain the status quo of RPC 3-510 as to settlement offers in civil cases (9 yes, 0 no, 1 abstain).

(3) By consensus, the Commission moved the definition of client in paragraph (b) to the rule commentary.

With these changes, a redraft was requested. The Chair announced that the drafting team for MR 1.2 would be Mr. Ruvolo (lead), Mr. Kehr, and Mr. Tuft.

[Intended Hard Page Break]

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

The Commission considered an October 25, 2005 memorandum outlining rule amendment issues and recommending a departure from the substance of MR 1.15 but adopting the rule number and format. Ms. Peck called attention to the State Bar Office of Trial Counsel's recommendation that advance fees be required to be placed in client trust account but indicated that the codrafters' preference is for the status quo that allows lawyers to discuss the placement issue with clients and to place advance fees in the trust account when that is an appropriate risk management decision. The Chair called for a straw vote on this issue and only a minority (two) members of the Commission expressed an interest in requiring that all advance fees be placed in the client trust account. The Chair stated that the discussion of this item would continue at a future meeting.

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