

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

MEETING SUMMARY - OPEN SESSION

Friday, February 3, 2006
(9:15 am - 12:30 pm and 1:00pm - 5:00 pm)

State Bar of California
1149 So. Hill Street, Room 723
Los Angeles, CA 90015

MEMBERS PRESENT: Harry Sondheim (Chair); Linda Foy (by phone); Bob Kehr; Stanley Lamport; Raul Martinez; Kurt Melchior; Ellen Peck; Hon. Ignazio Ruvolo (San Francisco); Jerry Sapiro; Sean SeLegue; Mark Tuft; Paul Vapnek; Tony Voogd

MEMBERS NOT PRESENT: JoElla Julien

ALSO PRESENT: Mary Yen (State Bar staff); Jim Biernat (BASF); Prof. Carole Buckner (COPRAC Liaison/Western State); Diane Karpman (Beverly Hills Bar Association Liaison); Kevin Mohr (Commission Consultant); Toby Rothschild (Access to Justice Commission & LACBA Liaison); Lauren McCurdy (State Bar staff); Audrey Hollins (State Bar staff); Meg Lodise (T&E Executive Committee Liaison); Peter Stern (T&E Executive Committee Liaison); Chris Munoz (BASF).

I. APPROVAL OF OPEN SESSION ACTION SUMMARIES FROM THE DECEMBER 2, 2005 and OCTOBER 28-29, 2005 MEETINGS

The open session summary from the October 28-29, 2005 meeting was deemed approved. Consideration of the December 2, 2005 summary was postponed at the request of staff.

II. REMARKS OF CHAIR

A. Chair's Report

The Chair encouraged members to submit assignments and e-mail comments in a timely fashion in order to allow adequate preparation for the meetings. The Chair emphasized that the draft language and recommendations found in the agenda materials will be deemed approved if comments or objections are not submitted. However, a rule of reason will govern such determinations.

The Chair noted that some of the items on the agenda raised the issue of law firm discipline and to address these issues in a comprehensive manner, the following drafting team was formed: Mr. Tuft (lead); Ms. Peck; Mr. Martinez; Mr. Ruvolo; and Mr. Kehr. Ms. Yen volunteered to retrieve State Bar law firm discipline background materials for distribution by staff.

B. Staff's Report

Staff reported on the State Bar Board of Governor's consideration of the following pending initiatives: (1) Assembly Bill 1612 (re government whistle-blower exception to a lawyer's duty of confidentiality); (2) Assembly Bill 612 (re regulation of construction defect advertisements sent by mail); (3) proposed rule changes to allow permanent disbarment; and (4) proposed new rules imposing mandatory disclosure of malpractice insurance coverage.

III. MATTERS FOR ACTION

A. Consideration of a Methodology for Seeking Official Public Comment

The draft public comment plan and time-line was deemed approved. It was suggested that the plan be shared with State Bar management to facilitate input from Supreme Court staff liaisons.

B. Consideration of Rule 3-500 [ABA MR 1.4] Communication; and Consideration of Rule 3-510 [ABA MR 1.2(a)] Communication of Settlement Offer

The Commission considered draft 3.2 of proposed rule 1.4 dated January 13, 2006. The Chair summarized the status of the draft indicating the text of the rule had been previously approved and that the proposed comments were the focus of the instant deliberations. The Chair explained that only those issues raised in Mr. Sapiro's e-mail messages of January 13, 2006 and January 31, 2006, and Mr. Kehr's memorandum of January 21, 2006 would be called for discussion. The following drafting decisions were made.

(1) The Commission deemed approved Cmt. [1] as drafted.

(2) In response to issues raised concerning Cmt. [2], the Commission modified paragraph (a)(4) by deleting the word "when" and inserting the word "for" in front of "copies" (13 yes, 0 no, 0 abstain).

(3) In Cmt. [2], the Commission deemed approved the substitution of the term "significant developments" for "significant events" as the latter term is not the term used in the rule text.

(4) The Commission considered but did not elect to modify the examples used in Cmt. [2]. (The vote to modify failed: 2 yes, 8 no, 2 abstain.)

(5) In Cmt. [2], the Commission deemed approved the addition of a comma after the word "credits" in line 7.

(6) In Cmt. [2], the Commission deemed approved the addition of the phrase "information concerning the" before the word "matter."

(7) In Cmt. [3], the Commission deemed approved replacing the phrase "employment agreement" with "representation agreement." It was understood that the global issue of a

possible definition of the phrase “representation agreement” would be considered at a future meeting.

(8) Regarding Cmt. [3], the Commission authorized the drafters to modify the language to more precisely express the concept that a lawyer must provide documents to a client under paragraph (a)(4) of the rule regardless of whether client has paid lawyer for documents. It was understood that the new language would also avoid the unintended implication that a lawyer cannot bill a client for performing other obligations imposed by the rule (8 yes, 3 no, 1 abstain).

(9) As a global stylistic matter there was a consensus to use, on an interim basis, the following conventions for this rule and all other rules: (1) substitute "Paragraph" for "Subparagraph"; (2) substitute "Lawyer" for "Member"; (3) substitute "This Rule" for "Rule X.X" or "This rule"; and (4) substitute lower case lettering for capital lettering in designating rule paragraphs.

(10) The Commission deemed approved Cmt. [4] as drafted.

(11) The Commission deemed approved Cmt. [5] as drafted.

(12) In Cmt. [6], the word “controversy” was replaced with the word “matter” and the comment was deemed approved.

(13) Regarding MR 1.4 Cmt. [6], the Commission added this comment as modified to use the active voice, along the lines of the following (7 yes, 4 no, 1 abstain):

“A lawyer ordinarily should provide to the client the information that would be appropriate for a comprehending and responsible adult. However, it can be impractical to inform the client fully according to this standard, for example, when the client is a child or suffers from diminished capacity. ... A lawyer may arrange a system of limited or occasional reporting with the client when many routine matters are involved.”

(14) The Commission deemed approved Cmt. [8] as drafted. It was understood that the meeting draft included modifications made in response to issues raised by Mr. Sapiro.

The Chair noted that only Cmt. [3] remains for further drafting as the rest of the rule and comments have been tentatively approved.

[Intended Hard Page Break]

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

The Commission considered a January 13, 2006 codrafter memorandum presenting a revised draft of proposed amended rule 2-300. Mr. Sapiro led a discussion of the issues raised by the codrafters and in comments submitted by Mr. Kehr and Mr. Voogd. The following drafting decisions were made.

(1) In paragraph (a), to eliminate redundancy the Commission deemed approved the striking of everything after the word "practice" so that it reads:

"(a) Either the lawyer whose practice is sold has died; or the lawyer or law firm has sold substantially all of the practice, or the geographic or substantive area of the practice, ~~of the selling lawyer or law firm.~~"

(2) The concept of paragraph (b) (that the sale of a practice would be allowed only once) was retained (6 yes, 4 no, 0 abstain) with the understanding that the codrafters would replace the word "exigent" with a more precise term, such as "extenuating." In addition, the codrafters were asked to attempt a redraft of paragraph (b) and (g) that would list the specific circumstances (such as death, public office, etc...) that would be the exceptions to the one-time only sale restriction.

(3) In paragraph (d)(1), the Commission approved by consensus the use of the term "no one" in the place of "member."

(4) In paragraph (d)(1)(a), the Commission approved by consensus a proposal to clarify the identity of the person (the seller, the conservator, and/or other representative) who is intended to be the recipient of a client's response to a notice of a sale.

In addition to the above, the codrafters were asked to consider moving the paragraph (b) language addressing the content of a notice to paragraph (d)(1)(a).

A redraft was assigned for the next meeting.

[Intended Hard Page Break]

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

The Commission considered a revised draft of proposed rule 1.8.1 dated January 13, 2006. Mr. Lamport led a discussion of the issues raised by the codrafters and in comments submitted by Mr. Kehr, Ms. Peck, Mr. Sapiro, Mr. Tuft, and Mr. Voogd. The following drafting decisions were made.

(1) The Commission revised the title to read: "Business Transactions with a Client and Acquiring Interests Adverse to a Client." (6 yes, 2 no, 0 abstain). Ms. Peck asked that the meeting notes reflect her position that the word "pecuniary" should not be deleted from the rule title.

(2) As to format, the use of: lower case paragraph numbering; capital "R" when referring to a specific "Rule" or "this Rule"; and changing "member" to "lawyer" were all deemed approved.

(3) Paragraph (b) was revised to read: "The client is advised in writing ~~that the client may~~ to seek the advice ..." (5 yes, 1 no, 2 abstain).

(4) The following modifications to Cmt. [1] were deemed approved:

"A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, or when the lawyer acquires an interest that is adverse to a the client for example, a loan or sales transaction or a lawyer investment on behalf of a client."

(5) The following modifications to Cmt. [2] were deemed approved:

"The requirements of this Rule must be met even when the transaction or acquisition is not ~~closely~~ related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. This Rule also applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance, brokerage, or investment services to existing clients of the lawyer's legal practice."

(6) The following modifications to Cmt. [3] were ultimately agreed upon following consideration of a series of attempts to revise the language:

"This Rule ~~Rule 1.8.1~~ is not intended to apply to **ordinary** agreements by which a lawyer is retained by a client unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees.

~~However, this Rule Rule 1.8.1 is intended to apply when the agreement confers on the member an ownership, possessory, security, or other pecuniary interest adverse to the client, such as when the lawyer obtains an interest in the client's property to secure the amount of the lawyer's past due or future fees. Such Agreements by which a lawyer is retained by a client are governed, in part, by rule 4-200 [rule 1.5]. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61, [14 Cal. Rptr.3d 58] [lawyer's agreement with client, authorizing a lien for payment of hourly attorney fees to be imposed against any recovery in litigation, must comply with rule 1.8.1].) An agreement to advance to or deposit with pay a lawyer a sum to be applied to fees or costs the lawyer incurs incurred in the future is not an ownership, possessory, security, or other pecuniary interest adverse to the client for purposes of this Rule Rule 1.8.1. This Rule Rule 1.8.1 is not intended to apply to an agreement with a client for a reasonable contingent fee in a civil case."~~

The modifications to the last two sentences of Cmt. [3] above were approved by a vote of 8 yes, 1 no, 0 abstain and 8 yes, 1 no, 1 abstain, respectively, but with the understanding that these changes could be reconsidered after discussion of the *Fletcher v. Davis* case.

For the next meeting, the codrafters were asked to set forth, in writing, the conceptual options for addressing *Fletcher v. Davis* (i.e., state the precise holding, restate a limited version of the holding, or state an intent to completely overrule the holding).

[Intended Hard Page Break]

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

The Commission considered Draft 4 of proposed rule 1.14 in a codrafter memorandum dated January 13, 2006. The Commission welcomed liaisons Peter Stern and Meg Lodise of the Trust and Estates Section Executive Committee. Ms. Foy summarized the revisions made to the proposed rule and led a discussion of issues raised by the codrafters and the liaisons.

Among the substantive issues discussed was the issue of whether to retain the broad exception to the rule aimed at protecting representations involving an impaired client's fundamental rights. Some members felt that the exception had the effect of swallowing the rule. Others thought that appropriate commentary could clarify the limits of the exception. Also discussed was the issue of whether any of the steps found in RPC 3-100 should be addressed in the proposed rule. One comment on this issue was that it might be logically inconsistent for a rule to require remonstration with an impaired client who is not likely to be capable of appreciating the lawyer's counseling.

After discussion the following drafting decisions were made.

(1) Paragraph (a) was deemed approved.

(2) In paragraph (b), the phrase "may consult" was replaced with "may notify" (8 yes, 2 no, 2 abstain).

(3) In paragraph (b), the following language was approved (8 yes, 0 no, 4 abstain) for implementation by the codrafters in the next draft: "the lawyer who is representing the client in a criminal matter or other matter where the fundamental rights of the client are at issue in that matter for which lawyer is retained." It was understood that the codrafters would adapt the language and/or add new comments to clarify that this exception (to the general permissive ability to notify persons outside of the lawyer-client relationship) applies in a pre-charging criminal setting.

(4) A straw vote of 7 yes, 4 no, 1 abstain revealed support for a recommendation that the codrafters consider adding a requirement for remonstration, similar to RPC 3-100, as an 'exhaustion' requirement or precondition to outside notification.

The Chair summarized the status of the draft rule, emphasizing that paragraph (a) was tentatively approved, paragraph (b) was to be revised, and that paragraph (c) would be discussed at the next meeting.

[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 a revised draft of proposed rule 1.7 in a codrafter memorandum dated January 17, 2006. It was explained that there were some differing views among the codrafters on how to approach certain issues and that Commission direction would be welcomed to facilitate further drafting. The Chair invited discussion of these issues. Among the points raised during the discussion were the following.

(1) Paragraph (d)(1) is under-inclusive to the extent that it can be read to apply only to litigation.

(2) Paragraph (d)(3) protects only third persons, not the lawyer's current clients who would be substantially affected by the outcome of the representation.

(3) The series of conflicts rules in the ABA rules should not be regarded as excluding application of the general rules requiring communication and competence.

(4) Paragraph (d) could be improved by moving to a general standard similar to, but not necessarily identical to, the MR 1.7 "materially impaired" standard.

(5) Circumstances not covered by paragraph (d) may be covered by paragraph (a) which is broader than RPC 3-310(e).

(6) Paragraph (a) may be too broad if mere positional or issues conflicts are not clarified as matters that are not "directly adverse."

(7) Cmt. [5a] should be reconsidered by the codrafters to assess a possible unintended impact on "unbundled" legal services.

Following discussion, the Chair asked all members to share comments on the issues raised by the codrafters to help clarify and streamline the next discussion of this proposed rule.

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G. Consideration of ABA MR 3.2. Expediting Litigation

The Chair stated that the basic issue of whether to pursue a California version of MR 3.2, even the exact ABA rule language, had been fully explored in prior discussions. Mr. Voogd moved the approval of rule 3.2 but the rule failed by a vote of 3 yes, 7 no, 0 abstain. With this vote, the Chair indicated that no further efforts would be expended on this matter at this time.

[Intended Hard Page Break]

H. Consideration of Rules 1-320(B) and 2-200(B) re Compensation/Rewards for Recommendations Resulting in Employment

Matter not called for discussion.

[Intended Hard Page Break]

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

The Commission considered a codrafter memorandum identifying rule amendment issues suggested by a substantive comparison of RPC 3-700 and MR 1.16. Mr. Kehr led a discussion of these issues and solicited Commission direction for attempting a first draft of a proposed amended rule. In the course of this discussion, straw votes were taken to offer the following input to the codrafters.

(1) Regarding the general scope of the rule, follow the broader approach of MR 1.16 in covering both termination of a representation as well as establishing a prohibition against accepting representations where mandatory withdrawal would be require (4 yes, 3 no, 2 abstain).

(2) Regarding withdrawal to avoid prospective violations of the rules, use the RPC 3-700 scienter concept of “knows or should know” rather than ABA concept of representations that “will” result in a violation (7 yes, 0 no, 1 abstain).

(3) Regarding the ABA’s inclusion of withdrawal to avoid violations of “other law,” it was suggested that the codrafters not make this revision and instead retain the RPC 3-700 approach with the possible addition of new commentary that cross-references a lawyer’s statutory duty to uphold the law under Bus. & Prof. Code sec. 6068, subd. (a).

(4) Regarding the issue of tracking the competence standard for purposes of withdrawal due to a lawyer’s lack of physical or mental capacity, it was suggested that the codrafters not pursue this change because the competence rule, as disciplinary standard, permits a single act of negligence but mandatory or permissive withdrawal may nevertheless be applicable even where there is no violation of the competence standard.

The Chair indicated that discussion of this matter would continue at the next meeting but that the codrafters were encouraged to submit supplemental materials.