

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

***MEETING SUMMARY - OPEN SESSION***

**Friday, November 2, 2007**  
(9:15 am - 5:00 pm)

**Saturday, November 3, 2007**  
(9:00 am - 12:30 pm)

**SF–State Bar Office**  
**180 Howard Street**  
**San Francisco, CA 94105**

**MEMBERS PRESENT:** Harry Sondheim (Chair); Linda Foy; JoElla Julien; Robert Kehr; Stanley Lamport; Raul Martinez; Ellen Peck; Hon. Ignazio Ruvolo; Jerry Sapiro; Dominique Snyder (by telephone); Mark Tuft; and Paul Vapnek.

**MEMBERS NOT PRESENT:** Kurt Melchior; and Tony Voogd.

**ALSO PRESENT:** Joe Androvich (Cooper, White & Cooper) (Friday only); David Bell (Morrison & Foerster) (Friday only); Carole Buckner (COPRAC Liaison) (Saturday only, by telephone); Randall Difuntorum (State Bar Staff); John Drexel (State Bar staff) (Friday only); Doug Hendricks (Morrison & Foerster) (Friday only); Diane Karpman (Beverly Hills Bar Association Liaison) (by telephone); Lauren McCurdy (State Bar staff); Marie Moffat (State Bar General Counsel); Prof. Kevin Mohr (Commission Consultant); Toby Rothschild (LACBA & Access to Justice Commission Liaison) (Friday only, by telephone); and Mary Yen (State Bar staff) (Friday only).

**I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM THE SEPTEMBER 28-29, 2007 MEETING**

The September 27-28, 2007 open session meeting summary was deemed approved.

**II. REMARKS OF CHAIR**

**A. Chair's Report**

The Chair outlined the planned order of business for the meeting.

## **B. Staff's Report**

Staff reported on: (1) the first draft of the Batch 1 report to the Supreme Court, indicating that a hard copy was available for review; (2) the Board of Governor anticipated consideration of Commission liaison appointments at the Board's November 8-9, 2007 meeting.

## **III. MATTERS FOR ACTION - CONSIDERATION OF PROPOSED RULES NOT YET DISTRIBUTED FOR PUBLIC COMMENT (ANTICIPATED BATCH 3 RULES)**

### **A. 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 Draft 9.1 of proposed comments to Rule 1.7 (dated 10/14/07). The Chair welcomed David Bell and Doug Hendricks who were present to address this rule. Mr. Kehr led a discussion of the open issues, calling attention to revised Comment [29] and revised Comment [32] concerning advance waivers. Mr. Bell and Mr. Hendricks offered input on these changes, in part, asking that the Commission give due consideration of Opinion No. 2006-1 of the Association of the Bar of the City of New York, including the exhibits to that opinion. (It was noted that the NY City Bar opinion was available online at <http://abcny.org/Ethics/eth2006-1.htm>.)

Following discussion, a straw vote was taken to ascertain whether there was a consensus for developing a revised Comment [32] along the lines of the language submitted by former Commission member Sean SeLegue in his February 26, 2007 memorandum. It was understood that the concept of this comment would be a positive, as opposed to neutral, statement about the ability of a lawyer to seek an advance waiver when there is little or no information about the reasonably foreseeable adverse consequences of the waiver. The results of the straw vote revealed 3 members in favor of such a comment, 4 members opposed and 3 members abstaining. In light of the straw vote, the Chair asked the codrafters to attempt a redraft with input from Mr. Bell and Mr. Hendricks for consideration at the next meeting. In addition, the codrafters were asked to compare Cmt. [12] with Cmt. [19] to determine if there is any inconsistency on the rule's treatment of withdrawal as an option for resolving a joint client or concurrent client conflict of interest.

[Intended Hard Page Break]

**B(1). Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased (Sale of Entire Practice)**

The Commission considered a revised draft of a sale of a law practice rule designated as "RLK Alternative Draft 2.1" dated October 16, 2007. The draft rule addressed the sale of an entire practice. The Chair introduced this matter indicating that the Commission had voted to develop two separate rules - one addressing sale of an entire practice and the other addressing the sale of an area of practice - in order to optimize the information obtained through the public comment process. The Commission discussed the open drafting issues and the following decisions were made.

(1) In the first sentence of the rule, the phrase "or substantially all" was retained (7yes, 2 no, 0 abstain) and it was understood that a comment would be added to explain what is meant by "substantially all."

(2) Cmt.[5] was deleted and replaced by Discussion paragraph 3 of RPC 2-300 (5 yes, 4 no, 0 abstain).

(3) In Cmt.[1] and [7], all references to a "law firm" as a seller were deleted so that the rule only refers to lawyers as sellers.

(4) In paragraph (b)(1), a recommendation was made to replace "lawyer" with "member" but there was no consensus to make this change.

(5) In paragraph (b)(1)(i), the codrafters were asked to revise the language (re: references to client papers or property) to be consistent with the terms of proposed Rule 1.16. The drafters were also authorized to revise the last sentence of (i) to possibly add references to the written fee agreement statutes.

(6) After the above discussion, the Commission decided to delete the language in paragraph (b)(1)(ii) and replace it with language in RPC 2-300(A)(1)(b) but perhaps modified slightly to use the active voice (7 yes, 0 no, 1 abstain).

(7) By consensus, the concept of allowing sales "to one or more lawyers" was approved for the rule governing sales of an entire practice but would not be included in the rule governing sales of an area of practice.

(8) In the precatory language above para. (a), the language of RPC 2-300 was substituted in for the language of the current draft (7 yes, 3 no, 0 abstain).

(9) In Cmt.[4], the phrase "that provides legal services to the poor" was deleted (9 yes, 0 no, 1 abstain).

(10) In Cmt.[7], there was no objection to the Chair deeming approved the addition of the phrase "for example," however, the codrafters were given the alternate option of listing every applicable provision so that "for example" is not needed.

Following discussion, the Chair asked that the rule be finalized by the codrafters and then circulated by staff for a 10-day ballot approval of only those changes made by the codrafters to avoid the possibility of confusing inconsistencies with the language used in the rule governing sales of an area of practice.

**B(2). Consideration of Rule 2-300 [ABA MR 1.17] Sale or Purchase of a Law Practice of a Member, Living or Deceased (Sale of an Area of Practice)**

The Commission considered a revised draft of a rule governing the sale of an area of practice designated as "Alternative Draft 6.1" dated October 16, 2007. The Commission discussed the open drafting issues and the following decisions were made.

(1) Paragraph (a)(9) was deleted with the understanding that the codrafters might discover a justification for including it and might recommend that the paragraph be retained (5 yes, 1 no, 3 abstain).

(2) Revise the heading of the rule paragraph on extraordinary circumstances to delete everything after "Extraordinary Circumstances", in the title portion of the rule (7 yes, 0 no, 3 abstain).

(3) By consensus, the codrafters were authorized the revise paragraphs (a)(11) and (a)(12) to use a parallel structure ending with the phrase "that is the subject of a sale."

(4) In paragraph (e), the language used was replaced with the similar language in paragraph (f) of the rule governing the sale of an entire law practice (3 yes, 1 no, 6 abstain). A separate recommendation to completely delete paragraph (e) was considered but not adopted (2 yes, 3 no, 5 abstention).

Following discussion, the Chair asked that the rule be finalized by the codrafters and then circulated by staff for a 10-day ballot approval of only those changes made by the codrafters to avoid the possibility of confusing inconsistencies with the language used in the rule governing sales of an entire practice.

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**C. Consideration of Rule 3-100 [ABA MR 1.6 & 1.8(b)] Confidential Information of a Client**

The Commission considered Discussion Draft 2.1 of proposed Rule 1.6 dated October 16, 2007. (Note: Unlike other draft rules considered by the Commission, this Discussion Draft was submitted for the limited purpose of presenting rule amendment issues and possible approaches for addressing those issues. It was understood that any Commission action on the issues presented in the Discussion Draft would not be treated as action that either approves or rejects any actual rule language.) The Commission Consultant led a discussion of the issues and the following action was taken to guide the codrafters.

(1) The codrafters were authorized to implement the approach of placing a definition of “confidential information” in paragraph (a) along the lines of Mr. Kehr’s suggested definition in his October 27, 2007 email message (9 yes, 1 no, 0 abstain). It was understood that additional language would be needed to “bridge” the concept of protection of confidential information and the broader obligation in Bus. & Prof. Code sec. 6068(e) to maintain the “confidence of a client.”

(2) For the substance of the definition of “confidential information,” the language in paragraph (f) would serve as the working definition (7 yes, 0 no, 1 abstain).

(3) In the precatory language of paragraph (b), the word “that” was inserted to strictly conform to the language used in Bus. & Prof. Code sec. 6068(e)(2) (6 yes, 0 no, 2 abstain).

(4) Paragraph (b)(2) was revised to read: “To secure legal advice about a lawyer’s compliance with the lawyer’s professional obligations.” (7 yes, 2 no, 0 abstain). Subsequently, the word “confidential” was added before the term “legal advice” (5 yes, 3 no, 0 abstain). A recommendation was made to delete the word “legal” but there was no support for making this change.

The Chair asked the codrafters to implement the changes in a revised Discussion Draft.

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#### **D. Consideration of Rule 4.3 (Dealing with Unrepresented Person)**

The Commission considered Draft 3.3 of proposed Rule 4.3 dated October 16, 2007. The Chair called for a discussion of the open issues identified by the codrafters and raised in email comments on the draft. It was noted that the text of the rule had been resolved by prior votes and that the focus of the discussion would be on the draft comments. The following drafting decisions were made.

(1) In Cmt.[1], a recommendation to delete the second sentence was considered but not adopted (3 yes, 4 no, 0 abstain).

(2) In Cmt.[1], the second sentence was revised to read: "In acting to correct a misunderstanding about the lawyer's role, the lawyer may disclose the client's identity if it is not confidential." (6 yes, 2 no, 1 abstain)

(3) In Cmt.[1], the last sentence was revised to read: "For guidance when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f)." (7 yes, 1 no, 1 abstain)

(4) In Cmt.[1a], there was no objection to the Chair deeming approved the replacement of "and" with "or" in the first sentence in both instances where "and" appears.

(5) In Cmt.[3], there was no objection to the Chair deeming approved the addition of the word "pending" after the word "proceeding" in the last sentence.

(6) Regarding the issue of "testers" (for example, a consumer protection attorney posing as a customer to conduct an on-site investigation of a business suspected to be engaged in unlawful business practices), the first sentence of alternate Cmt.[5] was adopted as revised to read: "Paragraph (a) is not intended to apply to lawful covert criminal and civil enforcement investigations." (7 yes, 1 no, 0 abstain) A prior recommendation to adopt Cmt.[5] failed (3 yes, 5 no, 8 abstain).

(7) The second sentence of alternate Cmt.[5] was adopted (5 yes, 1 no, 2 abstain) as revised to read:

"Paragraph (a) is also not intended to apply to exceptional situations where, for example, a lawyer supervises an investigator posing as a consumer or other person engaged in an otherwise lawful transaction for the purpose of gathering evidence that is not otherwise available where the lawyer reasonably believes that a violation of civil rights or intellectual property rights exists and the conduct of the lawyer and the conduct of the investigator the lawyer is supervising does not otherwise violate this Rules or the State Bar Act."

With the above revisions, there was no objection to the Chair deeming the rule and comments approved. The codrafters were asked to submit a final version of the rule.

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

This rule was circulated for a 10-day ballot with a deadline of November 1, 2007. In response to the ballot, a Commission member proposed that paragraph (b)(5) be revised to read:

"(5) the client breaches an agreement or obligation to the lawyer as to expenses or fees, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the agreement or obligation is fulfilled;"

Although it was reported that there were not six members who objected to approval of this rule on ballot, the Chair inquired whether there would be any objection to adopting a proposed revision submitted in response to the ballot. As there was no objection, the revision was deemed approved. With this change, the Chair indicated that the rule was approved in accordance with the 10-day ballot.

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

Matter carried over.

[Intended Hard Page Break]

## **G. Consideration of Rule 4-200 [ABA MR 1.5] Fees for Legal Services**

The Commission considered Draft 4.1 of proposed Rule 1.5 dated October 17, 2007. The Chair called for a discussion of the open issues identified by the codrafters. The Chair noted that the codrafters' recommendations on the open issues would be deemed approved absent adequate objection. The following drafting decisions were made.

(1) In paragraph (c)(5), the word "involved" was deleted and replaced with the phrase "at stake" (5 yes, 0 no, 3 abstain).

(2) In paragraph (e)(1), by consensus the word "divorce" was deleted and replaced with the phrase "dissolution or declaration of nullity of marriage."

(3) In paragraph (f), by consensus the second "an" in the first line was changed to "a." Also in paragraph (f), it was understood that the codrafters would add the Consultant's recommendations on non-refundable fees, including citations to cases in related Cmt.[1b].

(4) In Cmt.[1], by consensus the citation to *In the Matter of Harney* (Rev. Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 was deleted and replaced with a citation to *In the Matter of Shalant* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829. In addition, a citation to *In the Matter of Wells* (Rev. Dept. 2005) 4 Cal. State Bar Ct. Rptr. 896 was added as another example of discipline for charging an illegal fee.

(5) There was no objection to the Chair deeming Cmt.[5a] deleted.

(6) All of Cmt.[16] was deleted (7 yes, 0 no, 2 abstain).

With the above revisions, there was no objection to the Chair deeming the rule and comments approved. The codrafters were asked to submit a final version of the rule and also were given the option of recommending a 10-day ballot if they felt that the implementation of the revisions resulted in unforeseen issues.

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## **H. Consideration of Rule 5-100 [no ABA counterpart] Threatening Criminal, Administrative or Disciplinary Charges**

The Commission considered an October 17, 2007 memorandum from Mr. Sapiro and Mr. Tuft reporting on RPC 5-100 rule amendment issues. Mr. Sapiro led a discussion of the issues. The following decisions were made to give guidance to the codrafters.

(1) As a threshold policy determination, the Commission decided to retain a rule like RPC 5-100 (7 yes, 2 no, 0 abstain).

(2) The Commission considered the issue of whether the rule should apply to communications with both lawyers and unrepresented persons and decided that the rule should apply to both as this would be consistent with the status quo construction of the rule (9 yes, 0 no, 0 abstain).

(3) After discussion of the issue of whether the rule should define the concept of a “threat,” the codrafters agreed to study the issue further and include a recommendation in their next report.

(4) The Commission considered an Ethics Hotline staff suggestion to replace the term “present” with “file,” but no member made a motion in support of this change.

(5) After discussion about the possible inclusion of a comment addressing the statutory litigation privilege, it was agreed that this issue should not be addressed in this rule (9 yes, 0 no, 1 abstain).

(6) After discussion about the issue of whether to expressly list exceptions to the rule, the codrafters agreed to study the issue further and include a recommendation in their next report.

(7) There was no objection to the codrafters stated plan to change the term “member” to “lawyer” throughout the rule.

(8) The Commission discussed a comment letter from the California Center for the Law and the Deaf (Comment No. 2002-18) and it was suggested that the codrafters consider a comment clarifying whether the rule prohibits a lawyer’s general reference to administrative remedies that may or may not be actual steps toward litigation that might be required for exhaustion purposes.

Following discussion, the Chair asked the codrafters to prepare a revised report or first draft of a proposed amended rule in accordance with the guidance provided by the Commission.

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**I. Consideration of Rule 5-110 [including all of ABA MR 3.8] Performing the Duty of Member in Government Service**

The Commission considered an October 18, 2007 memorandum from Ms. Foy, Ms. Peck and Mr. Tuft reporting on RPC 5-110 rule amendment issues. Ms. Foy led a discussion of the issues. The following decisions were made to give guidance to the codrafters.

(1) Regarding the issue of whether the rule title should be changed, it was agreed that the codrafters should make a specific recommendation after the content of the rule is developed in a first draft.

(2) Regarding the issue of whether the scope of the rule should be expanded, a straw vote indicated that the rule should continue to address only the conduct of lawyers in government service, such as prosecutors (11 yes, 0 no, 0 abstain).

(3) Regarding the issue of whether the rule should define the term “prosecutor,” a straw vote indicated support for including a definition describing the prosecutors and other lawyers in government service who are intended to be covered by the rule (7 yes, 4 no, 0 abstain).

For the remainder of the discussion the Commission discussed the issue of whether the substance of the rule should be analogous to MR 3.8 or simply track RPC 5-110. Some members believed that the Commission should adopt the broader content of MR 3.8 as that rule is a majority rule and California’s standard would then foster national uniformity. Others believed that MR 3.8 creates enforcement issues, such as whether the rule is violated in every instance where a constitutional violation is found. Following discussion, the codrafters agreed to conduct research on how MR 3.8 is being applied by the states that have adopted it and to present that research in a follow-up report. It was also indicated that the next-steps for this matter should include coordination with the Rule 3.6 (Trial Publicity) drafting team because MR 3.8(f) addresses trial publicity by a prosecutor.

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**J. Consideration of Rule 5-120 [ABA MR 3.6] Trial Publicity**

Matter carried over.

[Intended Hard Page Break]

## **K. Consideration of Rule 5-200 [including all of ABA MR 3.3] Trial Conduct**

The Commission considered a first draft of a proposed amended Rule 5-200 dated October 15, 2007. Justice Ruvolo led a discussion of the issues identified by the codrafters and raised in email comments on the draft. The following decisions were made to give guidance to the codrafters.

(1) Regarding the issue of whether to use MR 3.3 or RPC 5-200 as the starting point for drafting, it was agreed that the codrafters could use either rule but should make recommendations on all of the components in MR 3.3 and if any are adopted, then the rule should attempt to track the order of those components in MR 3.3.

(2) There was no objection to the codrafters' use of "Candor Toward the Tribunal" as the working title of the rule.

(3) For the first rule paragraph, the codrafters were asked to use the alternate paragraph (A)[1], not (A)(1), as set forth in the first draft of the rule (11 yes, 0 no, 1 abstain).

(4) Regarding an Ethics Hotline staff suggestion to state the rule as a prohibition against all deception "without qualification," it was observed that such an approach might be overbroad if read literally because many acceptable trial tactics can be recast as a form of deception.

(5) Regarding the issue of including language that prohibits a lawyer from "intentionally misquoting" an authority, a recommendation to delete all of paragraph (A)(2) was rejected (5 yes, 6 no, 1 abstain) but it was agreed that the term "intentionally" should be deleted from paragraph (A)(2) because the precatory language, as drafted, already includes the proviso that a lawyer act "knowingly" and this adequately addresses the level of intent.

(6) Regarding the issue of including a prohibition on failing to disclose adverse cases and other authorities that are controlling, a recommendation to delete that language failed (3 yes, 8 no, 1 abstain) and the Chair indicated that the codrafters should retain the relevant part of paragraph (A)(1) in the next draft.

(7) Regarding the issue of including a prohibition on citations to repealed or unconstitutional law, the codrafters were asked to include that language (paragraph (A)(3)) in the next draft (7 yes, 5 no, 0 abstain).

(8) Regarding the issue of including MR 3.4(e) in the Commission's version of MR 3.3 as part of a trial conduct rule, it was agreed that the codrafters should wait until the MR 3.4 codrafters have made a recommendation on the content of that prohibition.

(9) The codrafters were asked to include the first part of MR 3.3(a)(3) (re offering false evidence) in the next draft (12 yes, 0 no, 0 abstain).

(10) The codrafters were asked to include the second part of MR 3.3(a)(3) (re required remedial measures) in the next draft (11 yes, 0 no, 1 abstain).

(11) A recommendation to ask the codrafters to include the third part of MR 3.3(a)(3) (re corrective disclosure to a tribunal) in the next draft failed (4 yes, 7 no, 1 abstain).

(12) A recommendation to ask the codrafters to include the fourth part of MR 3.3(a)(3) (re lawyer's refusal to offer evidence) in the next draft failed (5 yes, 7 no, 0 abstain). A recommendation to include it but with an express exemption for criminal matters also failed (4 yes, 8 no, 0 abstain).

(13) The codrafters were asked to include MR 3.3(b) (re client engaged fraud) in the next draft but to delete that portion which permits disclosure of confidential information (7 yes, 1 no, 3 abstain).

(14) The codrafters were asked to include MR 3.3(c) (re the duties to a tribunal continuing after the conclusion of a proceeding) in the next draft but to delete that portion which permits disclosure of confidential information (10 yes, 1 no, 1 abstain).

(15) The codrafters were asked to include the concept of MR 3.3(d) (re duties in *ex parte* proceedings) in the next draft (12 yes, 0 no, 0 abstain).

The codrafters were asked to prepare a revised draft rule in accordance with the Commission's discussion. In addition, the Chair asked the codrafters to consider including a comment addressing the "reasonableness standard" that is in the rule.

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## **L. Consideration of Rule 5-210 [ABA MR 3.7] Member as Witness**

The Commission considered an October 12, 2007 memorandum from Ms. Snyder reporting on RPC 5-210 rule amendment issues. Ms. Snyder led a discussion of the issues. The following decisions were made to give guidance to the codrafters.

(1) Regarding the issue of whether to use MR 3.7 or RPC 5-210 as the starting point for drafting, the Commission determined to use RPC 5-210 (10 yes, 0 no, 1 abstain). An earlier recommendation to adopt the rule text of RPC 5-210 (leaving open consideration of comments and possible definitions) was not approved (3 yes, 8 no, 0 abstain).

(2) The codrafters were asked to revise the scope of the rule to cover both bench and jury trials, inclusive of all tribunals where a lawyer might act as both an advocate and witness in a client's matter (6 yes, 5 no, 0 abstain).

(3) Regarding the client consent standard in RPC 5-210, the Commission determined that the rule should make clear that client consent is sufficient to permit a lawyer to act as both an advocate and a witness but that the actual dual activity is subject to authorization by the tribunal (10 yes, 0 no, 1 abstain).

(4) The codrafters agreed to consider a possible comment addressing lawyers who are pro pe litigants.

Following discussion, the Chair asked the codrafters to prepare a revised report or first draft of a proposed amended rule in accordance with the guidance provided by the Commission. In addition, Ms. Peck was added to the drafting team.

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**M. Consideration of Rule 5-220 [including all of ABA MR 3.4] Suppression of Evidence**

The Commission considered a RPC 5-220 rule amendment issues outline. Mr. Martinez led a discussion of the issues. The following decisions were made to give guidance to the codrafters.

(1) As a starting point, the codrafters agreed to begin with MR 3.4(a) as paragraph (a) of the draft rule and then continue with RPC 5-220 as paragraph (b).

(2) By consensus, MR 3.4(b) was adopted as amended to delete the phrase “or offer an inducement to a witness that is prohibited by law.” It was understood that this would be renumbered as paragraph (c) because RPC 5-220 would be designated as paragraph (b) in the draft rule. Also, it was understood that the codrafters would add RPC 5-310(B) as the next subparagraph of the rule.

(3) Regarding MR 3.4(c), the codrafters agreed to consider adapting this to track the Commission’s proposed Rule 1.2.1 and also to consider a reference to Bus. & Prof. Code sec. 6103. In addition, the codrafters were asked to consider a comment addressing court adopted rules of courtesy and professionalism.

(4) Regarding MR 3.4(d), the codrafters recommended that this provision not be included because California’s discovery law adequately regulates the conduct.

(5) Regarding MR 3.4(e), by consensus the first part (everything up to “admissible evidence”) and the third part (re statements of personal opinion) of this paragraph were rejected. However, the second part (re statements of personal knowledge) was referred to the codrafters for a specific recommendation in the next draft.

(6) The Commission determined not to adopt MR 3.4(f) (7 yes, 3 no, 1 abstain).

Following discussion, the Chair asked the codrafters to prepare a revised report or first draft of a proposed amended rule in accordance with the guidance provided by the Commission.

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**N. Consideration of Rules 5-300 (Contact with Officials), 5-310 (Prohibited Contact with Witnesses), 5-320 (Contact with Jurors) [including all of ABA MR 3.5]**

The Commission considered an October 18, 2007 memorandum reporting on RPC 5-300, 5-310, and 5-320 rule amendment issues. The memorandum also included a first draft of a proposed rule. Mr. Vapnek led a discussion of the issues indicating that: MR 3.5 (a) is similar to RPC 5-300(A); MR 3.5 (b) is similar to RPC 5-300(B); and MR 3.5 (c) is similar to RPC 5-320, but that MR 3.5 (d) seems to have no California counterpart. The following decisions were made to give guidance to the codrafters.

- (1) The Commission determined not to adopt MR 3.5(d) (5 yes, 0 no, 2 abstain).
- (2) The codrafters agreed to consider including RPC 5-310(A) as part of paragraph (d) of the draft rule.
- (3) The concept of paragraph (a) of the draft rule was adopted (10 yes, 0 no, 0 abstain).
- (4) There was no objection to the codrafters including the concept of paragraph (b) of the draft rule. It was understood that the concept of prohibited attempts would be studied by the codrafters and considered for the entire rule. It was also understood that the codrafters would consider a possible comment concerning the limitations placed on the propriety of judges to receive *ex parte* communications (see Conference of Delegates report posted at: [http://www.cdcba.org/res\\_2007\\_judicial-council.html](http://www.cdcba.org/res_2007_judicial-council.html) ).
- (5) There was no objection to the codrafters including the concept of paragraph (c) of the draft rule.
- (6) There was no objection to the codrafters including the concept of paragraph (d) of the draft rule.
- (7) There was no objection to the codrafters including the concept of paragraph (e) of the draft rule.
- (8) There was no objection to the codrafters including the concept of paragraph (f) of the draft rule. It was understood that the codrafters' proposed language was intended to codify the standard in State Bar Formal Op. No. 1997-149 which permits certain payments to a non-expert witness for loss of time.

Following discussion, the Chair asked the codrafters to prepare a revised report or first draft of a proposed amended rule in accordance with the guidance provided by the Commission.