

STATE BAR OF CALIFORNIA

PUBLIC HEARING  
PROPOSED NEW AND AMENDED  
RULES OF PROFESSIONAL CONDUCT

October 7, 2006

10:00 a.m. - 2:00 p.m.

Hyatt Regency Hotel  
Monterey, California

P A R T I C I P A N T S

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P R O C E E D I N G S

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(Time noted: 10:15 a.m.)

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4 MR. DIFUNTORUM: Good morning. It's about 10:15  
5 on October 7th, and we are here for a public hearing of the  
6 State Bar of California to receive testimony on proposed  
7 amendments to the Rules of Professional Conduct.

8 The Rules of Professional Conduct are professional  
9 responsibility standards, the violation of which will  
10 subject an attorney to discipline. Pursuant to statute,  
11 Business and Professions Code Section 6077, the State Bar of  
12 California is charged with the responsibility of developing  
13 and adopting amendments to the Rules for approval by the  
14 California Supreme Court. No Rules of Professional Conduct  
15 become binding until they are approved by the Supreme Court.

16 The State Bar staff has caused a notice of this  
17 hearing to be issued by several methods, including a posting  
18 at the State Bar Website and a press release to both general  
19 and legal mass media.

20 This proceeding is being audio recorded and will  
21 be transcribed by a certified court reporter. Please speak  
22 clearly and state your name when you are recognized and  
23 called to the podium, and if there are any intervening  
24 speakers, we ask that you restate your name so that your  
25 comments can be properly attributed.

1           If you have any written materials that have not  
2 yet been submitted, please hand them to Ms. Lauren McCurdy,  
3 of State Bar staff -- she is here. And if there is anyone  
4 who has not signed in, we also ask that you sign in with  
5 Lauren before being called to speak.

6           This public hearing has been authorized by the  
7 Board of Governors' Committee on Regulation, Admission and  
8 Discipline, which oversees the Commission. The Commission  
9 is a sub-entity of the Board of Governors. The public  
10 hearing, as well as the 120-day public comment period, have  
11 been authorized by the Board of Governors.

12           I want to introduce to you the chair of the  
13 Commission, Harry Sondheim. He is a two-time chair of the  
14 State Bar's Committee on Professional Responsibility. He is  
15 the retired head of the Los Angeles County District  
16 Attorney's Appellate Division, founded the Ethics Center  
17 there. And I'll yield the remainder of this proceeding to  
18 Mr. Sondheim.

19           CHAIR SONDHEIM: Good morning.

20           The other four persons who are up here with me are  
21 all members of the Commission for the Revision of the Rules  
22 of Professional Conduct. They are also all former members  
23 of the Committee on Professional Responsibility and Conduct.

24           To my immediate right is Mark Tuft, who is in  
25 private practice in San Francisco. Next to him is Ellen

1 Peck, in private practice in San Diego County. To my  
2 immediate left is Justice Ignazio Ruvolo, a justice of the  
3 Court of Appeal. And next to Justice Ruvolo is Stan  
4 Lamport, who's in private practice in Los Angeles.

5 Let me kind of give you sort of the ground rules  
6 that I'm going to try and operate by, if it's possible. And  
7 if this poses a problem for anybody who has a time  
8 constraint, please let me know.

9 One thing, when you talk -- assuming they can ever  
10 get the sound system working outside -- please stand near  
11 the mike, because we need to pick up your voice. If you're  
12 too far away, it can't be picked up. And especially now,  
13 using the mike which is up here, talk as loud as you can,  
14 near the mike.

15 What I'm going to do in terms of who is going to  
16 speak first is to take those persons in the order that they  
17 registered for their appearance here. And let's take an  
18 example -- Mr. Poll, who I don't think is here right now,  
19 unless I'm mistaken -- he registered first. And one of the  
20 rules he was going to talk on was 1.1. And then I would  
21 take everybody else who signed up to talk on 1.1 -- for  
22 example, Michael Judge, who would also talk at that time.  
23 So we can take it rule by rule. But if it turns out that  
24 Mr. Poll shows up later on, we'll go back to 1.1.

25 Now, is there anybody here who may have signed up

1 but didn't indicate what rules they want to talk on? I know  
2 some of the people who signed up just said they want to talk  
3 on the proposed new California State Bar Rules of  
4 Professional Conduct. Well, I don't assume you're going to  
5 talk on every one of them, so if you can give me some idea  
6 of what you would be talking on, I would appreciate that, if  
7 there's anybody here who can do that.

8           Finally, I'm going to give every speaker five  
9 minutes for the rule that they're talking on. If you signed  
10 up to talk about three or four rules, then you would get  
11 five minutes per rule.

12           Are there any questions that anybody has from the  
13 audience about how we're going to proceed?

14           (No response)

15           CHAIR SONDEHEIM: All right.

16           I take it Mr. Poll still hasn't arrived. So the  
17 next person would be Michael Judge, who signed up, among  
18 other rules, for Rule 1.1.

19           MR. JUDGE: Good morning. My name is Michael  
20 Judge. I am the Public Defender of Los Angeles County. I'm  
21 also here representing the California Council of Chief  
22 Defenders, as well as the California Public Defenders  
23 Association. Both organizations have authorized me to speak  
24 and to relate the comments that I'm about to provide.

25           I've also previously submitted in writing comments

1 regarding Rule 1.1.

2 I think the most critical thing that I have to say  
3 is that much or all of this is already covered in the newly  
4 promulgated guidelines approved by the State Bar for the  
5 provision of indigent defense in criminal cases in  
6 California. They were just promulgated in early 2006, and,  
7 in fact, they go a lot further than Rule 1.1 in terms of  
8 ensuring that not only the individual lawyers who are  
9 handling the cases are fully competent and retain their  
10 competence, as well as their motivation and their zeal and  
11 their knowledge, but all of the employees that work on the  
12 case fall under that same rubric, so that the chief defender  
13 is required to ensure that they maintain an awareness of all  
14 of the skills that are necessary to handle particular cases  
15 that they handle in their office, and that all of the  
16 persons -- investigators, paralegals, whoever it is -- it  
17 could be social workers -- as well as the lawyer, maintains  
18 a high degree of competence in order to ensure that we  
19 provide not only zealous advocacy, but skilled and  
20 knowledgeable advocacy.

21 The concern that we have about this rule is the  
22 one that is sort of the theme that goes through all of the  
23 rules that I'm appearing on, and that is the question as to  
24 who decides whether or not a person has the necessary time,  
25 the necessary knowledge, the necessary skill. If it's an

1 individual deputy public defender's decision, then that  
2 creates chaos in our offices. It's a matter of governance.  
3 It's a matter of who's responsible, who's accountable. And  
4 to the extent that this rule might permit individual  
5 deputies to determine whether or not the public defender  
6 will have the time, resources, skill, knowledge, and  
7 motivation to ensure that appropriate service is delivered,  
8 we object to that.

9           We believe that that is entirely within the  
10 purview of the public defender and public defender  
11 management and should not be the decision of an individual  
12 deputy public defender, who may be the least experienced or,  
13 perhaps, the most misguided person who's trying to assess  
14 the situation.

15           Thank you.

16           CHAIR SONDEHEIM: Let me just ask a question. As  
17 drafted, does 1.1 present any problems that you feel are  
18 there that need fixing, so to speak?

19           MR. JUDGE: Well, just to the extent that the  
20 environment within an institutional public defender's  
21 office, I think there should be some, perhaps, addition to  
22 the rule, like some of the rules have, you know, sort of  
23 these comments or footnotes, you know, indicating that in an  
24 institutional public defender's office, that this is the  
25 responsibility of the chief defender and only the chief

1 defender has the final authority to make decisions with  
2 respect to whether or not they have or will have the  
3 necessary knowledge, skill, time, and resources to properly  
4 represent the client.

5 CHAIR SONDEHEIM: Would that mean that the State  
6 Bar would have no ability to consider whether or not a  
7 deputy public defender is competent?

8 MR. JUDGE: Well, I think that the person who's  
9 ultimately responsible is the chief defender. And the Bar  
10 would be able to discipline the chief defender for failure  
11 of the deputy public defender directly. Now, that's --  
12 that's if we're talking about the skill and the competence.  
13 If we're talking about dishonest behavior, that's entirely  
14 different. I think that there, there's an individual  
15 responsibility as well. But it's -- it's -- you know, I  
16 took a second oath, not just the one when I was sworn in as  
17 a lawyer. I took an oath when I became the public defender,  
18 as a public official, to ensure for the community that  
19 people in my charge are being properly represented.

20 So I think that the Bar should focus on me and  
21 what I'm doing, because I have the resources to ensure that  
22 the service is proper, or to decline work if we have an  
23 excessive workload, or to decline a case if we lack the  
24 competence. And I've done both.

25 CHAIR SONDEHEIM: Go ahead. Would you state your

1 name?

2 COMMISSION MEMBER LAMPOR: Sure. I'm Stan  
3 Lamport, member of the Commission. And by the way, not only  
4 do we have our panel of people up here, we have -- there are  
5 also two members of the Commission in the audience at the  
6 moment. So, I mean, we are very interested in your  
7 comments.

8 I guess my question -- there's two things I wanted  
9 to know. In reading your letter, I understood that there  
10 was an ABA opinion that deals with public defenders that  
11 you're concerned would be imported into our rules if we  
12 adopt an ABA -- let me preface what I'm about to say.

13 Look at this rule relative to 3-110, which is our  
14 existing rule. They are substantially the same.

15 The one thing that we are doing -- at least as  
16 we've sent these rules out for public comment -- is to adopt  
17 the ABA numbering system, with the idea that when someone in  
18 Connecticut comes to California and wants to see what the  
19 rules are, or somebody who went to law school that's  
20 familiar with the ABA would at least be able to use the same  
21 numbering system to see the rules, even, in some cases, if  
22 they're not the same.

23 So the two -- I noticed from your letter your  
24 concern was that there's an ABA opinion that you have  
25 concerns with. And is the concern driven more by the

1 language of the rule, or are you concerned that the ABA  
2 opinion would, by virtue of us adopting a numbering system,  
3 akin to the ABA numbering system, get imported into  
4 California?

5 MR. JUDGE: Well, when I heard that the Bar was  
6 considering changing the numbering system, that did not  
7 cause me concern.

8 COMMISSION MEMBER LAMPORT: Right.

9 MR. JUDGE: It's not the numbers, it's the  
10 concepts and the substantive aspect of the rules. And 1.1,  
11 as I understand it, has changed in the sense that if  
12 somebody reasonably should know that they lack the time,  
13 resources, and skill, et cetera, that they would then be  
14 violating the rules.

15 But my main concern with all this is -- I think  
16 that that may be a fair requirement to have. But if it's in  
17 my office, it should be that I'm the one who has to make  
18 that decision, and I should be held accountable. And I  
19 should be the one who has the authority to make that  
20 determination, because the -- the numbering system is one  
21 thing, but there's also rules that are either the same or  
22 derived, clearly derived, from ABA substance that are being  
23 put forward. And I have a great concern about that, because  
24 I think it could very easily be argued that this changes the  
25 landscape profoundly, in that individual deputies will end

1 up making their own decisions and be able to utilize these  
2 rules to prevent me from taking effective action to manage  
3 my office. And that's a concern of all of the chief  
4 defenders in California.

5 COMMISSION MEMBER RUVOLO: May I ask a question?

6 I'm Ignazio Ruvolo, Mr. Judge.

7 MR. JUDGE: Yes, sir.

8 COMMISSION MEMBER RUVOLO: Did you notice that 5.1  
9 is a rule that -- a proposed rule that deals with  
10 supervisors --

11 MR. JUDGE: Yes.

12 COMMISSION MEMBER RUVOLO: -- and imposes on you  
13 responsibility to see that the others in your office conform  
14 to the rules. Doesn't that give you the control and  
15 responsibility to which you speak today?

16 MR. JUDGE: Well, to some extent, but it greatly  
17 blurs the situation, because it speaks of supervisors. And  
18 the only definition of "supervisor" is that they have some  
19 direct supervisory role. And whether they're a supervisor  
20 or not, according to the proposed rule, is determined  
21 factually by the circumstances on a case-by-case basis,  
22 which would mean that there may be over 200 individual  
23 deputy public defenders in my office who have some arguably  
24 supervisory role. And I think that that's a reason that  
25 we have a problem with 5.1. We believe that it's fair and

1 that the managers and the chief defender ought to be held  
2 fully accountable if they -- if they ratify or order a  
3 violation, or if they learn of a violation, fail to take  
4 corrective action, and also, for the environment in the  
5 office, if they fail to ensure, even without knowledge of an  
6 individual violation, if they have failed to ensure that  
7 there is an environment that encourages and ensures  
8 compliance with the rules, I should be responsible for that,  
9 but not supervisors, because supervisors are -- it's such a  
10 vague term in these rules. And whether somebody's a  
11 supervisor or not can change during the course of a single  
12 day, based upon who may be involved in certain decision-  
13 making and making certain kinds of advice.

14           So I think that's far too amorphous. I think we  
15 have to clearly identify who's accountable. And that should  
16 be permanent managers appointed by the chief defender and  
17 the chief defender.

18           CHAIR SONDHEIM: Look, let me -- this is Harry  
19 Sondheim again. Let me go a little further on this issue of  
20 accountability.

21           Let's assume that there is a deputy public  
22 defender who has a case for trial, and there's a search and  
23 seizure issue in the case, and the deputy public defender  
24 does absolutely no research, makes no motion to in any way  
25 preclude the submission of evidence that was seized, and has

1 not prepared at all, the case goes to trial, and the  
2 defendant is convicted. Now, under those circumstances, do  
3 you think it's you that should be held accountable for the  
4 action of that deputy DA? This may be a grade one deputy,  
5 out in one of the outlying offices, who you may have seen  
6 once when he or she was hired into the office.

7 MR. JUDGE: I think it depends on what I've done  
8 and what my response is. If I properly train the person,  
9 and somehow, due to lack of diligence or just inattention,  
10 they have failed, then I have two choices: remedial  
11 training or termination. If I have not properly trained the  
12 person, then I am definitely accountable, at the outset.

13 CHAIR SONDEHEIM: Assuming -- let's assume you've  
14 done all the proper things.

15 MR. JUDGE: Okay.

16 CHAIR SONDEHEIM: And this deputy simply has not,  
17 for want of a better term, been a -- been a competent deputy  
18 in terms of his responsibilities. Should he be held  
19 accountable or should you?

20 MR. JUDGE: Well, certainly, I hope --

21 CHAIR SONDEHEIM: To the State Bar -- accountable  
22 to the State Bar?

23 MR. JUDGE: I don't think so, under those  
24 circumstances. If it's a single incident and -- I -- I can  
25 assure you that I have better leverage in a single incident

1 like that than the Bar does. I would seriously doubt the  
2 Bar would disbar somebody for a single incident.

3 Now, obviously, there's going to be civil  
4 liability for my office. But you're talking about a grade  
5 one deputy, the only option there is, they're gone, fired.  
6 That's a pretty clear sanction that ought to deter that kind  
7 of misconduct and failure to zealously prepare to represent  
8 these clients.

9 COMMISSION MEMBER LAMPOR: This is Stan Lampor.

10 But then that lawyer would be somewhere in the  
11 community, practicing law. And if that lawyer has exhibited  
12 qualities that would render that person unfit to practice,  
13 the State Bar would still want to have the ability to have  
14 the public not subjected to the services of somebody who  
15 would be -- who wouldn't meet the standards of the rule, I  
16 agree, you know. The standard is "intentionally,  
17 recklessly, or repeatedly," so it would have to be something  
18 more than sort of ordinary negligence. But if somebody  
19 intentionally misses a hearing, or does so repeatedly, or in  
20 some circumstances where the lawyer knew that they had to be  
21 there and -- and did it in some sort of reckless fashion,  
22 doesn't the State Bar have an interest in ensuring that --  
23 that wherever that person is, that that's -- that that  
24 person should not be deemed to be fit to render services as  
25 a lawyer to the public?

1           MR. JUDGE: I think that the State Bar has an  
2 interest. And the State Bar, knowing what I'm doing,  
3 probably should be satisfied with it. Now, if it's repeated  
4 conduct, you know, that raises in my mind the likelihood of  
5 substance abuse. And that's something that we also deal  
6 with. If we think that someone has some disability, then we  
7 will refer them for treatment and not allow them to handle  
8 cases, and then, as we bring them back, very carefully  
9 supervise them, much more intensely than we otherwise would,  
10 in order to ensure that nothing happens to the client.

11           We just don't let them come back after we think  
12 that, you know, they've completed some treatment and just  
13 turn them loose. But we're able to do that. You're not  
14 able to supervise them when they finish their treatment.

15           COMMISSION MEMBER LAMPOR: Let me ask you a  
16 second question.

17           When I was reading your letter --

18           CHAIR SONDEHEIM: That's Stan Lampor.

19           COMMISSION MEMBER LAMPOR: I'm sorry. I was  
20 hoping the tape would somehow -- Stan Lampor -- recognize  
21 my voice by now.

22           When I was reading your letter, I thought the  
23 concern was that from a distribution of work perspective,  
24 that your concern would be that you would have personnel who  
25 would be rejecting assignments on the basis that they didn't

1 have sufficient time and resources, in their opinion,  
2 contrary to your view, as their supervisor, to handle  
3 assignments, and that that should be a decision that you and  
4 your managers make, as opposed to something that your  
5 defenders make. That was -- that was the sense I got from  
6 reading your letter. Am I correct about that?

7 MR. JUDGE: Well, you're correct that that is a  
8 very large concern. And that's critical to us. And I sort  
9 of listed that under 5.2 because the ABA opinion seemed to  
10 reference 5.2.

11 5.2 looked to me like it was a real stretch to get  
12 to that so-called ethics opinion in 5.2. The language,  
13 pretty innocuous, and -- as is the State Bar proposed 5.2  
14 language, fairly -- just general and somewhat innocuous.

15 However, since that did yield a disastrous so-  
16 called ethics opinion issued by the ABA --

17 COMMISSION MEMBER LAMPORT: Right.

18 MR. JUDGE: -- we are very much concerned about  
19 that. And we want to do anything we can to prevent that  
20 from happening in California.

21 COMMISSION MEMBER LAMPORT: Well, and -- and the  
22 reason I'm posing these questions -- and I think we all have  
23 the same issue -- is, when you get comments, the first thing  
24 that goes through our head is, "I'm going to deal with this;  
25 where do I deal with it in this rule?" for those of us who

1 have to, at the end of the day, write something.

2           And so, the only place that I see the concern that  
3 -- that you expressed in your letter coming up is not in the  
4 rule itself, but in the comment to the rule. And that would  
5 be Comment 3, saying:

6           "It is a violation of this Rule if a lawyer  
7           accepts employment or continues representation in  
8           a matter as to which the lawyer knows or  
9           reasonably should have know that the lawyer does  
10          not have, or will not acquire before performance  
11          is required, sufficient time, resources, and  
12          ability to perform the legal services with  
13          competence."

14 And it goes on from there. So I -- if I -- if I were to try  
15 to figure out how to deal with what you're expressing in the  
16 rule, I -- am I dealing with it in the context of this? You  
17 don't accept work if you don't think you have sufficient  
18 time and resources to do it? And you would want us to put  
19 something in there that says "unless you're" -- let me state  
20 it without making a specific reference to the public  
21 defender, but -- "unless your supervising attorney has  
22 concluded that you do have sufficient time and resources to  
23 do it." Is that what your -- what we would need to do in  
24 the rule to satisfy your concern?

25           MR. JUDGE: No. What I would recommend is that

1 you include some language that states that in the case of a  
2 public defender, it is the public defender who is bound by  
3 that rule, and responsible for compliance, not that  
4 individual deputies would have the authority to make that  
5 determination, because this -- when we have a governmental  
6 law office, it's a little bit different than if you have an  
7 individual attorney in private practice, obviously. And  
8 somebody has to have the ultimate authority and to be held  
9 accountable to comply with that rule.

10 And I think that it should specify that that  
11 responsibility is on my shoulders, and I am accountable.

12 COMMISSION MEMBER LAMPOR: And that  
13 responsibility is the responsibility of deciding whether or  
14 not the lawyer is taking -- in this case, the public  
15 defender -- is taking on an assignment for which that lawyer  
16 would need to have the sufficient time, resources, and  
17 ability.

18 MR. JUDGE: Correct.

19 COMMISSION MEMBER LAMPOR: Okay.

20 CHAIR SONDEHEIM: This is Harry Sondheim again.  
21 Doesn't your concern, though, spread over to the private  
22 sector as well, where you have supervisors who may determine  
23 the caseload of a particular individual? And there may be  
24 some concern by the individual that he or she is being  
25 overtaxed in terms of available resources by that

1 individual. So, is it something that's unique to the public  
2 defender's office as compared to the private sector?

3 MR. JUDGE: No. Obviously, the rule is intended  
4 to apply to all lawyers. And I -- and I recognize that.  
5 But I am -- I've been in the public defender's office for 37  
6 years. I know what the environment is. I'm not so certain  
7 about the environment in private law firms and exactly how  
8 that operates.

9 The one thing I did say about that, though, is if  
10 it's going to be characterized as an ethics obligation, the  
11 issue of workload, and not governance, then, instead of  
12 having the rule like the ABA does that only applies to  
13 indigent defense providers -- and that's -- that's what that  
14 rule does, it only -- it only applies to indigent defense  
15 providers, and it sets up a scheme by which an individual  
16 deputy public defender can determine that they think that  
17 the workload is excessive, they ask for relief, whatever,  
18 relief is provided, but whatever response occurs, that  
19 they're not satisfied, and they think that it's  
20 unreasonable, then the rule mandates that they take further  
21 action, including telling the court that the public defender  
22 has an excessive case load and telling the client that the  
23 public defender has an excessive case load and demanding to  
24 be relieved, demanding that the public defender be relieved.  
25 And that, they claim, is an ethics opinion. But I think if

1 it were truly an ethics opinion, it would apply to all  
2 lawyers. Why shouldn't some, you know, first-year associate  
3 who's totally stressed out after working every weekend, who  
4 doesn't get relief, why shouldn't that person be required to  
5 report it to the court and report it to -- oh, let's just  
6 say you're representing General Electric -- that just  
7 happens to be your client -- and then they should be  
8 required to notify General Electric that O'Melveny & Myers  
9 is really screwing up, or whatever firm you want to mention.

10 It really isn't an ethics opinion. What it is, is  
11 it's an attempt to deal with some poorly run public defender  
12 offices or indigent defense providers in some places in the  
13 country. Rather than taking the issue head-on, they've gone  
14 around sort of a side way and tried to make it an ethics  
15 opinion.

16 And so, it gets in the way of any well run office.  
17 And, you know -- I mean, I -- I would join with them, you  
18 know, if they want to impact litigation, if they want to do,  
19 you know, any kind of lobbying about, you know, what the  
20 rules should be for public defenders, but if you're going to  
21 create it as an ethics opinion, then I think it has to apply  
22 to all lawyers.

23 CHAIR SONDEHEIM: I'm going to give you an  
24 opportunity to talk on other rules that you may want to talk  
25 on.

1           But let me just see if there's anybody else here  
2 in the room who wants to talk on 1.1.

3           (No response)

4           CHAIR SONDHEIM: Okay. Then why don't we take up  
5 1.4, if you want to add anything to what you've already  
6 said, and we'll go through the various rules that you have?

7           MR. JUDGE: Look, you know, I've already submitted  
8 that in writing --

9           CHAIR SONDHEIM: Right.

10          MR. JUDGE: -- and I'm pretty satisfied with that.

11          CHAIR SONDHEIM: Okay.

12          Is there any other rule that you want to talk on?  
13 You had 5.1 and 5.2.

14          MR. JUDGE: Yes.

15          CHAIR SONDHEIM: We've gotten into that a little  
16 bit.

17          MR. JUDGE: We have gone into that, but I -- I'd  
18 like to mention something else with 5.1 that I'm authorized  
19 to say. You will receive a written communication from Steve  
20 Cooley, the district attorney of Los Angeles County, who  
21 opposes Rule 5.1 in its current form. And he authorized me  
22 to make that representation to you.

23          What these rules boil down to, I think, is it  
24 becomes a question of -- of governance for governmental law  
25 offices, and certainly for institutional public defenders.

1 The environments are overlaid with civil service protections  
2 already that the lawyers enjoy, which is something that I do  
3 support. It's -- there are also unionized employees that  
4 are involved. In some instances, prosecutors are unionized  
5 and defenders are unionized.

6           We have a question as to, you know, who is the  
7 lawyer. In our instance, I am the attorney of record. It's  
8 not the amorphous public defender's office. I am the  
9 attorney of record. We have policies that have been adopted  
10 in our offices for who has the authority to declare  
11 unavailability because of excessive workload and reject  
12 incoming case loads. We also take it seriously. The  
13 California Public Defenders Association has had training on  
14 the issue of excessive workload. And I participated in that  
15 as a faculty member, not only how to determine whether it's  
16 excessive, but how to successfully divert the work in a way  
17 that's sensible, to manage the diversion so that it  
18 mitigates the cost that results. If we just had individual  
19 deputies doing that, it could be substantially more costly  
20 than if we have an experienced manager with a business-like  
21 sense who approaches it, who can then explain to the board  
22 of supervisors what's happening and why, so that you don't  
23 get the backlash that otherwise would occur, which would  
24 likely result in members of the board of supervisors wanting  
25 to eliminate public defender offices and contract the whole

1 thing out to the lowest bidders.

2 I think that it really boils down to who's going  
3 to run a public defender's office. I think that what you're  
4 attempting to do here in many respects is fine. I want you  
5 to put the responsibility on my shoulders and hold me  
6 accountable, and I won't -- I won't let you down. And that  
7 will also be good for me, because if anybody asks why am I  
8 doing something, you know, I can explain the reasons that  
9 would make sense and what my obligations are, and I can also  
10 say, "And the Bar expects me to do this, and if I don't,  
11 then I can be disbarred or suspended from practice." And  
12 you cannot indemnify me from that.

13 And I can tell you, when I go and ask for  
14 resources, that's one of the things I've said during the  
15 worst budget years: "It's going to be one way or the other,  
16 but I'm not going to get disciplined by the Bar. Either  
17 we're not going to take the cases, or you're going to give  
18 me the resources." And that's how we get the resources.

19 Thank you.

20 CHAIR SONDEHEIM: Is there anybody else who wants  
21 to speak either on 5.1 or 5.2?

22 Mr. Windom.

23 MR. WINDOM: Good morning. My name is Gary  
24 Windom. I'm the public defender for Riverside County. I'm  
25 the past chair of the California Public Defenders

1 Association, and present manager chair of that organization.  
2 I'm here as a representative of CPDA. I am also the chair  
3 of the California Council of Chief Defenders, and I'm here  
4 representing them here today.

5 And during the time that the ABA adopted Rule 06-  
6 441, I was co-chair of the American Council of Chief  
7 Defenders that opposed -- a majority of those opposed that  
8 particular provision going forward.

9 I'm here to talk about 5.1 and 5.2. And I will be  
10 brief, because I had an opportunity over the last four  
11 months or so to talk with Michael Judge. I've looked over  
12 his written responses and talked it over with the CPDA, and  
13 we adopt that written response. I also listened to what he  
14 said this morning, and I adopt much of what you said this  
15 morning.

16 I disagree on one aspect, and that is with regard  
17 to the individual liability that the chair has talked about.  
18 It might be some joint liability here, in the sense that if  
19 we have a lawyer who is repeatedly violating the rules, he  
20 might be held individually liable, but we also, because --  
21 it goes right to the training, right to the accountability  
22 and responsibility that we're talking about.

23 Under 5.1, it is my responsibility. I am and will  
24 -- I am the chief public defender for the County of  
25 Riverside. I appoint my executive management team to help

1 me with policies and procedures in order to ensure that  
2 those responsibilities -- and we are held accountable for  
3 those responsibilities.

4 I agree with Michael that the definition of  
5 "supervisor" is extremely vague. In our organization, I  
6 have lead attorneys who are experienced attorneys that I  
7 rely on to represent the hundred new -- brand-new baby  
8 lawyers that I hired last year, and we have a three-week  
9 orientation, we have training, we are members of the CPDA  
10 that has 21 courses a year, every week we have courses,  
11 every month we have mandatory courses for those individuals.  
12 But we have these lead individuals that are not management,  
13 that are not supervisors, but handle supervisory  
14 responsibilities. They follow those individuals, they guide  
15 them using the experience that they have, and -- and mentor  
16 them. Under this definition, they could be held vicariously  
17 responsible for the duties of that individual lawyer, if  
18 they're deemed to be a supervisor. And that causes me  
19 concern. I have no concern whatsoever with regard to my  
20 duties and responsibilities.

21 I was in Minnesota when this issue was being  
22 argued with the American Council of Chief Defenders, and one  
23 chief defender said, "Oh, no, I don't want that  
24 responsibility." And as a result, we -- you know, the  
25 dialogue began. And that's where the problem is.

1           Now, with regard to 5.2 and the issue of who  
2 should be declaring unavailability or overload, that was a  
3 major issue of the ABA Rule 06-441 that was brought to our  
4 committee, and we rejected it. And over our objection, it  
5 went forward. And we opposed it in Chicago, again telling  
6 them the responsibility is the chief defender's.

7           What we have is a situation where, in 2000, I was  
8 in office for four months, one of the worst run public  
9 defender offices in the State of California. The board of  
10 supervisors had tentatively voted three to two to close that  
11 office down. So I walked in, and I started looking at the  
12 services that were being provided in that office, and I  
13 started putting in policies and procedures that never  
14 existed in that office in the seventeen years before I  
15 arrived.

16           And all of a sudden, I had lawyers going into  
17 court, writing letters to my clients, saying that they were  
18 overworked, that they were overloaded, and that they needed  
19 additional time in order for them to be able to handle those  
20 cases. And then I had lawyers who were not taxed going to  
21 court and make motions to have me relieved as the attorney  
22 of record because they saw disciplinary actions headed in  
23 their direction. They heard the hooves, and they saw the  
24 dust that was cleaning up that operation.

25           So I talked to that one judge -- and I don't know

1 if it's appropriate to mention names -- I won't, unless you  
2 really want me to -- I talked to that particular judge and  
3 said, "Why did you grant that motion?" He says, "I was  
4 helping you out, because ruling that way, you could utilize  
5 that to go to your funding source to get more resources and  
6 material and functions to be able in the organization."

7 Well, I don't need the help!

8           What I need is something very clear. It is my  
9 responsibility, it is my accountability. I stand up to  
10 that. I enamor that -- I'm enamored with that -- with that  
11 responsibility, because I'm focused on what is best for my  
12 clients. It is a different situation here in the public  
13 defenders system, because we don't have at-will lawyers like  
14 we do in the private sector. If they don't like it, they're  
15 gone. If I don't like it, I've got a civil service  
16 procedure I have to go through, or a union procedure I have  
17 to go through. So these individuals who don't like my  
18 policies and procedures -- they don't like -- one lawyer  
19 told me, "God, if I had to work that hard, I'm going to go  
20 somewhere else." Please! But they didn't, so I have to go  
21 through the process.

22           (Laughter)

23           MR. WINDOM: So, it prevents me from being able to  
24 do what I need to do. And so, I'm here to oppose it only to  
25 that degree, when it comes down to declaring overload -- and

1 we have -- I declared an overload in 1,600 cases eighteen  
2 months ago when I took an assessment -- I met in San Diego  
3 with Michael Judge and others of -- 36 other public  
4 defenders from institutionalized public defender offices in  
5 the State of California, and we addressed the issue, because  
6 of the budget crises that were happening. And we talked  
7 about the procedures and how to deal with our funding  
8 source, and how to talk to the judges and make them  
9 understand the nature of our business.

10 And we came up with a process, and we utilized  
11 that process, and it worked to the benefit of all involved.  
12 And we were able to declare 1,600 cases without any negative  
13 connotation being attributed to our lawyers, to our clients,  
14 and to -- and any negative ramifications from our funding  
15 source.

16 We have those things in place. We ask you to put  
17 the responsibility where it belongs. And the ABA opinion  
18 doesn't do that. It was built for Louisiana and Virginia,  
19 who had an insufficient system. And instead of fixing that  
20 system directly and putting the accountability where it  
21 belonged, they came up with this rule. And I submit that  
22 that rule will ruin a system -- not perfect, but one that's  
23 substantially better, and getting better every day.

24 CHAIR SONDHEIM: This is Harry Sondheim again.

25 Let's just assume for the moment that that ABA

1 opinion didn't exist and you just had the Rule 5.2 and the  
2 wording of that rule. Can you live with the wording,  
3 putting to one side the ABA's interpretation of it? But can  
4 you live with the wording that says, in 5.2(b): "A  
5 subordinate lawyer does not violate the Rules of  
6 Professional Conduct or the State Bar Act if that lawyer  
7 acts in accordance with a supervisory lawyer's reasonable  
8 resolution of an arguable question of professional duty"?

9 MR. WINDOM: If you add that it is the  
10 responsibility of the public defender, and his alone, I  
11 would join in that.

12 CHAIR SONDEHEIM: Okay.

13 COMMISSION MEMBER TUFT: A comment. Mark Tuft.

14 Some of us have observed your issues in other  
15 settings, in public interest organizations, for example,  
16 which had a sudden decrease in funding. There are disputes  
17 within organizations, given organizations, public interest  
18 organizations, as to workload assignments, whether the  
19 situation is such that the lawyers can or cannot perform  
20 with competence.

21 It is an issue that's come up historically in  
22 other settings too. And ABA rule for which -- we are  
23 incorporating many of its provisions in terms of inter-  
24 working relationship between the supervisory attorney and  
25 the supervised attorney, but it's not intended to

1 necessarily resolve the kinds of disputes that you're  
2 experiencing in the sense of whether or not particular  
3 circumstances in a given office are forcing younger lawyers  
4 to perform incompetently, for example. That's a hard --  
5 that's a hard thing to legislate in a Rule of Professional  
6 Conduct. That's why the ABA, right or wrong, has come out  
7 with an opinion, which is guidance only -- which may not be  
8 good guidance, from what I'm hearing -- to assist lawyers in  
9 your field in how to apply the rule.

10           But just because they issued the opinion doesn't  
11 mean that it becomes part of the rule itself. It's their  
12 opinion, that committee's opinion, on how the rule would  
13 work in a specific situation.

14           MR. WINDOM: It gives fodder for those individuals  
15 who are incompetent, those individuals who are malevolent,  
16 to utilize and hide behind it as a shield. Since the May  
17 adoption of 06-441 of the ABA rules -- the State of Oregon  
18 has already adopted it -- we don't know what the impact is  
19 going to be, but they adopted it because of people who were  
20 -- I call the renegade individual -- that went beyond the  
21 mandate and directions of the American Council of Chief  
22 Defenders that moved this thing forward. They are from that  
23 state and got this data. So time will tell exactly how that  
24 will impact that state, although it's run differently than  
25 us. We are the attorney of record in an attorney-operated

1 system, where they have a statewide system where you have  
2 one public defender with different deputies covering the  
3 different jurisdictions. So their system is a little  
4 different.

5           And that's what's one of the major things wrong  
6 with the ABA rule. They're trying to come up with a rule  
7 that will cover the whole United States, but that's  
8 impossible, in my opinion, because of the divergence and the  
9 variety of systems that are out there, other than  
10 institutionalized public defender offices.

11           But I agree with you. It is not law. It is an  
12 opinion. But it's a strong opinion. And if there is no  
13 law, they will turn to that in an arbitration proceeding or  
14 a matter in front of the court and use it as a basis of  
15 making that decision. So it becomes very important that,  
16 from the very beginning, the foundation, that we address  
17 this issue.

18           COMMISSION MEMBER LAMPOR: Thank you, Mr. Windom.  
19 Stan Lamport.

20           If I -- I'm going through 5.1 and trying to kind  
21 of get the -- what I hear the core problem is, is that --  
22 and there's two -- I guess there's two core problem. Core  
23 problem number one is there is a concern -- and I think we  
24 talked about this with Mr. Judge -- that -- that subordinate  
25 personnel will take the competence rule and view the

1 competence rule as allowing them to disagree with your  
2 decision to assign work to that person, and that 5.2 would  
3 be an instruction to them to take matters into their own  
4 hands in that regard. And then, I guess, the second concern  
5 I'm hearing is that there is some -- there is some lack of  
6 clarity with respect to the supervisor role -- lawyer role  
7 in 5.1.

8 And I'm the last guy on this Commission to be an  
9 apologist for 5.1 or 5.2, but --

10 MR. WINDOM: You drafted it?

11 COMMISSION MEMBER LAMPOR: No.

12 (Laughter)

13 COMMISSION MEMBER LAMPOR: No. Everybody wants  
14 to go after the fee-splitting rule. Here I am, okay?

15 (Laughter)

16 COMMISSION MEMBER LAMPOR: But as far as 5.1 and  
17 5.2, I was an unwitting accomplice. But having said that,  
18 as I hear -- as I see what we're doing in 5.1, 5.1 is saying  
19 those people who run the office, the firm, have to take  
20 reasonable measures to ensure that there are reasonable  
21 assurances that lawyers on the firm will comply, and this  
22 will become the full -- I view this as a full employment act  
23 for the law we're in, because they'll go into every law firm  
24 and they'll create this little, you know, doctrine of  
25 Wittenberg that they'll hammer on the door, and, you know,

1 "Hear our policies, and we'll give you reasonable  
2 assurance," and, you know, they'll trot it out, and that  
3 will exist. And maybe that's a good thing, but it -- you  
4 know, to me, that's -- and what you've described you do in  
5 your office seems fairly consistent with what 5.1(a) is  
6 talking about.

7           And then you get down to 5.1(b), which just says a  
8 lawyer having direct supervisory authority shall make  
9 reasonable efforts to ensure that other lawyers conform to  
10 the Rules of Professional Conduct. And the way -- the way I  
11 sort of have seen us going with that is that if you have --  
12 if you have lawyers working for you, one, they should be  
13 made aware of the policies of the firm, if the firm -- if  
14 you or a private law firm has not done a sufficient job of  
15 doing that; and, two, where one is aware that is something  
16 is going awry or isn't -- you know, somebody is not  
17 necessarily conducting themselves in a fashion that would be  
18 upholding the rules, that they need to make sure that those  
19 people are brought into line.

20           And so, I understand it's ambiguous, what does it  
21 mean to "directly supervise." And I don't think we -- I  
22 agree with you -- maybe we could come up with a better way  
23 of articulating direct supervision. But if somebody is in a  
24 position who can -- who can, you know, tell somebody how to  
25 conduct themselves, you know, is there a reason why we

1 shouldn't have a rule saying that?

2           MR. WINDOM: I agree with you with respect to a  
3 partner in a law firm, the managing partner in a law firm  
4 that makes the policies and procedures in the office, that  
5 has a duty and responsibility for training, for career  
6 development, and all of those things. In the public  
7 defender system, it becomes the public defender and his  
8 executive team that -- that does the same thing, even at the  
9 middle management level.

10           When you get down to the supervisors, leads,  
11 mentor levels, where the definition blurs and there is  
12 vicarious liability attached -- I think it's under (b) or  
13 (c) -- that you can have vicarious liability because you  
14 knew or should have known that this person was doing  
15 something in that regard, then it becomes a concern.

16           And that's one of the major concerns, because  
17 these people -- it would have a chilling effect to get these  
18 individuals to mentor, to guide, to lead, because of the  
19 personal liability that they would have vicariously. And  
20 that's the concern when you get away from the management  
21 structure that is full-time held responsible for making sure  
22 that the policies, procedures, training, et cetera, are --  
23 and that the competency, more so than anything else -- the  
24 competency and skills that are being delivered are  
25 maintained.

1 CHAIR SONDHEIM: Thank you, Mr. Windom.

2 Let me ask if there's anybody else who wants to  
3 speak on either 5.1 or 5.2.

4 (No response)

5 CHAIR SONDHEIM: Another question: is there  
6 anybody in the audience who had not signed up to speak who  
7 wants to speak? If you haven't signed up, would you raise  
8 your hand?

9 Okay. Just tell me -- tell me what rule you want  
10 to speak on, and --

11 MS. BOXER: Well, I'm going to echo the 5.1 and  
12 5.2 comments from my colleagues.

13 CHAIR SONDHEIM: Okay.

14 MS. BOXER: I am Doreen Boxer. I am the chief  
15 public defender for San Bernardino County. I have been in  
16 that position now for six months, so I'm kind of speaking  
17 back -- what Mr. Windom was talking about -- when he took  
18 over his office, he walked into an office that was decimated  
19 and had to formulate new policies and change the entire  
20 culture of an office that had been ongoing for seventeen  
21 years.

22 I'm dealing with the same thing. I am -- I walked  
23 into an office that was equally decimated and am writing new  
24 policies and changing the culture in the office, that was  
25 heretofore sort of an unguarded and untrained entity. We've

1 started our first training program ever within the last six  
2 months.

3           And the reason why I'm saying that is, with any  
4 change like that, a leader of a large office like that is  
5 going to encounter a lashback -- backlash from people who  
6 are acculturated to a different way of doing things. And in  
7 a system where you have civil service protections and  
8 whatnot, a leader has a -- has a lot of responsibilities, a  
9 lot of things that we cannot do that private bar people  
10 could do.

11           And as such, our situation is very, very  
12 different, I think, than a private law firm, or even other  
13 types of indigent defense service providers. I urge you as  
14 a panel to reconsider these rules, because they will be  
15 devastating to county public defender offices.

16           Back to my situation for a moment. When I walked  
17 into this office, one of the main problems was it was under-  
18 funded. The reason it was underfunded was because the  
19 culture in that office was the individual deputies ran the  
20 courtrooms and ran the office. There was no particular  
21 leader of that office. Because there was no leader, the  
22 funding source did not fund that office, did not trust that  
23 office to handle cases.

24           If these rules go down the slippery slope that we  
25 all expect them to, in that we're going to have deputies who

1 are not fond of new policies, not fond of the  
2 responsibilities that are thrust upon them -- rightfully by  
3 the public defender, but in their opinion, it was  
4 wrongfully. You're going to have a bunch of county  
5 departments who can't manage their lawyers, can't manage the  
6 caseload, and therefore undermining the strength of what is  
7 actually a much better system as the public defender system.  
8 So the public defender is a different entity than anything I  
9 think that the board has been able to consider in regards to  
10 these rules.

11           If the public defender can't manage that caseload  
12 because of 5.2, I think you're going to see a very definite  
13 negative impact on county public defenders, which I think is  
14 an ironic outgrowth of this rule, because the rule probably  
15 was to strengthen indigent defense services. But what it's  
16 really going to end up doing is undermining -- undermining  
17 them.

18           And then, I just want to echo that I adopt  
19 everything that was said by my predecessor chief defenders.  
20 And I know that we've spent a lot of time talking about  
21 this, and I know that the general sentiment of other chief  
22 defenders is the same. We're very concerned. I urge you to  
23 at least table this, or reconsider adoption of these rules.

24           CHAIR SONDEHEIM: Thank you.

25           MS. BOXER: No questions?

1 CHAIR SONDEHEIM: No questions. I think we've  
2 cross-examined your predecessors enough.

3 (Laughter)

4 COMMISSION MEMBER LAMPORT: We want to make sure  
5 we understand it.

6 CHAIR SONDEHEIM: All right.

7 Are you here also on 5.1 and 5.2?

8 MR. CHANDLER: Yes, I am. My name is Tim  
9 Chandler. I'm the chief defender for the alternate public  
10 defender in San Diego County.

11 And I wanted to add my voice to the concerns of my  
12 colleagues as well.

13 If you are managing a group of lawyers and you're  
14 trying to create good morale, good work environment,  
15 especially public defenders, you cannot have a system which  
16 pits one lawyer against another. And that's what this rule  
17 will create. I would create a necessity for one lawyer to  
18 attack another in order for this to work -- I mean, if it  
19 could work, because in order for a supervisor to avoid  
20 liability, he would have to put it on someone else. So  
21 you'd have two supervisors saying, "I wasn't the one," and  
22 you'd have a supervisor saying it was the act of the line  
23 deputy, and it would create bad morale, chaos within a  
24 public defender agency. So it's critical that that version  
25 of this rule not be adopted.

1           Frankly, I don't think that you can do with these  
2 rules what you want to do. And it sounds like what you want  
3 to do is eliminate mistakes by attorneys, eliminate high  
4 case loads by attorneys, and that sort of -- you want to  
5 manage, through reaching the deputy, the operation of a  
6 particular office. And I just think that you cannot get  
7 there with this rule, or with these rules.

8           And so, my experience with this -- because I've  
9 had exactly this situation come up -- I had a deputy who  
10 filed a declaration in court saying, "I can't do the case-  
11 load because I am too busy." Now, I thought that was a  
12 dishonest declaration.

13           Now, if a lawyer files a declaration that's in  
14 fact dishonest, what does the managing attorney do? How do  
15 they -- how does he handle it? I mean, that's a -- that  
16 declaration was filed not because the workload was too  
17 severe, but because there was a political agenda or there  
18 was an opportunity or an effort to embarrass the responsible  
19 person.

20           Of course, I went in and I said, "I am the  
21 attorney of record. I make this decision. That  
22 declaration, I'm taking it back, Your Honor. We're not  
23 proceeding with that. You're not going to rule on this  
24 unless I ask you to. The duty of this deputy was to report  
25 to me and to say, 'I cannot do this work,' and then I will

1 decide what happens."

2           This rule -- these rules that you would adopt, if  
3 they had been in existence, I would have had a difficult  
4 time disciplining this deputy for lying in court, filing a  
5 false declaration.

6           The true control of lawyers is the control that  
7 you put on their integrity, their honesty, and their  
8 obligation to be direct, straightforward, and forthcoming  
9 with people that they work with, the court, and the clients.  
10 Any other effort to manage this in the manner that you're  
11 doing is just not effective, and cannot be effective. And  
12 what you will do is create a tension between lawyers and a  
13 tension between the court and lawyers that does not  
14 presently exist. And I think we should move away from that.

15           My question to you is, who brought this to you?  
16 Why did you seek -- or believe you needed to make this  
17 change? I think therein lies the responsibility of a board  
18 like yourself, and to say sometimes there are things we  
19 cannot change by the rules we make, and may not be necessary  
20 to attempt to change them in the manner that you sought to  
21 here.

22           So my recommendation and my suggestion to you and  
23 request would be that since this rule is substantially  
24 similar to what you are changing -- I'm going by Mr.  
25 Lamport's comment -- why change it? Certainly not now. If

1 anything, defer it till next year or -- so that it can be  
2 vetted more carefully, so we have an opportunity to come  
3 back to you, if you perceive that you need to proceed with  
4 such a ruling, that we have the time to do that in a very  
5 different environment than the one that I've had to respond  
6 to this morning.

7 I appreciate you giving us the time and  
8 consideration to be heard, and I thank you.

9 CHAIR SONDHEIM: Thank you, Mr. Chandler.

10 Incidentally, there will be other opportunities to  
11 comment again on some of these rules because eventually,  
12 after each batch, so to speak, has gone out for the final  
13 wrap-up, which will then be submitted, and at that time,  
14 there can be a further comment.

15 As I mentioned at the beginning, we're going to  
16 try and -- if they're present -- consider speakers in the  
17 order that they registered. And I understand Mr. Poll is  
18 here and would like to hear from him.

19 But I have one question before I have you speak.

20 And that is, is there anybody here who wants to  
21 talk on 2.4? Is there?

22 JUDGE KENNEDY: I'm Judge John Kennedy.

23 CHAIR SONDHEIM: Yeah. I don't want you to speak  
24 now, but I just want to know if you do --

25 JUDGE KENNEDY: Yes.

1 CHAIR SONDHEIM: -- you do want to speak on 2.4.

2 JUDGE KENNEDY: I believe that's the number -- but  
3 I don't have the number. I'll defer to you --

4 CHAIR SONDHEIM: Okay.

5 All right, Mr. Poll. You're on. I announced at  
6 the beginning that each speaker would have five minutes on  
7 the rule that they had signed up for. So you've signed up,  
8 I believe, for three rules. Take it as you wish. We'll  
9 start with 1.1, which we had called earlier, but I guess you  
10 weren't here at that time.

11 MR. POLL: Thank you. Thank you, Mr. Sondheim. I  
12 don't think I'm going to need five minutes for all the rules  
13 that I had in mind. Contrary to some people who know me, I  
14 hope to be very brief.

15 I want to address Rule 1.1. And I guess, first, I  
16 need to identify myself. I'm Edward Poll. I've practiced  
17 law for 25 years, and the last 16 years, I have been a coach  
18 and consultant on the business side of the practice of law.  
19 I am the immediate past chair of the Law Practice Management  
20 and Technology Section, and I am -- at the end of this  
21 meeting will be the co-chair of the Council of Section  
22 Chairs for the State Bar of California, and have an  
23 extensive history both in local bar politics as well as the  
24 American Bar Association.

25 Rule 1.1, I would like to address first on the

1 issue of competence. And I would only make reference for  
2 your consideration to the fact that there is nothing in that  
3 rule as I have read it -- unless I'm mistaken -- to the  
4 effect of what impact technology has on competency.

5           Years ago, the American Bar Association's similar  
6 rule on competency had a comment in it to the effect that  
7 technology is an element of competence to be considered in  
8 light of the community standard in which the lawyer was  
9 practicing. That led me to believe that if you're in Tulsa,  
10 Oklahoma, you might have one standard, and if you're in New  
11 York City, New York, you might have another standard. But  
12 the fact is that technology was a factor to consider, that  
13 is, the lawyer's ability to deal with competency.

14           And there's -- that comment, by the way, has been  
15 removed from any ABA rule years ago. Why it was removed, I  
16 do not know. I was not percipient enough to, at that time,  
17 ask the question, so I don't know now even how to go back  
18 and find out.

19           But I would just recommend that the Commission  
20 consider the impact of technology on competence. In today's  
21 world, I think it's really very important for lawyers and  
22 for this board, in defining competence, to at least touch on  
23 the issue, however you come out on it. I would also kind of  
24 point out to you that at the SEI Institute lunch on a  
25 Saturday in January of 2007 has as its title the program

1 "Meeting New Professional Responsibilities and Challenges:  
2 Adjusting to the Electronic Environment." So I think that  
3 that is something that your body ought to consider.

4 That is as far as I need to go or want to go at  
5 this moment, unless you have questions.

6 COMMISSION MEMBER TUFT: I have one. The comment  
7 you referred to in the ABA model rule, is that the '83 --  
8 are you talking about the model rules, not the model code?

9 MR. POLL: You've pushed my memory beyond its  
10 ability to respond.

11 COMMISSION MEMBER TUFT: Okay. So it could -- it  
12 could be in the code?

13 MR. POLL: Yes.

14 COMMISSION MEMBER TUFT: Okay, because we'll look  
15 for it.

16 MR. POLL: Okay. Yeah -- it was in the comments  
17 and not in the rule.

18 COMMISSION MEMBER TUFT: I understand that.

19 MR. POLL: Okay.

20 COMMISSION MEMBER TUFT: But it was -- it could be  
21 in the earlier version of the model rules or the ABA code?

22 MR. POLL: Yes.

23 COMMISSION MEMBER TUFT: And that's -- that's fine  
24 with me. Thank you.

25 Okay. Thank you.

1           COMMISSION MEMBER LAMPORT: This is Stan Lamport.

2           What is the standard, that competency would be  
3 having technological competency? What is it that you want?

4           MR. POLL: A lawyer's ability to deal with  
5 technology is one element of defining his competency or her  
6 competence in dealing with the practice of law and  
7 representing clients. There is no lawyer that I'm aware of  
8 today, for example, that does not have a computer, that does  
9 not deal with email. But you can go beyond that and talk  
10 about their ability to use a variety of applications to  
11 become more effective and more efficient in research and  
12 other aspects of the practice of law, to make them more  
13 competent.

14           In other words, as an example, if a lawyer were to  
15 do a quick skimming of Lexis or Westlaw before going into a  
16 courtroom and would find a recent case that overturned their  
17 position, not to present that before the court is a  
18 violation of the duty and responsibility as an officer of  
19 the court. If the lawyer doesn't have that access, then is  
20 that competent or is that not competent?

21           Again, I'm not trying to suggest what your  
22 conclusion should be. I'm only trying to suggest that  
23 that's an issue that you ought to -- ought to discuss, and  
24 then deal with it one way or another. But to not have any  
25 commentary about technology in the definition of competence

1 here, I think, is a mistake.

2 CHAIR SONDHEIM: Thank you, Mr. Poll.

3 MR. POLL: If I -- if I may proceed, just for a  
4 brief comment?

5 CHAIR SONDHEIM: Sure. I think you also had 1.51  
6 and 8.3.

7 MR. POLL: I would only suggest, in terms of 1.51,  
8 my question as to whether referral fees are permitted in the  
9 State of California. And here, I would only suggest to you  
10 that as somebody who perceives himself to be reasonably well  
11 educated, I was not clear on the conclusion after having  
12 read the language. And I would only urge the body to review  
13 the language to make sure it's clear as to what your  
14 position is as to whether referral fees are or are not  
15 permitted, and if so, under what circumstances.

16 My conclusion after having read it several times  
17 is that it might now be permitted under the new rule, but  
18 only with consent of the client. And I'm not here to argue  
19 one way or the other, but just to suggest that you might  
20 want to look at the language, especially with the suggestion  
21 that we use clear and concise English language in the  
22 development of our rules, as the standard having been  
23 adopted in California.

24 With respect to -- I'm not sure whether it's 8.3  
25 or 5.6 -- but the idea of reporting professional conduct --

1 misconduct, rather -- I'm reminded of the Illinois case --  
2 and it gives me grave, grave concern that this rule may be  
3 following, in effect, the Illinois Supreme Court's position  
4 -- or rather -- not the Supreme Court -- it might have been  
5 the Supreme Court, but I think it was the Illinois  
6 disciplinary system -- where they said that Attorney Number  
7 2 was temporarily disbarred or suspended because Attorney  
8 Number 2 agreed not to report the misconduct of Attorney  
9 Number 1 in order to cause Attorney Number 1 to refund funds  
10 to the client that were inappropriately taken from the  
11 client. And the negligence of Attorney Number 1 was agreed  
12 not be reported by Attorney Number 2 in order to protect the  
13 client.

14           And if the new rule that you've come up with  
15 supports the obligation of Attorney Number 2 to report the  
16 misconduct of Number 1, then we are doing a disservice to  
17 the client.

18           Attorney Number 2 was able to negotiate a deal to  
19 refund money for the protection of the client, but the  
20 requirement by Attorney Number 1 was that he not be reported  
21 by Attorney Number 2. It's sort of convoluted, but I think  
22 you understand the context. And I'm just --

23           CHAIR SONDEHEIM: We're familiar with that case.

24           MR. POLL: Okay. I'm just concerned, if we are,  
25 in effect, seeking to protect the public, this is one way

1 that Attorney Number 2 had to protect his client, the  
2 public. And I would just encourage you not to go down the  
3 path that Illinois went.

4 CHAIR SONDEHEIM: Mark.

5 COMMISSION MEMBER TUFT: Mark Tuft.

6 If you look at 8.3(a), it says, "A lawyer may, but  
7 is not required to, report." Is that not clear in your  
8 reading? Is there something unclear that makes it  
9 discretionary and not mandatory? That was our intent.

10 MR. POLL: Okay.

11 CHAIR SONDEHEIM: Illinois, I believe, has the  
12 mandatory reporting rule.

13 MR. POLL: Right. Okay.

14 COMMISSION MEMBER TUFT: And California has never  
15 had a mandatory reporting rule. We're not seeking to change  
16 that, but we are -- we put it in here for -- this is new  
17 that we put, that a lawyer "may" make such a report, but we  
18 did not intend to make it mandatory.

19 MR. POLL: Okay.

20 COMMISSION MEMBER TUFT: Is that -- are we not --  
21 are we not clear?

22 MR. POLL: I don't have that language in front of  
23 me, but as I originally read it, it seemed to me that the  
24 Himmel case, if I recall --

25 COMMISSION MEMBER TUFT: That's the case.

1 MR. POLL: -- am I correct?

2 COMMISSION MEMBER TUFT: Right.

3 MR. POLL: -- was a result that was important to  
4 me, when, in fact, Attorney Number 2 is merely trying to  
5 protect the client.

6 COMMISSION MEMBER TUFT: We are not attempting to  
7 codify that case. But I just -- I'm only asking how clear  
8 are we in our drafting? If it's not clear, tell us, because  
9 that was --

10 MR. POLL: Okay.

11 COMMISSION MEMBER TUFT: I just -- okay.

12 MR. MOHR: Kevin Mohr, consultant to the  
13 Commission.

14 The Himmel case was very important in the  
15 determination when we were writing 8.3. And I think we  
16 addressed it not only by using the language "may, but is not  
17 required to," but if you also look at proposed Rule 8.3,  
18 Comment 2, it specifically refers to the fact that the  
19 lawyer may not violate the duty of confidentiality, which  
20 means if the client told you not to disclose that  
21 information, you may not disclose it. And that was the  
22 problem in Himmel. The client had told the lawyer not to  
23 disclose the information, and so the lawyer didn't, but the  
24 court said the lawyer still had an obligation to. And we  
25 didn't -- we intentionally wanted to avoid that problem.

1           COMMISSION MEMBER TUFT: Right. That's what I'm  
2 telling you.

3           MR. POLL: Thank you for the clarification.

4           And I would just like to raise one other issue  
5 here with you and ask you whether it's permissible for me to  
6 comment on it, because I don't think it's on your list. And  
7 that is reflective of the rule pertaining to the sale of a  
8 law practice. May I make one comment on that?

9           CHAIR SONDHEIM: I would suggest this, because  
10 we're still working on that -- it will be out eventually for  
11 comment, both unofficially on our Website and then  
12 afterwards as part of a batch of rules -- and if you would  
13 reserve your comments for that time -- or send them in now,  
14 but in writing, then we can consider it, rather than having  
15 it here at the public hearing where others want to speak on  
16 rules that are directly before us.

17           But I would encourage you to send anything in that  
18 you'd like to now, in writing, so that we can consider it as  
19 we try to, so to speak, temporarily or tentatively, whatever  
20 you want to call it, finalize that rule. And then it'll go  
21 onto our Website, and eventually it will be part of another  
22 batch of rules.

23           MR. POLL: Okay. Thank you.

24           COMMISSION MEMBER LAMPORT: This is Stan Lamport.

25           Our agenda materials are online, and as we go

1 through the rules, you can see where we're going with it,  
2 through our agenda materials.

3 MR. POLL: Where you're going with it scares me.  
4 But that's all right.

5 (Laughter)

6 CHAIR SONDEHEIM: Well, that's what we'd like to  
7 know, why it scares you. Please -- please advise us.

8 MR. POLL: Okay. Thank you very much.

9 CHAIR SONDEHEIM: All right.

10 As I indicated before, we're going to go in the  
11 order that people signed up in. Normally, Carol Langford  
12 would be the next person, but one of our Commission members  
13 has to leave in a short period of time and is interested in  
14 comments that will be made on 2.4. So with your permission,  
15 I'd like to kind of skip over you for a moment

16 MS. LANGFORD: Of course.

17 CHAIR SONDEHEIM: -- and have that person who is  
18 here on 2.4 talk to us, which I understand is Judge Kennedy.

19 JUDGE KENNEDY: Yes. I find myself in an  
20 amusingly ironic position. I'm here as a judge, unprepared,  
21 asking attorneys for a postponement.

22 (Laughter)

23 JUDGE KENNEDY: It came to our attention just  
24 recently -- actually, let me give you a slight amount of  
25 background and give you a sense that we're working with you.

1           Back in March, Star Babcock was kind enough to  
2    join the retired judges meeting, and we had a lengthy  
3    discussion about membership in the bar. And as a result of  
4    that -- and I don't know if the discussion took place with  
5    Star present or not -- but as a result of that, one of the  
6    things we realized is that we had a responsibility as  
7    retired judges to develop ethical standards for ADR  
8    providers. And so, Terry Friedman was very supportive of  
9    that goal, put together a committee, and in the summer, he  
10   asked me to chair the committee. And in a moment of  
11   weakness, I said I would.

12           As I really got into the reality and my time --  
13   other time commitments, I realized I couldn't, and so Mike  
14   Hanlon has been made chair. That delay, however, has  
15   delayed us really dealing with what we think we need to deal  
16   with with you. And it recently came to our attention that  
17   you actually have been dealing with this and we were not  
18   aware of it.

19           We would simply ask that you put this over for  
20   further consideration, give our committee a chance to wrap  
21   up now, to thoughtfully provide some thoughts, to run it  
22   past the California Judges Executive Committee for their  
23   review and approval, and work with you. I will say that all  
24   of us, and myself in particular, have had a warm and  
25   friendly and lengthy relationship with Star and feel

1 comfortable working with him. While we don't always agree,  
2 they're comfortable relationships, and we'd like to work  
3 with him and feel that that can be a productive partnership.

4 CHAIR SONDHEIM: Let me -- this is Harry Sondheim  
5 again. Let me just state that it's not only judges that  
6 have asked for postponement of some things, or at least a  
7 continuance. There are some members of the Bar and  
8 different Bar committees that have asked for that. And this  
9 is the way that I think we perceive the matter.

10 The earliest that it can be on our agenda again  
11 would be the 1st of December. And in order for us to  
12 consider comments on rules that are now in this first batch,  
13 it would be helpful if we can get something in the early  
14 part of November so that it can be circulated in time for  
15 that December 1st meeting. I don't know how quickly the  
16 judges can act, but there's at least, let's say, two to  
17 three weeks additional time that you have to send some  
18 further -- or some comments in.

19 JUDGE KENNEDY: John Letton is on the Executive  
20 Committee, and I think John indicated the next board meeting  
21 is November 20th.

22 MR. DIFUNTORUM: It's the weekend prior to  
23 November 20.

24 JUDGE KENNEDY: Weekend prior to November 20th.

25 CHAIR SONDHEIM: You can -- you can send in your

1 comments, and we'll try to do our best to have it circulated  
2 in time for our December meeting. But I can't promise at  
3 this point, because that is rather, so to speak, late in the  
4 game for our agenda items. But we'll certainly try and give  
5 it some consideration.

6 COMMISSION MEMBER TUFT: Can I just say an  
7 additional thing, a question also? But we are in the  
8 unusual process of also submitting -- after we get comments  
9 from the Bar and -- the bench and the Bar, to submit the  
10 first batch to the Supreme Court for its comments, even  
11 though it got finalized. But we don't want to lose that  
12 schedule if we can avoid it, because hearing back from them  
13 is extraordinarily important, if we're going in the wrong  
14 direction on it, so we're not being arbitrary -- at least  
15 we're trying not to be arbitrary.

16 Secondly, is your concern about having more time  
17 directed to 2.4 or are you also going to be coming on 2.4.1  
18 and 2.4.2, which are --

19 JUDGE KENNEDY: Not having read those yet, the  
20 proposals, as may have been apparent from my blank look when  
21 you said 2.4, I can't speak to the content of all --

22 COMMISSION MEMBER TUFT: There's three -- there's  
23 three rules, yeah.

24 JUDGE KENNEDY: Yeah. I can't speak. I can't  
25 speak on all three now.

1 COMMISSION MEMBER TUFT: Okay.

2 CHAIR SONDHEIM: And let me just clarify something  
3 with regard to this time fact vis-à-vis the Supreme Court.  
4 The court has indicated a willingness to have us send to the  
5 court the first batch when we have completed the public  
6 hearings and our own reconsideration of the first batch.  
7 But the court will not make a final judgment, so to speak,  
8 on these rules until we submit the entire batch of rules, or  
9 that is, all the rules together, somewhere down the line --  
10 I can't tell exactly when. We may or may not receive  
11 feedback from the court after they receive the first batch,  
12 so -- there will be other opportunities, even if you don't  
13 make the first stop of this train. There are additional  
14 stops that we will be making.

15 JUDGE KENNEDY: Just as long as it hasn't left the  
16 station.

17 (Laughter)

18 JUDGE KENNEDY: Thank you.

19 CHAIR SONDHEIM: Thank you.

20 All right. Carol Langford.

21 MS. LANGFORD: Okay. Thank you.

22 I'm Carol Langford, and I'm going to be speaking  
23 on Rule 1.8.10, the otherwise known as the sex-with-client  
24 rule. And my position is that the proposed Rule of  
25 Professional Conduct does not go far enough, and that it

1 should be like the ABA rule, no sex with clients unless it  
2 predates the attorney-client relationship or it is between  
3 spouses, a rule similar to what we have for psycho-  
4 therapists, doctors, and those providing pastoral care.

5           Why do I say this? Well, I believe that rule is  
6 necessary. As you folks know, my practice is ethical advice  
7 and representing lawyers before the State Bar. And I'm  
8 seeing quite a big increase in cases involving sex with  
9 clients. I'm not sure if that is because of the Internet or  
10 what it is, but I'm seeing an increase in it, with clients  
11 that may or may not -- have other addictions.

12           There are two types of sex-with-clients cases,  
13 those where the lawyer has sex with a client that's  
14 generally in a weakened position. That can come up in a  
15 family law case where they're getting a divorce, or an  
16 immigration case -- I had a case like that -- where they're  
17 about ready to get deported, or a pro bono case, where the  
18 client can't go to another lawyer, so they just don't have  
19 the resources. And sometimes it's one and the same. It's  
20 very often family law.

21           The second type of cases where it can be any  
22 lawsuit, and maybe in the beginning there was consent, but  
23 something happened, the relationship goes sour, and then the  
24 allegations are flying.

25           In both cases, there is a high likelihood that

1 prosecution by the Bar will not ensue. I did an informal  
2 poll of the State Bar judges, and I told them I wouldn't  
3 name them because, you know, I don't want to speak for the  
4 Bar, and an old prosecutor -- been there a long time -- and  
5 -- because I know all of them, and I work with them -- and I  
6 said, "Okay, what's the problem here?" And they said a  
7 couple things. They said, well -- the prosecutor said  
8 because the rule is one -- it can't be enforced because  
9 absent any type of clear and even written coercion, it's  
10 hard to prove -- for example, where the lawyer makes  
11 harassing phone calls and the client has taped them, or the  
12 lawyer does letter that look harassing -- lawyers can do  
13 that sometimes. But most of the time, lawyers are smart  
14 enough not to have that type of proof.

15           And also, because if you look at the statute --  
16 you know, we have a Rule of Professional Conduct on this,  
17 but there's also a statute, and that's 6106.9 -- it requires  
18 that a declaration be filed. And that is not true of any  
19 other State Bar rule that is prosecuted, where they have to  
20 have a declaration. And, a) the clients are complaining  
21 witnesses -- they call them "CW's" -- find it insulting;  
22 and, b) I think they get afraid of the legal process. Now  
23 they're signing something, it's -- I think it scares them.

24           Also, it ends up being like a rape case, okay.  
25 When I defend a client on those type of charges, or they ask

1 me about it, the defense is always, "She wanted it." And a  
2 lot of women don't want to go through that type of thing.  
3 So what ends up happening, I get them and the lawyer to call  
4 me and say, "Give her some money." And I basically end up  
5 being a bag man for these people, you know, "Give her some  
6 money to make her go away." And I don't want -- you know, I  
7 think that that's not the way it should work. I think the  
8 Bar needs to prosecute those type of cases.

9           We also talked about the various standards and the  
10 rule, and we both agreed that "require" and "demand" is not  
11 enough, and the rule should cover cases where the lawyer  
12 actually requests it too, as a condition to employment,  
13 because that is predatory conduct. And again, the Bar can't  
14 prosecute that.

15           We both agreed that there is not a clear  
16 definition for coercion and intimidation that can be proven  
17 by clear and convincing evidence. Remember, you're having  
18 someone said -- saying, "She wanted it," she's saying, "I  
19 didn't want it." That's not clear and convincing, you know.  
20 It's just -- it doesn't meet that standard.

21           And there's also cases where the lawyer might say,  
22 "Hey, you know, if you go out with me" -- they're not going  
23 to say "sex" -- they're going to be more suave -- "If you go  
24 out with me, you'll get a huge reduction in your bill." The  
25 rule doesn't cover that type of thing. Even if she says yes

1 willingly, that can still be a very detrimental thing in a  
2 family law case, where you have issues of support and child  
3 custody.

4           If you look at the original statute, 6106.8 --  
5 that's where the Legislature said, "Do a rule, folks" -- and  
6 read it really carefully, because it says, "The Legislature  
7 finds that it is difficult to separate sound judgment from  
8 emotion or bias that may result from sexual involvement  
9 between a lawyer and his client, and emotional detachment is  
10 essential to the lawyer's ability to render competent  
11 services."

12           They also said in particular they wanted to see a  
13 rule that dealt with probate and family law matters, so they  
14 understood the issue.

15           I think that you have an opportunity here to have  
16 a rule kind of like a speed rule -- you know, "Don't go over  
17 60 miles an hour" -- that can be prosecuted. And I think if  
18 you don't do it, I think eventually you might see the  
19 Legislature back at you. I think it's only getting worse.  
20 I think -- you know, we talked about it, the prosecutors,  
21 and a lot of people think it's getting worse.

22           Well, a lot of things -- I mean, you know, you  
23 start with the '70's, and feminism, it's uphill, it goes  
24 through the Internet. And I think lawyers are afraid to put  
25 their faces on match.com or the other sites, so they have an

1 easier availability to clients who are somewhat vulnerable.

2           What else? What type of cases do I see? All  
3 kinds, from lawyers who have sodomized a client, sexual  
4 harassment type cases, a lawyer molesting minors, married  
5 lawyers often going to (inaudible). And then there's sex  
6 with non-clients too, but that's strippers, spending the  
7 client's trust account money on that. And I've had all  
8 those different types of cases.

9           It's a very hidden problem because if the Bar is  
10 not prosecuting it -- and you're not going to see it civilly  
11 as much because these clients can't pay lawyers. So the  
12 lawyers have to take it on a contingency fee. And you look  
13 at it and you say, you know, especially where there may not  
14 be incompetence, or there may be a little bit of  
15 incompetence -- in other words, the lawyer may delay the  
16 case a little, but nothing where you're going to get a big  
17 recovery -- they're not going to be able to get a lawyer.  
18 And I can't do all those cases, you know, pro bono. So it's  
19 hard to do. So it's somewhat of a hidden problem.

20           An alternative position could be require some  
21 disclosure or waiver of the reasonably foreseeable adverse  
22 consequences to the representation, or even a 3-300: go to  
23 another lawyer and, you know, have them explain. If a  
24 lawyer sat down with someone in a family law case and said,  
25 "Look, if you and your lawyer break up, he may not want to

1 handle your case. And what about a fee disagreement you're  
2 going to have?" That always comes up because they do -- you  
3 know, they do give a little fee discount when they're having  
4 sex with them, but when it stops, they might not. What's  
5 going to happen if the lawyer doesn't have good judgment or  
6 makes the husband mad in this divorce case? It might make  
7 people think.

8           So, in sum, I would say the proposed rule doesn't  
9 go far enough. I don't believe it protects people enough.  
10 And I think we should read more like the ABA.

11           Yes?

12           COMMISSION MEMBER TUFT: Mark Tuft.

13           The proposed rule, which, as you correctly  
14 identify, does stay with the California approach, which I  
15 think is also in the State Bar Act, but it does have as a  
16 separate -- a new comment that the rule does not preclude  
17 the application of either the competence rule or the  
18 conflict rule. Does that aid in your -- how does that  
19 affect your thinking?

20           MS. LANGFORD: I think --

21           COMMISSION MEMBER TUFT: That this rule is not  
22 exclusive, there may be other rules that apply here.

23           MS. LANGFORD: There are other rules that  
24 definitely apply. But I think the problem is still proof,  
25 because those rules have been applying, and the State Bar

1 still won't prosecute.

2           And so, I think it's hard when -- I think, as a  
3 prosecutor -- I'm not a prosecutor -- I defend -- it's hard  
4 to defend the lawyers and it's hard to prosecute them. It's  
5 hard to defend because you're up there with a lawyer that no  
6 one likes saying, "She wanted it." That -- you know, that's  
7 -- that's hard to say in a nice way. You're up there with,  
8 you know, the prosecutor, and they know there's a conflicts  
9 rule, but what happens is, the cases are -- usually we're --  
10 the lawyer protects himself just enough, and it becomes a  
11 matter of "just the sex," the sex that maybe the client was  
12 afraid to stop -- and they're always afraid to stop it.  
13 They're worried about if the lawyer's going to get mad at  
14 them, it's the middle of their case, and maybe the lawyer  
15 still continues, but you still have a client who is worried  
16 about it.

17           COMMISSION MEMBER TUFT: Okay. Let me follow up  
18 my question -- Mark Tufts here again.

19           If -- if the coercion that this rule is intended  
20 to prohibit is not present, and if the lawyer's conduct is  
21 not otherwise incompetent under 1.1 --

22           MS. LANGFORD: Um-hmm.

23           COMMISSION MEMBER TUFT: -- and if there is not a  
24 conflict of interest under whatever version of the conflict  
25 rule we come up with, which is still under -- under work --

1 MS. LANGFORD: Um-hmm.

2 COMMISSION MEMBER TUFT: -- what interest -- what  
3 additional interest do you want us to protect?

4 MS. LANGFORD: Well, I think there's always  
5 somewhat of a conflict of interest when you're in a sexual  
6 relationship with a client, particularly in a family law  
7 case, because, you know, you are dealing with, say, the  
8 wife, and there's the husband. And so, you're -- I don't  
9 think you could ever have the clear judgment that a lawyer  
10 would have otherwise. You are going to have your own  
11 interests at heart of making this person happy versus in her  
12 case -- or, which may help her case.

13 But I think also, with the coercion, it's inherent  
14 sometimes, and -- but it's not always vocalized. For  
15 example, it could be the lawyer saying, you know, like I  
16 say, "Let's go out" in a pro bono case. And is that  
17 coercion? Not enough that the Bar is going to take it. But  
18 it's there.

19 In a family law case, if you have someone  
20 vulnerable -- I talked to a family law lawyer this morning -  
21 - I said, "Do you ever think, you know, lawyers should have  
22 sex with clients, because I'm going to testify on this and I  
23 don't want to say this if I think, you know, that, you know,  
24 family law attorneys think differently." She said, "Never!  
25 Are you kidding? They are always -- they're always

1 vulnerable in a divorce." And that's the inherent coercion,  
2 even where the lawyer may not malpractice.

3           So I think, in some types of cases, it is inherent  
4 in the nature of the case. Someone maybe is going to  
5 declare bankruptcy, or -- you see it in immigration. I --  
6 you know, I had a client, so I can't talk specifically about  
7 it, but just immigration in general. They're afraid of  
8 being deported. They don't know what to do, and they are  
9 not going to yell at the lawyer, and they don't speak  
10 English well. They're not going to go to the Bar. They're  
11 afraid to go to the Bar. They're afraid they're going to be  
12 deported, so they don't want to go to any government person.  
13 And it can become very difficult for the Bar to know about  
14 these cases.

15           I mean, I talked to a State Bar Court judge, and I  
16 said, "How often do you see these?" She goes, "We almost  
17 never do." Well, I see them a lot. So they're coming up.  
18 They're just not on the radar.

19           COMMISSION MEMBER TUFT: Thank you.

20           CHAIR SONDEHEIM: This is Harry Sondheim. The  
21 Legislature, so to speak, directed the State Bar to enact a  
22 rule.

23           MS. LANGFORD: Yes.

24           CHAIR SONDEHEIM: And the rule was enacted.

25           MS. LANGFORD: Yes.

1           CHAIR SONDHEIM:  If my recollection is correct,  
2  didn't the Legislature then follow it up with a piece of  
3  legislation relating to this area?

4           MS. LANGFORD:  Are you talking about 6109?

5           CHAIR SONDHEIM:  Yes.

6           COMMISSION MEMBER LAMPORT:  6106.9, yeah.

7           MS. LANGFORD:  Yeah, right.  6106.9.  It had 6108,  
8  that said what I said it said, telling them really, "Hey,  
9  address family law, address probate."  And then, I don't  
10  know how it occurred, but we had our rule first and we did  
11  our rule, which doesn't -- isn't quite what they  
12  specifically directed.  And then they have a statute, 6106.9  
13  that says roughly the same, and it also adds signing a  
14  declaration, which --

15          CHAIR SONDHEIM:  Now, doesn't our proposed rule  
16  now actually track the legislated enactment?

17          MS. LANGFORD:  Yes, but it didn't before.

18          CHAIR SONDHEIM:  All right.  No, no -- it does  
19  now.  There are changes to ours which now makes it identical  
20  to the --

21          MS. LANGFORD:  Right.  Very few.

22          CHAIR SONDHEIM:  Very few.

23          MS. LANGFORD:  Very little.

24          CHAIR SONDHEIM:  But now, it tracks it.

25          MS. LANGFORD:  To track it better, right.

1           CHAIR SONDHEIM: All right. Given that there's a  
2 legislative policy, if you can call it that --

3           MS. LANGFORD: Um-hmm.

4           CHAIR SONDHEIM: -- that supposedly represents the  
5 will of the people, if you can view it that way, why should  
6 -- how could we go beyond what the Legislature has done?

7           MS. LANGFORD: Well, because I don't think it  
8 reflects the will of the people in 6106.8, which was the  
9 rule that the Legislature said, "We want you to draft a  
10 rule."

11          CHAIR SONDHEIM: But then they followed it up with  
12 their version of what they believe the rule should be,  
13 which --

14          MS. LANGFORD: Because they didn't understand how  
15 it was going to be enforced. They didn't know the impact.  
16 When I looked at it, in my first year at COPRAC, I was one  
17 of the ones who voted for the rule too. It was my first  
18 year. I looked at it. My argument was, "Well, heck, if  
19 you're, you know, representing a client, maybe you'll do  
20 better on the representation." That wasn't agreed to by the  
21 group. And so --

22          CHAIR SONDHEIM: Well, only because life has come  
23 full circle.

24          MS. LANGFORD: Yes, it has.

25                 (Laughter)

1 MS. LANGFORD: And then we came out with our rule,  
2 and I think that the Legislature now doesn't yet know really  
3 how it's working. Their 6106.8 said, "Okay, the will of the  
4 people is we don't like these family law situations or  
5 probate" -- they didn't mention bankruptcy or immigration,  
6 which is where they come up -- "but we don't like that, so  
7 draft a rule." They relied on COPRAC to draft a rule that  
8 would be enforced.

9 And we thought we did. But guess what? We  
10 didn't, because the proof is in the pudding, in how many are  
11 being enforced by prosecutors saying they can't. They would  
12 like to have a rule that reads like a speed rule, "No 60  
13 miles per hour." That's a lot easier.

14 CHAIR SONDEHEIM: Given, though, that the  
15 Legislature did enact a statute which we now track --

16 MS. LANGFORD: Yes.

17 CHAIR SONDEHEIM: -- wouldn't it be perhaps more  
18 appropriate to make the same pitch, if I can call it that,  
19 that you've made to us today to the Legislature? Wouldn't  
20 that be the next step? Because otherwise, the legislative  
21 enactment will be, so to speak, contrary to what you're  
22 proposing. And there is then, you might say, a question of  
23 the relationship of the Supreme Court when it adopts a rule  
24 that's different from what the Legislature has mandated.

25 MS. LANGFORD: Well, I asked the State Bar about

1 that. I asked a prosecutor about that, and the prosecutor  
2 said, "No, Carol, we can have a rule that's an order of the  
3 Supreme Court that can be different from the Legislature,  
4 and they can then change too." It can work the other way.  
5 And I'm not -- I don't remember how it worked in  
6 confidentiality, whether we changed our rule or the  
7 Legislature did, but we've had situations where they haven't  
8 quite matched. We can handle that.

9 CHAIR SONDEHEIM: Remember, we -- the Legislature  
10 also had to amend 6068(e) --

11 MS. LANGFORD: Right.

12 CHAIR SONDEHEIM: -- for 3-100 to exist.

13 MS. LANGFORD: And then 3-100 changed.

14 CHAIR SONDEHEIM: I remember the painful  
15 experiences we went through trying to get an exception for  
16 6068(e) through the Supreme Court, and the Supreme Court  
17 kept rejecting it on the basis that it conflicted with the  
18 statute.

19 MS. LANGFORD: Yes, but, you know, I think the way  
20 the Legislature -- if you pointed back to -- something  
21 happened between 6106.8 and 6106.9 in the rule. And I think  
22 if they were pointed back to their original concern, and if  
23 you said, "Wait a minute, no one's getting prosecuted" --  
24 they know it's happening -- they said that in 6106.8 -- I  
25 think that might hold some sway.

1 CHAIR SONDEHEIM: All right. Anything further?

2 Thank you.

3 MS. LANGFORD: Thank you.

4 CHAIR SONDEHEIM: All right. What I'd like to do  
5 now is take a break of maybe fifteen minutes, and then we'll  
6 start up again with Mr. Falk, who's next in line, so to  
7 speak, in terms of having signed up.

8 Is there anybody else, by the way, aside from Mr.  
9 Falk, who wants to speak on any issue? Would you identify  
10 yourselves and come --

11 MS. HAWKINS: I'm on your list. Karen Hawkins.

12 CHAIR SONDEHEIM: My apologies. You are. My  
13 apologies. And you've even identified the rule. So thank  
14 you.

15 MS. HAWKINS: You're welcome.

16 CHAIR SONDEHEIM: Yes, sir.

17 MR. GROSSMAN: Glen Grossman, for 5.2.

18 CHAIR SONDEHEIM: Okay.

19 MR. GROSSMAN: Very briefly.

20 CHAIR SONDEHEIM: All right. We'll hear from Mr.  
21 Falk.

22 And then, Ms. Hawkins, we'll have you.

23 With that, we'll take a fifteen-minute break right  
24 now.

25 (A short recess was taken.)

1 CHAIR SONDHEIM: We're going to start again.

2 And our next speaker will be Mr. Falk. And I want  
3 to say to you that we're glad to have a member of the  
4 public, because this is a public hearing, and that is one of  
5 the things that we've always been concerned about. These  
6 rules are not just for lawyers, but they're here also to  
7 protect the public. And so, we're glad to have you here.

8 MR. FALK: Thank you. Thank you very much. Thank  
9 you for accepting public comment as well.

10 And before I start my comments on Rule 1.0, I just  
11 want to say how refreshing it is to be around attorneys who  
12 are sincerely and deeply concerned with ethics. I  
13 appreciate that.

14 And so, you -- I want you to take my comments in  
15 the context that I was not in the -- in the same environment  
16 as we are here today. So don't take what I say personally.  
17 Obviously, I'm just trying to improve the system, and I'll  
18 try to be as professional as I can in my comments.

19 So, the first is Rule 1.0, which is the purpose  
20 and scope of professional conduct.

21 Oh, I should say -- a little bit about me  
22 personally -- my name is Richard Falk. I -- as you say, I  
23 am a member of the lay public. I am not an attorney. And  
24 you could probably best characterize me as a petulant ex-  
25 juror.

1           The Rules 1.0, 8.3, and 8.4 state two of the  
2 purposes of the Rules of Professional Conduct are to protect  
3 the integrity of the legal system and to promote the  
4 administration of justice, and to promote respect for and  
5 confidence in the legal profession.

6           My experience on my first trial earlier this year  
7 -- it ended in February, I believe -- when I was jury  
8 foreman, and my inquiries with attorneys and lay people  
9 afterwards indicates that the most important goal for most  
10 attorneys, both defense and prosecution -- and again, this  
11 is -- we're talking about criminal law, and this was a  
12 securities fraud case -- the most important goal for most  
13 attorneys seemed to be, in trials at least, to win their  
14 cases.

15           The goals of protecting the integrity of the legal  
16 system and promoting the administration of justice at least  
17 appear, from me, the public, and a person on the jury, to  
18 take a back seat if these are in conflict with winning a  
19 case, especially through having a jury return the desired  
20 verdict.

21           Rather than give specific examples from the trial  
22 -- and I would be happy to discuss those if you're  
23 interested -- I think it's more instructive to look at an  
24 indicator that shows the priorities of any attorney you can  
25 consider -- for those of you that are attorneys in the room,

1 ask these questions of yourself as well.

2           Many defense and some prosecutorial attorneys, in  
3 my opinion -- because I did a search on the Web, just  
4 looking at a variety of various Websites -- they publicize  
5 or otherwise advertise or discuss the percentage of cases  
6 that they win as some sort of proxy for their competence or  
7 ability to obtain a non-guilty or guilty verdict for their  
8 clients.

9           In the trial that I was on, Judge Walker, in the  
10 trial of U.S. v. Geelock, told the jury -- and this was my  
11 recollections, as best I can remember -- I didn't write it  
12 down -- that a trial is a search for the truth through the  
13 presentation of evidence so that the juror can render a  
14 proper and just verdict. However, if this were true, in my  
15 opinion, then assuming a certain minimum, though very high  
16 level, of competence on the part of both defense and  
17 prosecution to clearly present evidence -- and remembering  
18 what the judge told us, that what the attorneys have to say  
19 is not evidence -- then a proper and just verdict, based on  
20 the jury's determination of the truth through the evidence  
21 -- is determined through the evidence and has nothing to do  
22 with the attorney's ability to manipulate or control the  
23 verdict.

24           Therefore, true justice means that statistics for  
25 winning cases would be solely determined on the guilt or

1 innocence of their clients, or certainly on the competence  
2 of the jury alone -- again, assuming minimum competence of  
3 the attorneys in presenting the facts of the case clearly  
4 and their perception of it or viewpoint of it.

5 True justice would also mean that the best  
6 attorneys, those put on the covers of lawyer magazines and  
7 so on, are judged on their level of integrity and on  
8 promoting justice and on obtaining proper and just verdicts,  
9 and not on any sort of win-loss record.

10 Now, I -- when I wrote this at first, I, you know,  
11 was first thinking that the shift that needed to happen was  
12 putting justice first and winning the case second instead of  
13 having the priorities seemingly be the other way around.  
14 But it still didn't feel right. And I went back to it and  
15 tried to change language and, you know, what could be  
16 improved, and the only -- the conclusion I came to was that  
17 -- that the entire paradigm of competition and winning and  
18 losing is incompatible with justice. It just -- you can't  
19 have it in there at all. The whole thought process of "I  
20 won my case" or "I lost my case" just doesn't work if the  
21 focus is to be on justice and the risk minimized of trying  
22 to manipulate the jury in any way, except through their  
23 presentation of evidence and their viewpoint on the  
24 evidence.

25 The way I -- so then I was left with a gap. Well,

1 how do you fill the gap? What paradigm should there be?  
2 And the best I could come up with -- and I don't like it  
3 exactly, I don't think it's perfect, but it's the best I  
4 could come up with -- perhaps others could come up with  
5 something better -- is that the attorneys are like teachers,  
6 the jury are like the students, and, of course, the evidence  
7 or the facts are, you know, the history lessons to be taught  
8 through different viewpoints and so on, because a good  
9 teacher doesn't feel like they've won when their students  
10 agree with them. A good teacher feels, when the students  
11 are able to come up with their own conclusions and address  
12 history and understand the subject matter, that they feel  
13 they've done a good job, on that basis, not on whether the  
14 students agree with them.

15 I just want to mention briefly about the public  
16 viewpoint or perception of the legal system, and my view  
17 also supports the argument, that a significant number of  
18 attorneys don't have integrity or justice as their primary  
19 goal. And I think they have integrity -- I think most  
20 attorneys want to do a good job. That's not the issue.  
21 It's just a matter of priorities.

22 Those stereotypical jokes may be based on  
23 prejudice and generalization. Such jokes among the general  
24 public rather than just bigoted people, for example, are  
25 simply not funny, nor do they make sense if there isn't at

1 least some element of truth in them. For example, replacing  
2 the term "lawyer" with "accountant" in almost any joke about  
3 lawyers, you know, turns the joke into something that just  
4 doesn't make sense, it's not funny. So public perception of  
5 the legal system isn't based on total fabrications. Clearly  
6 the jokes are exaggerated and so on, but they're not just  
7 based on total fabrications. They're based on real  
8 experiences that real people have, either through the court  
9 system or through the perception of the court system,  
10 through -- or the legal system, through the media, and it  
11 shouldn't be entirely dismissed.

12           And in my view, it's a good indicator of how  
13 you're doing, because if the jokes shift to being about how  
14 you're struggling with integrity on an issue, you know,  
15 you'll know that you've made it, where integrity is, in  
16 fact, a true goal and priority, or justice.

17           So I wrote, in my writing, that Rule 103 should go  
18 beyond simply stating the purpose of the rules and should  
19 also state -- and this could be in a comment -- I notice you  
20 have comment sections to clarify rules and such -- that the  
21 protection of the integrity of the legal system and the  
22 promotion of administration of justice should be the primary  
23 goals for attorneys and more important than simply winning  
24 their cases. I'd like to amend that to say it shouldn't  
25 even be about winning at all, as I said. It should be about

1 the focus on justice. And this entire paradigm of  
2 competition, of winning and losing, you know, that paradigm  
3 needs to be shifted away. And even the lexicon and  
4 terminology of winning and losing cases needs to go away.

5 And I know that's a radical shift, but I just  
6 couldn't come to any other conclusion of anything that would  
7 really make a difference.

8 COMMISSION MEMBER TUFT: Mark Tuft.

9 You -- your comments raise a very interesting  
10 proposition in terms of both the purpose and the scope of  
11 the Rules of Professional Conduct. But beyond that,  
12 although we have adopted a numbering system and we have  
13 adopted some formatting close to the ABA Model Rules, one  
14 thing we do not have in here -- the ABA has what's called a  
15 preamble, which discusses some of the issues that you're  
16 addressing. You may not agree with it, but it does address  
17 it. Then it has a scope note, which then talks about how do  
18 those big principles apply under these Rules.

19 Is that what you're looking for, is some more  
20 global statement of what the role of the lawyer is in  
21 society? Is that what you're looking for? Or what are  
22 you --

23 MR. FALK: Sort of, or basically -- I mean, the  
24 fact is, if everybody just followed truly what was in their  
25 heart that they knew to be right, you wouldn't have to have

1 the Rules of Conduct at all. So, you know, but you need  
2 something because you need -- the reason the Rules of  
3 Conduct are there -- the Rules of Conduct don't make people  
4 behave well. I mean, that's just a fallacy -- just like the  
5 laws don't make people behave well. That is just not the  
6 way it works. People behave well because they feel that  
7 they want to behave well, for whatever reasons that they  
8 have. They may try to avoid going to jail and prosecution,  
9 and to the extent that the Rules of Conduct are a threat, it  
10 may give someone a second thought of something.

11 But the way the Rules of Conduct are laid out  
12 here, it seems that because of Rule 1.0 and the way it was  
13 written, that you are trying to give some -- the Rules are  
14 trying to at least imply the model conduct that you're  
15 trying to get. And they're doing it in a backwards way,  
16 because they're saying, "Don't do this, don't do that,"  
17 which, of course, is the more extremity of what you don't  
18 want people to do. And I talk about that later, in the  
19 general section.

20 But to answer your question of where to put it, I  
21 mean, I don't -- that's -- I don't know. I mean, I don't --  
22 I just think that it needs to be said. It is -- a preamble  
23 is perhaps the appropriate place to do it. You know, I  
24 don't -- I don't have the answer.

25 COMMISSION MEMBER TUFT: Okay.

1           COMMISSION MEMBER LAMPOR: This is Stan Lamport.  
2           Where would the -- because 1.0 talks about other  
3 interests as well, one of which is protecting the interests  
4 of clients, where do the interests of clients come out in  
5 the balancing, in your view?

6           MR. FALK: Can I -- can I defer that to when we  
7 talk about the misconduct rule?

8           COMMISSION MEMBER LAMPOR: Sure.

9           MR. FALK: Because that's probably the place.

10          COMMISSION MEMBER LAMPOR: Sure, just so I can  
11 get a handle on the --

12          MR. FALK: Basically, what it is, the consensus --  
13 and there was a term used today, because I -- let me see --  
14 what was it? It was zealous, yeah, because I had used the  
15 term in my writing later, in the misconduct area,  
16 "vigorously defending a client."

17          COMMISSION MEMBER LAMPOR: Zealous.

18          MR. FALK: But "zealous" is the word that came out  
19 here.

20          So, I mean, to me, it's very fair. You can be  
21 absolutely vigorous and zealous and not cross the line that  
22 goes out of the boundary of the most -- utmost of integrity.  
23 Vigorously -- and there are specific examples we can talk  
24 about when we get to the misconduct section -- but to me,  
25 you know, you can vigorously and zealously defend your

1 client and -- and do so without focusing on winning. See,  
2 it's about what's right for the client. It's about justice.  
3           And I talk about it in the general section, for  
4 example. There's a -- it's not in the Rules of Conduct, but  
5 as far as my belief is concerned, an attorney has a  
6 responsibility of justice as first and foremost. But if the  
7 evidence indicates overwhelmingly and your client is non-  
8 committal about it, or if your client actually admits guilt  
9 to the attorney, I think the attorney has a responsibility  
10 to tell the client what the right thing to do could be, what  
11 the possibility is, which would be, if you actually did  
12 something, apologize, restitution, get a fair plea  
13 agreement, and so on. We start there. Of course, if a  
14 client demands a trial and says, "No, I want you to get me  
15 off the hook," you know, yes, you have to follow that. But  
16 that's not where you start. You don't start with this  
17 concept of, "I'm going to get the guy -- I'm going to get a  
18 not guilty verdict from the jury." You don't start there.  
19 You start with what's just. It's not about what the verdict  
20 is, it's about what's just.

21           And so that -- it's just a -- it's a shift in  
22 thinking, but it's an important shift in thinking, because I  
23 think most of -- at least what I saw, and what I heard from  
24 other people, from other cases, where most of the misconduct  
25 occurs, or where most of the going -- crossing the line out

1 of integrity occurs -- comes from that thinking of where  
2 it's more important to get the verdict the way you want it  
3 than it is to just follow a path of, "This is how to operate  
4 in the utmost integrity," present the evidence clearly and  
5 forcefully as possible, you know. And I give some examples  
6 of questioning witnesses in a proper way and improper way  
7 and on so, so there's -- to me, it's pretty clear. Now,  
8 maybe -- I'm just one person, and maybe I'm just, you know -  
9 - but I just can tell you, and you can decide whether it's  
10 appropriate.

11 COMMISSION MEMBER LAMPORT: those are interesting  
12 points.

13 MR. FALK: Okay.

14 CHAIR SONDHEIM: What is the next rule you'd like  
15 to discuss? This is Harry Sondheim.

16 MR. FALK: The next one is just a very short  
17 comment, Rule 1.2.1, counseling or assisting a violation of  
18 law. Rule 1.2.1 states that, "A lawyer shall not counsel a  
19 client to engage or assist the client in conduct that the  
20 lawyer knows is criminal, fraudulent, or a violation of any  
21 law, rule, or ruling of a tribunal," but legal consequences  
22 may be discussed. This rule leaves open the possibility of  
23 a lawyer counseling and assisting someone who is not their  
24 client, because the rule says only, you know, with respect  
25 to counseling of a client.

1           So the rule leaves open the possibility of a  
2 lawyer counseling or assisting someone who is not their  
3 client in conduct that the lawyer knows is criminal. And  
4 there's a specific example of this, and I have to -- I  
5 forget the person's name -- I can look him up -- but, you  
6 know, out of lawyers that I had talked to with respect to  
7 the case that I was on a jury, and other attorneys -- I  
8 mean, I talked to about nine different attorneys -- and this  
9 guy was, I would say, of the highest integrity of everyone  
10 that I had talked to, and he gave as an example a debate on  
11 this issue that I'm just about to talk about, where he -- he  
12 agreed with what I described, but a judge did not. And to  
13 me, it just -- I couldn't believe how he could see any other  
14 point of view.

15           But, for example, the lawyer to ask the witness,  
16 say an alibi, to testify when the lawyer knows or strongly  
17 believes that the witness will lie on the stand -- in other  
18 words, commit perjury -- on behalf of their client, to me,  
19 it seems inconceivable that this could be -- that anyone  
20 could even possibly think that this is okay.

21           But I can understand it from the point of view  
22 that you were describing earlier, and that is, if you're  
23 really focused on the vigorous defense of your client, yeah,  
24 put some guy on the stand that'll -- that'll lie and deceive  
25 the jury in that way. But that's -- but to me, the line is

1 crossed when, if the attorney knows that something is false  
2 and therefore risks deceiving a jury, it's not allowed. If  
3 the attorney doesn't know, it's a different story.

4 COMMISSION MEMBER LAMPOR: This is Stan Lampor.

5 Just for -- as a clarification, I guess, two  
6 things -- one, there are prohibitions of having someone  
7 suborning perjury. We're not saying -- we are certainly not  
8 going to -- I, for one, would not support a system of rules  
9 that would allow lawyers to counsel people to commit crimes  
10 in any capacity.

11 And just -- I mean, just for --

12 MR. FALK: Okay. Can I clarify?

13 COMMISSION MEMBER LAMPOR: Sure.

14 MR. FALK: Counsel is -- I'm not talking about  
15 where the lawyer asks a person to lie. I'm -- this is where  
16 they know their testimony is false --

17 COMMISSION MEMBER LAMPOR: Right.

18 MR. FALK: -- and not -- and that they don't --  
19 and it's not like the person believes what they're saying.  
20 They know that the person is --

21 COMMISSION MEMBER LAMPOR: There is a rich body  
22 of rules on this, and so I don't propose to summarize them.

23 MR. FALK: Okay.

24 COMMISSION MEMBER LAMPOR: So just -- I don't  
25 want to leave you with the impression that we would even

1 countenance this scenario where lawyers were allowing people  
2 to commit perjury on the stand. I don't think that that's a  
3 place we've gone with our rules.

4           So I understand your point, but I just want you to  
5 also not feel that we're sitting here going, "Yeah, you can  
6 tell your client one thing, but tell the world something  
7 else." I don't think we -- I think generally the profession  
8 does not view that as acceptable behavior.

9           I don't -- I think this rule is dealing with one  
10 slice of something that we'll probably share many slices of  
11 pie.

12           MR. FALK: The specific client relationship aspect  
13 of it, yeah.

14           I would -- normally, I would agree exactly with  
15 what you're saying, except, like I say, there was a -- there  
16 was a judge who disagreed with this, and it was debated. It  
17 was debated as if it was an ethical debate, right. So  
18 that's why I was concerned about it. So I -- maybe that's  
19 an outlier case.

20           Go ahead.

21           COMMISSION MEMBER TUFT: Mark Tuft.

22           Just to assure you that this is Batch One of a  
23 series of rules -- there will be additional batches coming  
24 out -- and encourage you to please stay with us as we do  
25 that. There -- there are rules in our rules existing today,

1 plus some proposed rules on the horizon, that I think will  
2 come closer to addressing the concern you raised. And it's  
3 not in this rule, but there are other rules that, hopefully,  
4 you will see in the not-too-distant future that might --  
5 might help to address that.

6 CHAIR SONDHEIM: And there are also criminal laws  
7 that would cover perhaps some of the situations that you  
8 have in mind.

9 COMMISSION MEMBER LAMPOR: Right. And there are  
10 general statutes, so you cannot violate -- it's an ethical  
11 violation to be violating those statutes.

12 So you just want to -- I think what you're saying  
13 is important, and -- but I also want to make sure that you  
14 know we're not --

15 MR. FALK: Yeah, you're not -- not just leaving  
16 that.

17 COMMISSION MEMBER LAMPOR: -- not blind to the  
18 whole -- right, yeah. We're not blind to that.

19 MR. FALK: Okay. Thank you. Thank you.

20 So you can (inaudible) to ignore that last  
21 paragraph.

22 Okay. So now let's talk about Rule 8.4,  
23 misconduct. And this will address some of the questions you  
24 had earlier a little more specifically.

25 Rule 8.4(c) -- oh, let me -- let me just put into

1 perspective with respect to Rule 1 that I commented on and  
2 the whole paradigm versus what I'm going to talk about now,  
3 in the misconduct, by far, the paradigm part is the most  
4 important. In other words, if that gets fixed, however it  
5 does -- in other words, the shift away from the focus on  
6 winning -- everything else falls into place. This is now  
7 going to talk about a specific -- a specific problem, but  
8 it's -- it's a secondary problem. And it partly occurs  
9 because of the rule, the focus not being on the -- as much  
10 on the justice as I believe it should be.

11           So Rule 8.4(c) states that it is professional  
12 misconduct for a lawyer to "engage in conduct involving  
13 dishonesty, fraud, deceit, or misrepresentation." Though  
14 not part of the first batch that we discussed at this  
15 conference, Rule 5-200(b) is very similar, and that states  
16 that in presenting a matter to a tribunal -- so what it  
17 distinguishes is, in fact, trial conduct -- "a member shall  
18 not seek to mislead the judge, judicial officer, or jury by  
19 an artifice or false statement of fact or law." So my  
20 comments apply equally to both, even though I know you're  
21 only addressing one of the two rules at this time.

22           There's apparently -- and this I'm not clear on,  
23 just so you can, you know, help me on this -- if there's  
24 state or federal law or a ruling, something that states that  
25 a defense attorney is not required to disclose to a judge,

1 jury, or prosecution any facts or evidence that may hurt  
2 their client. Perhaps this only comes from 3-100 regarding  
3 confidential information from my client. I'm not clear on  
4 this thing, if there's other aspects. But, for example,  
5 what I'm not clear on is if a defense attorney discovers  
6 evidence on their own, without consultation from the client,  
7 so there's no confidentiality aspect of it, and that such  
8 evidence points to their client's guilt. Are they required  
9 to disclose it to the prosecution? When we go into  
10 discussion, maybe you could answer that, because I just  
11 don't know.

12           Also, I believe there is some law or ruling that  
13 the defense attorney should vigorously defend -- the  
14 terminology that was used here earlier today was "zealously"  
15 -- you know, defend their client. And maybe that's a rule  
16 -- an extension of Rule 1.1, regarding competence, or maybe  
17 it's somewhere else. I don't know.

18           In any event, there's an inherent conflict between  
19 Rule 8.4(c) about don't have fraud, don't have deceit, don't  
20 practice that -- there's a conflict between that and a  
21 defense attorney being required not to disclose certain  
22 information about his client that might indicate guilt.

23           In the jury instructions in the trial where I was  
24 jury foreman, the definition of fraud, and I modified it  
25 somewhat to apply to this, was to make a statement or

1 representation which is untrue and known to the attorney to  
2 be untrue, or knowingly fail to state something which is  
3 necessary to make other statements true and which relates to  
4 something material. Clearly, evidence of a defendant's  
5 guilt is material information for the prosecutor, and most  
6 especially for the jury. So the inherent set-up of  
7 confidentiality and the burden of proof, which I well  
8 understand and that we're all taught since grade since --  
9 it's not like the public doesn't understand the concept --  
10 that the burden of proof being with the prosecution means  
11 that the defense is explicitly allowed to commit fraud,  
12 specifically to withhold materially important information  
13 that may indicate the guilt of their client.

14 I'm not saying that needs to change or there's  
15 anything, you know, wrong with that. In a -- I mean, there  
16 is, in some sense, something dead wrong with it, but it's a  
17 tradeoff in terms of the presumption of innocence and burden  
18 of proof, and that's understood.

19 But because -- unfortunately, these two  
20 conflicting sets of rules, what our rulings mean, that it's  
21 up to the defense attorney to decide whether fraud is  
22 allowed or not, where the line is drawn, because, yeah, they  
23 have Rule 8.4 that says don't deceive the jury, but on the  
24 other hand, they know they can deceive the jury, so the line  
25 is not clear. Where is exactly to deceive the jury -- where

1 must you stop?

2           So this can easily lead to abuse, where the  
3 attorney can attempt to manipulate the jury through a  
4 stratagem of deceit that is justified by the fact that fraud  
5 and deceit are allowed in some circumstances. Therefore, I  
6 believe it is very important to first acknowledge in the  
7 rules -- I mean -- and I know this is not going to be easy,  
8 because it sounds bad, but it's not bad, it's just the way  
9 the system has been intentionally decided and set up -- it  
10 needs to say that the defense attorney is, in fact,  
11 explicitly allowed to commit fraud or deceit, but it is  
12 narrowly defined and contained. There are narrow limits for  
13 it.

14           Second, it should be noted that the only form of  
15 fraud or deceit that is allowed is what I would call -- and  
16 this is just my terminology -- you can maybe come up with  
17 something much better than this -- but I call it a "passive  
18 deceit," a keep-your-mouth-shut deceit. It's a don't-do-  
19 anything-active deceit, because the attorney is simply not  
20 disclosing information that they have that is hurtful to  
21 their client. That's a passive deceit. An active deceit  
22 would be where the attorney states a statement of fact or  
23 introduces evidence, but where such statements or evidence  
24 are either believed to be untrue or where they present  
25 partial truths that imply the opposite to what the full

1 truth would imply -- it's a subtlety, but it's important --  
2 I saw this on this case, and it was really upsetting to most  
3 of us on the jury -- and are presented in a way where  
4 there's significant risk of deceiving the jury.

5 I'll give you a couple of quick examples. For  
6 example, it would be deceitful to present or refer to  
7 evidence that implied advice of counsel -- which is,  
8 interestingly, an affirmative defense, so the ball's kind of  
9 in the other court in that case, on the other side -- that  
10 the attorney knew to be untrue. You know, clearly, the  
11 initial burden of production for an affirmative defense in  
12 this on advice of counsel means that the advice of counsel  
13 more likely than not -- preponderance of evidence --  
14 occurred at some point in the timeline of the crime, as was  
15 the case in the trial we were on. But if such advice was  
16 known not to occur at another point in time, then  
17 presentation and reference to the evidence that implies such  
18 advice of counsel would be an active deceit.

19 And in the case that -- in the situation that  
20 actually happened, it was very much of a gray area, a  
21 subtlety about it, because it wasn't, "Oh, there's advice of  
22 counsel," or "Oh, my client clearly" -- you know, it wasn't  
23 like that. It was throughout the trial -- there were  
24 lawyers everywhere. There were people reviewing things.  
25 There were -- you know, there was the general overview of

1 advice of counsel, and then, in that context came this  
2 particular piece of -- "Ask Hank on the facts." "Who's  
3 Hank?" "Hank Vandercamp, an attorney." That's -- it's in  
4 the gray area of the line, but that's where I would draw the  
5 line. That's wrong.

6           There's two ways you could, in my opinion,  
7 properly present the facts in that case, where you know that  
8 that, in fact, would -- because what I did is I followed up  
9 after the case and I talked to Hank Vandercamp and he said  
10 that, no, he gave negative advice in writing to the -- you  
11 know, whatever. So -- but it wasn't to the defendant, it  
12 was to this other guy. But the lawyer knew that.

13           So in my -- I think the right thing to do is one  
14 of two things. You can either have passive deceit, which is  
15 the lawyer just lets the evidence speak for itself because  
16 then it doesn't give undue weight to it, and the jury can  
17 properly, you know, deal with it. I think that would have  
18 been appropriate. Or, if the attorney has to open his mouth  
19 on something that he knows is, you know, not correct, he  
20 doesn't have to say the whole truth that says the guilt of  
21 his client, but he has to say the whole truth that puts the  
22 perspective of the evidence in the proper place, which, in  
23 this case would be, you know, "Ask -- ask Hank." Hank  
24 Vandercamp is the attorney. "Now, there is no -- there's no  
25 evidence presented that the attorney actually gave advice,

1 or whether it was positive or negative or whether my client  
2 received the advice. But I do want the jury to understand  
3 or see, you know, this was presented this way."

4 Now, some attorneys might say, "Well, that's the  
5 job of the prosecution." Well, normally it is, but not in  
6 this case, because this case has the deceit going on, active  
7 deceit going on, because of, you know, the lawyer opening  
8 his mouth when he really shouldn't be because of something  
9 he knows that's not true -- in my opinion.

10 Another gray area, which I think -- and the gray  
11 areas are places you need to look, I think, because that's  
12 where the real essence is to get to where you want to draw  
13 the line.

14 When there's a witness that believes that the  
15 lawyer believes it's truthful, telling the truth, but the  
16 attorney knows or believes that what the person said is  
17 incorrect -- so let's say it's an eyewitness, and the lawyer  
18 knows that their client was not where the eyewitness said  
19 that he was, but the eyewitness believes it. Well, I think  
20 that's allowed, but the attorney has to be very careful on  
21 how that evidence is presented, as being presented just  
22 matter-of-factly, "This is what this person believes," and  
23 not cross the line and say, "That means my client wasn't  
24 there," or whatever you want to say. That's where the line  
25 can't be crossed, because the attorney knows that -- or

1 believes that the person -- what the person saw is not true,  
2 that doesn't mean they're not allowed to present the  
3 evidence. They can present the evidence, because that  
4 person believes it's true, but they have to be careful about  
5 not drawing the line and drawing any conclusions as  
6 deceiving the jury, in my opinion.

7           An example of a proper defense would be not --  
8 that would not be deceitful, for another one, would be the  
9 questioning the capabilities or motivations of a witness,  
10 because even -- even though the attorney may know that the  
11 witness is, in fact, telling the truth -- in other words,  
12 "Did you -- do you wear glasses?," "Was it dark at night?,"  
13 you know, that kind of thing, because that questioning is  
14 perfectly acceptable if done in that way, right, because the  
15 -- questioning the veracity is not the same thing as  
16 directly claiming the opposite of what the witness is  
17 stating. It's not being defrauding. It's simply clarifying  
18 the evidence and how pure it is, how clean it is. It simply  
19 questions whether the evidence is valid.

20           To the degree that the question simply nullifies  
21 the evidence, without providing contrary or implying  
22 contrary evidence, then this is not deceitful. A jury  
23 should consider the quality of the evidence presented when  
24 the defense is simply pointing out (inaudible). And that's  
25 quite different from the defense making or deceitfully

1 implying an assertion that the defense knows to be untrue.

2           So, what does that mean about this, you know,  
3 rule? In addition to clarifying that certain passive deceit  
4 is allowed, while active deceit is not -- going through that  
5 distinction and so on, I think some examples like the ones I  
6 gave, or even better ones that you can come up with, should  
7 be in the comments.

8           Sorry it took so long.

9           CHAIR SONDHEIM: That's fine. Very helpful.  
10 Thank you.

11           Any further questions?

12           COMMISSION MEMBER LAMPOR: Just the -- I think  
13 the statute you're referring to, or was referred to you --

14           MR. FALK: Yeah. I had a question about that,  
15 yes.

16           COMMISSION MEMBER LAMPOR: -- is Business and  
17 Professions Code Section 6068(d), which says it's the duty  
18 of an attorney "to employ, for the purpose of obtaining the  
19 causes confided to him or her, means only consistent with  
20 the truth and never seek to mislead a judge or judicial  
21 officer by artifice" -- wait a minute -- this is the wrong  
22 statement.

23           MR. FALK: No, that's more like if --

24           COMMISSION MEMBER LAMPOR: No, no, no. There's  
25 one that says -- and I -- I misread it -- there's one that

1 says -- it's up with -- Harry, you know this one.

2 CHAIR SONDHEIM: Criminal defense?

3 COMMISSION MEMBER TUFT: It's (c) or (d).

4 COMMISSION MEMBER LAMPORT: Yeah, criminal  
5 defense. That's what I thought. I'm missing it here.

6 There's one that says, "Except for a party charged with in  
7 the defense of a criminal matter," and I thought it was --

8 COMMISSION MEMBER TUFT: (c) or (d).

9 COMMISSION MEMBER LAMPORT: Here it is, (c):  
10 "Counsel may maintain those actions or proceedings or  
11 defenses only as appear to him to be legal and just, except  
12 the defense of a person charged with a public offense."

13 So there is -- I think that's the statute you're  
14 referring to, which the Legislature adopted in 1872. And, I  
15 mean, I understand your point, but I'm saying that that's  
16 where the statutory basis for that comes from.

17 MR. FALK: What about the question I had about if  
18 the defense attorney discovers evidence on their own,  
19 without the confidentiality aspect of it being done, and it  
20 indicates guilt. Is there anything that says they do not  
21 have to disclose that, or they do have to disclose it?  
22 What's the rule there?

23 CHAIR SONDHEIM: Well, you have an -- this is  
24 Harry Sondheim. You have an issue of loyalty to your client  
25 too. Your client isn't going to appreciate the fact that

1 you tell the prosecution something that you learned from an  
2 outside source. How much trust will the client have in that  
3 lawyer? So those are factors that have to be weighed by  
4 lawyers.

5           COMMISSION MEMBER LAMPART: Here's something that  
6 we struggle with, and it's probably one of the things that's  
7 -- that makes California unique in some respects, because of  
8 the vigorous statement of it, but the same statute says it's  
9 the duty of the lawyer to "maintain inviolate the confidence  
10 and, at every peril to himself or herself, preserve the  
11 secrets of a client." And so the struggle that we always  
12 have is that that is an expression of, I think, the view, as  
13 I've articulated it, that lawyers are that one place in  
14 society where you can come and find out how the laws apply  
15 to your most intimate problem without fear of consequence.

16           And so, to assure open communication, one can't be  
17 in a place where there would be an adverse ramification from  
18 making the disclosure: "You've now told me this, now I've  
19 got to go and use it against you." So we have to struggle  
20 with the fact that if we want to hold that value dear, then  
21 there are certain other things that we have to account for  
22 in order to preserve that value. And that's something that  
23 is something that we deal with not only as members of this  
24 Commission, but in daily practice. You know, that's  
25 something that we deal with constantly.

1           So that -- that's the other thing that we have to  
2 balance, is how you account for that, that value relative to  
3 the fact that that information from a client may end up  
4 having -- may be useful in other contexts, and how you  
5 balance that relative to the administration of justice.

6           MR. FALK: Well, there was a -- and I understand  
7 that, and I think -- and I -- the reason I brought up the  
8 question, I didn't -- I'm not of the opinion that an  
9 attorney should disclose it -- I just didn't know where the  
10 rule was. And I understand that, from your aspect --  
11 because there's confidentiality, and that covers the things  
12 from your client, but the things that were discovered  
13 outside -- yes, I can see what you're saying in terms of  
14 loyalty, and I would agree with it.

15           What I would say -- what I would suggest with  
16 respect to rules, though, is that you did very clearly -- I  
17 forget which rule it was -- but there was -- where if  
18 there's harm, if there's someone who's going to be killed, and  
19 you have information --

20           COMMISSION MEMBER LAMPORT: Right.

21           MR. FALK: -- that someone's murdered, it's an  
22 exception. Okay. The same -- that's a great concept, that  
23 way that's your definition and delineation, however you want  
24 to put it. However, what I think needs to be done is it  
25 needs to be applied to not just the confidentiality part,

1 but also other information the attorney may find on their  
2 own --

3 COMMISSION MEMBER LAMPOR: Well, yeah.

4 MR. FALK: -- that's outside of confidentiality,  
5 but which relates to their client, and apply it in the same  
6 way, which means that if it's not about murder, not about  
7 somebody getting murdered, they can keep it quiet to  
8 maintain the loyalty of their client and be -- you know, for  
9 the vigorous defense of the client and so on.

10 COMMISSION MEMBER LAMPOR: The definition of  
11 confidential information -- well, and each of us have used  
12 it differently from the statute -- I think Harry would use  
13 the word "secrets" -- is information -- not only  
14 communications with a client, but information which the  
15 client wants the lawyer to hold inviolate --

16 MR. FALK: Oh, I see.

17 COMMISSION MEMBER LAMPOR: -- or the disclosure  
18 of which would likely to be embarrassing or detrimental to  
19 the client.

20 MR. FALK: Okay. That's what I -- yeah.

21 COMMISSION MEMBER LAMPOR: And it includes not  
22 only information that comes from what the client utters to  
23 you, but any information that you receive by virtue of being  
24 or in the course of or related to --

25 MR. FALK: Working on the case.

1           COMMISSION MEMBER LAMPOR: -- working on the  
2 case. In some cases, you may have information that predates  
3 the lawyer-client relationship and -- but it's now involved  
4 in your representation, and that -- some of us would view  
5 that as being within the umbrella as well.

6           MR. FALK: Right.

7           COMMISSION MEMBER LAMPOR: So that just -- I  
8 mean, those are -- that's -- you have now hit the core  
9 concern we had. And the big debate over that exception that  
10 you just referenced was -- I think everybody would say that  
11 you need to do the right thing there, but you've opened the  
12 door for other exceptions. And then, you know, you erode  
13 the dam, if you will.

14          MR. FALK: Right.

15          COMMISSION MEMBER LAMPOR: And you're right with  
16 the -- at ground zero of probably one of the most talked-  
17 about issues in our profession, and one of the things that  
18 we deal with on a -- it involves some of the most troubling  
19 issues and the most fundamental values.

20          MR. FALK: I would agree. The fortunate part is  
21 that this is probably not as common as these other things  
22 that go on.

23          COMMISSION MEMBER LAMPOR: Yeah.

24          MR. FALK: So it's, fortunately, not frequent.

25          COMMISSION MEMBER LAMPOR: Right.

1           MR. FALK: But you are correct that it is one of  
2 the most difficult decisions.

3           So I had, in addition, general comments that I  
4 don't -- you know, I would like to speak, but I know they're  
5 not exactly tied with a specific rule, because, partly,  
6 they're missing rules or they're tangentially related. Is  
7 it okay for me to talk about those or do you want me to wait  
8 until after everyone else has talked, or what?

9           CHAIR SONDHEIM: Let me suggest this. Number one,  
10 you have submitted that in writing. And we will be here  
11 till two o'clock, but I want to give everybody else who's  
12 come an opportunity.

13          MR. FALK: Sure.

14          CHAIR SONDHEIM: And then, if there's time, we'd  
15 be happy to hear from you.

16          MR. FALK: Okay. And even if it's not done  
17 formally like this, there were some additions -- just as I  
18 had additional modifications to Rule 1, in terms of thinking  
19 about it more, the same thing happens to some general  
20 comments.

21          CHAIR SONDHEIM: Feel free to send them in.

22          COMMISSION MEMBER LAMPORT: We read everything.

23          COMMISSION MEMBER TUFT: And there will be more  
24 than one public hearing, but do send them in.

25          MR. FALK: All right. Thank you. Thank you very,

1 very much.

2 CHAIR SONDHEIM: Thank you.

3 COMMISSION MEMBERS: Thank you.

4 CHAIR SONDHEIM: All right.

5 Karen Hawkins.

6 MS. HAWKINS: Good morning. Is this working? Can  
7 I speak into it?

8 CHAIR SONDHEIM: Yes, it is working, as long as  
9 you're close enough to it, and I think you are.

10 MS. HAWKINS: I'm speaking on Rule 5.6. I'm Karen  
11 Hawkins. I'm, in my practice, a tax attorney from Oakland,  
12 California, but here I am representing the Chicago-based law  
13 firm of Katten, Muchin, Rosenman LLP. And I'm going to call  
14 them "KMR" for everybody's sake.

15 KMR maintains a Los Angeles office where it has  
16 about 65 attorneys and 95 support staff. And its concern is  
17 specifically with what the proposed rule, in its current  
18 iteration of 5.6, would do to its relationship with its  
19 California partners, and in particular, what it would do to  
20 that firm's retirement and death benefit plan.

21 As just sort of a basic synopsis, I think our --  
22 KMR's problem with 5.6 is in Section (b)(2). And in most  
23 likelihood, if asked, the biggest problem is with the single  
24 word "solely." Requiring that there be no forfeitures for  
25 anything other than retirement benefits that are paid

1 specifically from and solely from future earnings really  
2 doesn't take into account the realities of how law firms  
3 fund for plans that are not otherwise qualified plans that  
4 are plans that are being generated by the partnership  
5 itself.

6           And in that regard, I think that we need to look  
7 very carefully at some of the things in particular that the  
8 case law said. Much of the case law that deals with the  
9 issue of the funding is really trying to interpret whether a  
10 retirement benefit is really a forfeiture of something that  
11 the partner has become entitled to by virtue of their  
12 performance of services with the partnership, or that they  
13 have made a contribution of capital, or that has evolved as  
14 a matter of equity for the length of time that the partner  
15 has been in it, versus the giving up of what would otherwise  
16 be supplemental income that a truly retired partner can  
17 expect to receive when they really do retire and their  
18 income is expected to drop.

19           Many of the cases struggle with the source of  
20 funding, because it seems, I think, probably the most  
21 graspable -- if that's a word -- concept in trying to figure  
22 out whether a partner is being asked to give up something  
23 they're really already entitled to or whether they're being  
24 asked to give up something as a toll, if you will, for the  
25 ability to go out and practice law in conflict and in

1 competition with the firm that they've chosen to leave.

2           Professor Hillman, Robert Hillman, who has a  
3 treatise on the matter that I'm sure that you're very  
4 familiar with, I think, needs to be -- his concepts need to  
5 play a big part in the analysis that goes into what really  
6 should be in Rule 5.6. And he in particular cautions  
7 against the inflexibility and the rigidity of attempting to  
8 consider the source and to trace the kinds of funding that  
9 is being looked at, for purposes of a reduction in a retired  
10 partner's benefits when they leave the firm, in a  
11 competitive fashion as opposed to a non-competitive fashion.  
12 He essentially says that it's understandable that the courts  
13 would consider the source of the benefit in tracing where  
14 the payments are coming from, but his point, I think, is  
15 that in a law firm, partners fund their own post-withdrawal  
16 benefits by accepting less in the way of present  
17 compensation in exchange for the payments of the future.

18           So, essentially, any benefit that is paid to a  
19 withdrawing partner is in the form of deferred compensation.  
20 And this is true even of plans that base the benefits to a  
21 former firm member on a percentage of the firm's current  
22 profits, because the profits allocable to the remaining  
23 partners are reduced. As a consequence, they accept that  
24 reduction in the hope that they'll enjoy a similar benefit  
25 in the future.

1           So, getting into the concept of what constitutes a  
2 future benefit versus what constitutes other sources of  
3 funding that may, in fact, include some previously accrued  
4 and accumulated assets, I think it is a very difficult  
5 problem that 5.6, I think, tries to solve by using the word  
6 "solely." But I think it's a bigger problem, because there  
7 are many examples of other sources of income which will  
8 violate 5.6 which are not really future earnings.

9           By way of example, assume that a responsible law  
10 firm wants to provide a bona fide retirement benefit, with  
11 the benefits being subject to reduction if the retired  
12 partner competes with the firm. It's in the best interests  
13 of the firm, its remaining partners, and, indirectly, the  
14 firm's clients to be able to pay those retirement benefits  
15 upon the partner reaching retirement. But if no amounts  
16 have been accumulated with which to pay the existing  
17 retirement obligations, the entire burden, based on the  
18 language of 5.6, falls or begins to fall on the current  
19 partner group, and they end up foregoing current  
20 compensation in order to meet whatever funding shortfalls  
21 there may be. Partners who then leave in order to avoid  
22 those funding demands continue to exacerbate that future  
23 funding benefit problem and the shortfalls, and, as a  
24 result, I think, cause a significant risk to the firm's  
25 ongoing viability and survival as a result.

1           COMMISSION MEMBER TUFT: Can I ask a question so I  
2 can track it? This is Mark Tuft.

3           So you're talking about a situation where the  
4 future benefits do not come from future firm revenues,  
5 correct?

6           MS. HAWKINS: Solely.

7           COMMISSION MEMBER TUFT: Solely.

8           MS. HAWKINS: Solely is really the issue.

9           COMMISSION MEMBER TUFT: But are you -- are you  
10 quarreling with the remainder of (b)(2), which says that --  
11 it does not affect a share of compensation that has already  
12 been earned by a lawyer. So you're talking about income  
13 that's not been earned.

14           MS. HAWKINS: Right. KMR has no problem with the  
15 lawyer being entitled to their equity in the firm, has no  
16 problem with the lawyer being entitled to a share of the net  
17 profits that have been earned in that period of the lawyer  
18 being there. As a matter of fact, their plan specifically  
19 provides for that --

20           COMMISSION MEMBER TUFT: All right.

21           MS. HAWKINS: -- as well as for the capital.

22           COMMISSION MEMBER TUFT: Okay. And so what about  
23 the last one, which is a vested interest in a retirement  
24 plan? It's already vested.

25           MS. HAWKINS: Well, frankly, we weren't sure what

1 that meant, because conceptually, that, for me, is a term of  
2 art under ERISA, and I don't --

3 COMMISSION MEMBER TUFT: Right.

4 MS. HAWKINS: -- I don't mean to even suggest that  
5 I'm an ERISA lawyer, but --

6 COMMISSION MEMBER TUFT: And that's --

7 MS. HAWKINS: But for me, that's what I read when  
8 I saw that. And that, for me, means an independent defined  
9 benefit, defined contribution, 401K -- whatever word you  
10 want to put on it -- kind of a plan --

11 COMMISSION MEMBER TUFT: Right.

12 MS. HAWKINS: -- where the partner says, "I'm  
13 intentionally, deliberately, knowingly foregoing x -- up to  
14 x percent" -- usually those plans allow for some spread --  
15 "of my current compensation in order to fund my retirement."  
16 They have no quarrel with -- with that, if that's what you  
17 meant by that.

18 COMMISSION MEMBER TUFT: That's my question,  
19 because we have ERISA laws.

20 MS. HAWKINS: Right.

21 COMMISSION MEMBER TUFT: We don't --

22 MS. HAWKINS: Yeah, there's no quarrel with that  
23 whatsoever.

24 Let me give you the very practical example from  
25 the way that their plan goes, because that might help you

1 understand what we're talking about with respect to what's a  
2 future benefit versus what's already earned.

3           They have a variety of funding sources, and the  
4 first one, a substantial portion of their benefits will, in  
5 fact, be paid from future firm revenues. Some portion will  
6 not. And the portion that will not comes from a number of  
7 sources, the first of which is they have an -- a pool of  
8 assets, primarily in the form of whole and universal life  
9 insurance policies, on the lives of certain partners. The  
10 partnership is the owner and the beneficiary of those  
11 policies. The asset pool is recognized as a prudent means  
12 of amassing tax-favored cash build-up in the form of cash  
13 surrender value in the policies, and to facilitate KMR's  
14 receipt of tax-free death benefit proceeds.

15           Consequently, when a partner retires, KMR looks to  
16 those insurance policies to fund his or her benefits in the  
17 following manner: either by borrowing against the cash  
18 surrender value of their policies, by making withdrawals  
19 from the insurance policies, by applying a death benefit  
20 proceed which it has received on the account of another  
21 partner's death, or by the dividends that it receives from  
22 the life insurance policies. So that's one major source of  
23 its funding.

24           In addition to utilizing insurance policies as a  
25 retirement benefit funding source, KMR uses two other

1 sources that we think at the moment runs afoul of your rule.  
2 The first is a reserve that they create from the current  
3 year's profits, which, by agreement in their partnership  
4 agreement, is typically somewhere between one and two  
5 percent of net income from the partnership. And it is not  
6 allocated or allocable to any specific partner. And it  
7 includes that amount plus any earnings that are made on that  
8 account in the future.

9           This reserve is not -- not viewed by anybody in  
10 the partnership as compensation already earned by a lawyer,  
11 nor as any specific lawyer's share of current profits. That  
12 money is used to pay insurance policy premiums, to pay the  
13 interest on any loans taken against the insurance policies'  
14 cash surrender value, and to pay current year retirement  
15 benefits.

16           A third source of funding is what I call a rebate.  
17 And I apologize -- there are a lot of tax lawyers in this  
18 room, and so this is -- this is the one where everybody, you  
19 know, goes like this (gesturing). The rebate is this: is  
20 that the current partners pay to the partnership an amount  
21 on an annual basis that is equal to the tax benefit that  
22 that partner receives in that current year in connection  
23 with the partnership's deduction of the payment of  
24 retirement benefits. So there's this kind of revolving door  
25 of money going back --

1           COMMISSION MEMBER LAMPOR: Something similar --  
2 something akin to a capital call.

3           MS. HAWKINS: Well, but it's not -- I don't want  
4 to call it that.

5           COMMISSION MEMBER LAMPOR: I know. Don't --  
6 yeah.

7           For those of us -- this is Stan Lamport -- for  
8 those of us who aren't so tax-evolved, I understand. I  
9 think I get the point.

10          COMMISSION MEMBER TUFT: Can I ask a question?  
11 Mark Tuft.

12          So the rebate -- I understand the concept -- where  
13 does that money go and what's it used for?

14          MS. HAWKINS: The rebate is used to pay current  
15 year's retirement benefits, it's used to pay other -- some  
16 of these same other things that -- that the special reserve  
17 is used to pay. If there's a shortfall, it's used to pay  
18 premiums, it's used to do these other things, or it goes  
19 towards the current year's retirement benefits.

20          KMR, in addition to having a Los Angeles office,  
21 is multi-state. It has offices in many locations, and it  
22 has specifically, since 1983, had this plan in place, and it  
23 has assured itself that it is in compliance with the ABA  
24 Model Rule 5.6.

25          Our current reading of what California proposes to

1 do, what the Commission proposes to do with 5.6, almost  
2 exclusively because of the use of the word "solely," would  
3 mean that KMR would not be in compliance with the California  
4 rules. And it's going to be put in a rather delicate  
5 Hobson's Choice. It certainly does not want to go -- forego  
6 its Los Angeles firm, but it's either going to be telling  
7 its Los Angeles partners that they're no longer eligible to  
8 participate in its retirement plan or they're terminating  
9 the retirement plan, because the expense of doing -- and now  
10 it's --

11 CHAIR SONDEHEIM: Let me back you up for a second.

12 This is Harry Sondheim.

13 You assumed a fact not in evidence with regard to  
14 me, anyway, and that is familiarity with Professor Hillman.  
15 Is there an article that he has written?

16 MS. HAWKINS: Oh, he's written -- he's written a  
17 rather large treatise, only a few pages of which I have,  
18 called Hillman on Lawyer Mobility.

19 CHAIR SONDEHEIM: Okay. Thank you.

20 MS. HAWKINS: And it's the law and ethics of  
21 partner withdrawals and law firm break-ups.

22 And he makes considerable -- brings considerable  
23 caution to this issue of trying to trace where the funds  
24 come from, which I think is part of what (b), that we're  
25 having problems with, really is trying to do. It's trying

1 too hard, I think, to identify what I'm sure at the time the  
2 drafters thought was the only other conceivable source of  
3 funding besides the ones that are listed as the exceptions.  
4 And I guess what we're trying to tell you is that that's not  
5 really the case.

6 COMMISSION MEMBER LAMPOR: This is Stan Lampor.

7 So, the second -- what the sentence -- what (b)(2)  
8 says is it doesn't come from compensation earned by the  
9 lawyer, the lawyer's share in the equity of the firm, the  
10 lawyer's share of the firm's net profits, or the lawyer's  
11 vested interest in a retirement plan. That part doesn't  
12 trouble you? It's the idea that we have this -- we have not  
13 recognized there is more to the universe in the first part  
14 of the sentence, but not the fact -- because I -- to me, I  
15 think that the second part of the sentence is really the key  
16 thing.

17 MS. HAWKINS: Well, it's interesting to me because  
18 there was an earlier version of this 5.6 that you had on  
19 your Website that didn't have -- it was identical, except it  
20 didn't have the word "solely" in it. And then, all of the  
21 sudden, the word "solely" popped up in your clean version.  
22 And the only commissioner that I was able to reach to speak  
23 to is -- was Paul Vapnek, and Paul wasn't able to tell me  
24 from his notes why that suddenly happened.

25 So I'm assuming that it was just another effort of

1 trying to say that (b) absolutely defines the universe of  
2 sources for funding of retirement benefits, and that's why  
3 I'm trying to give you examples that suggest otherwise.

4           The other thing that I would call your attention  
5 to is the most recent relevant discussion that I have been  
6 able to find with respect to Model Rule 5.6, is a case out  
7 of New Jersey, from the New Jersey Supreme Court, in 2004,  
8 which is not referenced in the comment. And so, I'm  
9 assuming that either it was -- the comment was written  
10 before Borteck came out or someone just didn't realize it  
11 was out there. But it had a very extensive conversation in  
12 it about criteria associated with retirement benefits.

13           COMMISSION MEMBER TUFT: Can you -- Mark Tuft.  
14 Can you give us that case?

15           MS. HAWKINS: It's in my written comments.

16           COMMISSION MEMBER TUFT: It is? Thank you.

17           MS. HAWKINS: I cited to it.

18           COMMISSION MEMBER TUFT: Very good. Thank you.

19           MS. HAWKINS: And, in fact, I -- I sort of tried  
20 to highlight what the Borteck court says, because it looks  
21 first to an expert actuary who helps the court identify what  
22 the Internal Revenue Service criteria is for a benefit  
23 program. And that's actually five criteria.

24           You've got two of them in (b)(1), the minimum age  
25 and the length of service. The other three are the terms

1 containing benefit calculation formulas, and defining terms  
2 for the benefit payout, and the benefits are payable to a  
3 deceased retiree's estate. So that would be the IRS  
4 criteria for qualified benefit plans.

5 But then the court relied very heavily on  
6 Professor Hillman's factors, and essentially -- and I will  
7 quote you -- it says, "According to Hillman, the first and  
8 most important factor is the existence of the minimum age  
9 and service requirements. A second factor to consider is  
10 the existence of provisions dealing independently with  
11 withdrawal for purposes of retirement and withdrawal for  
12 other reasons. And the third factor focuses on the time  
13 period over which benefits are to be paid."

14 There is no reference in Borteck to the funding  
15 being solely from the future firm revenues. As a matter of  
16 fact, the language in Borteck is that they found evidence  
17 that the funding was at least in part from revenues that  
18 would postdate the withdrawal of a partner. So, even in  
19 Borteck, which is an interesting overview of a lot of the  
20 other cases that are cited in your commentary as to how each  
21 court has come out, it is saying that at least some of the  
22 revenues are from future earnings, but it's not suggesting  
23 that they all have to be. In fact, in Borteck, they were  
24 not.

25 COMMISSION MEMBER LAMPOR: This is Stan Lampor.

1 Does taking out the word "solely" really help you?

2 I mean --

3 MS. HAWKINS: Well, if it -- if I'm being asked  
4 for language, I think that I would substitute "solely" with  
5 "in some part," or some --

6 COMMISSION MEMBER TUFT: That wouldn't help you  
7 either.

8 COMMISSION MEMBER LAMPORT: Yeah, I'm not sure --  
9 I mean, I understand your point, and I --

10 MS. HAWKINS: We don't care that some of the  
11 funding comes from future revenues, because I think I  
12 understand the point that the courts are trying to make, is  
13 that they're -- they don't want the deprivation for a  
14 competing withdrawing partner to have -- to be foregoing  
15 what they've worked hard for, for however many years they  
16 were in the firm. They want it to be the cost of the -- of  
17 the, I guess, ability to continue to compete with the firm  
18 after the fact.

19 So -- so I'm -- I'm appreciative of why the courts  
20 struggle with that. But "solely" is really the problem.

21 COMMISSION MEMBER LAMPORT: Okay.

22 MS. HAWKINS: Really. I mean, if KMR had a  
23 choice, they would suggest that we just go with the ABA  
24 Model Rule. But if California wants to try and elaborate, I  
25 mean, one of the things that the Borteck court does say is

1 that it wanted its Rules Commission to think about whether  
2 it should attempt to define in some way what retirement  
3 benefits are. And so, that looks like that's what you here  
4 are trying to do. And we commend you for the first part of  
5 (b); (1) is perfect. It's just (2) that is going to cause a  
6 problem, and we assume it's not just KMR that is going to  
7 have that problem.

8 COMMISSION MEMBER TUFT: Yeah. So -- yeah -- Mark  
9 Tuft.

10 Just so I -- we're going to have to read the case  
11 and digest this -- but you and your law firm, other than the  
12 sources of the funding, you don't have a problem with the  
13 remainder of (b)(2), which is if it's earned compensation or  
14 the share in the equity of the firm, or the net profits, or  
15 the vested interests from a retirement plan, you don't have  
16 a problem with that.

17 MS. HAWKINS: That's correct.

18 COMMISSION MEMBER TUFT: Okay.

19 COMMISSION MEMBER LAMPOR: As long as it -- as  
20 long as it doesn't come from those sources --

21 COMMISSION MEMBER TUFT: You're okay with that.

22 COMMISSION MEMBER LAMPOR: -- you're okay with  
23 that. It's just that it's -- the first half of this is  
24 narrower than the universe.

25 MS. HAWKINS: That's correct.

1           COMMISSION MEMBER TUFT: Yeah. Sophisticated law  
2 firm.

3           MS. HAWKINS: And the concepts are -- the concepts  
4 are not easy to grasp.

5           COMMISSION MEMBER TUFT: No, I think -- I think --  
6 I mean, you know -- we have -- we understand it.

7           COMMISSION MEMBER LAMPORT: We have some -- just  
8 thinking aloud, one thing we could do is just -- is just get  
9 rid of the first clause and just keep the "nots" in there.  
10 I mean, there are other things you could do. I'm just  
11 thinking through how we would, you know, play that out.

12          MS. HAWKINS: Right. And we would be happy to  
13 continue to work with you on that.

14          COMMISSION MEMBER TUFT: Well, just speaking for  
15 me -- just speaking for me, we'll have to -- I mean, this  
16 case is very -- thank you for your memo -- we'll have to  
17 read this and the case you cite. But suggested language is  
18 very helpful to us.

19          COMMISSION MEMBER LAMPORT: Right.

20          COMMISSION MEMBER TUFT: Please feel free.

21          MS. HAWKINS: And I understand that. My only, I  
22 guess, apologia at the moment is that this is a project that  
23 I started two weeks ago, because nobody really realized it  
24 was in the clean version that the word "solely" was going to  
25 pop up. So we're intending to put together a more extensive

1 written commentary for the October 16th deadline.

2 COMMISSION MEMBER TUFT: Okay.

3 CHAIR SONDHEIM: This is Harry Sondheim.

4 If we were to remove the word "solely," that would  
5 solve your problem, though, from your perspective?

6 MS. HAWKINS: Well --

7 CHAIR SONDHEIM: That's the way I -- that's what I  
8 interpret your --

9 MS. HAWKINS: -- I don't -- "solely" is --  
10 "solely," having "solely" in there is definitely a bigger  
11 problem. I think what happens if you remove "solely" is  
12 that then it's open for dispute.

13 COMMISSION MEMBER TUFT: Right.

14 MS. HAWKINS: And I don't know. Maybe in the  
15 grand scheme of things, that's what it has to be, is --  
16 because as you've even acknowledged and recognizing that  
17 this commentary more than any other relies on case law,  
18 because everything is so fact-specific, it may very well be  
19 that that's where you have to end up.

20 CHAIR SONDHEIM: But you'd be more comfortable if  
21 not only did we remove "solely," but we remove the entire  
22 first clause, I take it?

23 MS. HAWKINS: That would probably be very helpful.

24 CHAIR SONDHEIM: This is Harry Sondheim, by the  
25 way.

1           COMMISSION MEMBER LAMPOR: Just so you -- I mean,  
2 what -- this is Stan Lamport -- we get comments, and  
3 sometimes you'll get comments of a problem without the core  
4 of a solution, and we'll be sitting there scratching our  
5 heads trying to figure out, "Okay, we acknowledge maybe  
6 there's an issue here. How do we deal with it?" And so,  
7 anything that you can do to get us past that moment would be  
8 helpful.

9           MS. HAWKINS: Well, I can -- there's -- the firm  
10 is very motivated, now that they've -- it's come through.  
11 So I think we'll be working on that, as I said, and for the  
12 October 16th, we intend to submit something further.

13           COMMISSION MEMBER TUFT: Good. Thank you.

14           CHAIR SONDEHEIM: Thank you very much.

15           MS. HAWKINS: Thank you so very much.

16           CHAIR SONDEHEIM: All right. I see Wendy Patrick  
17 has returned.

18           And the floor is yours.

19           MS. PATRICK: All right. Thank you.

20           Good afternoon. Thank you very much for the  
21 opportunity to speak today. I am up here, of course, this  
22 weekend speaking on ethics, and also representing the San  
23 Diego County Bar Association's Legal Ethics Committee as one  
24 of the co-chairs.

25           When we learned of the opportunity we were going

1 to have to provide some comments on these rules, we jumped  
2 on it with everything we had. We appointed a project  
3 coordinator, Ross Simmons, we split ourselves into teams, we  
4 divvied up the rules, and what I'm going to report on today  
5 is not how fabulous we think almost all the rules are --  
6 we're going to provide some nitpicky comments, but albeit  
7 some important comments, that we have discussed at our  
8 committee level on just a certain, select number of the  
9 rules.

10           And the very first rule I'd like to discuss  
11 briefly -- and before I begin any of these, the reason that  
12 I don't have a written product with me today is because  
13 although we, at the Legal Ethics Committee, have approved  
14 our proposed modifications, we still need that Bar Board  
15 approval. And unfortunately, the next Bar Board meeting is  
16 the 10th. We're sure they're going to approve our comments,  
17 but until they do, we'll hold up on the written project.  
18 But everything we're going to forward to you is already  
19 drafted and ready to go. And as soon as October the 10th  
20 rolls around, we're going to submit it.

21           Rule 1.0, the Subsection (a), "The purpose of the  
22 following Rules are" (1) through (4), as listed in your  
23 proposed modifications: "To protect the public," Number 1;  
24 "To protect the interests of clients," Number 2; Number 3,  
25 "To protect the integrity of the legal system and to promote

1 the administration of justice"; 4, "To promote respect for,  
2 and confidence in, the legal profession."

3 My committee has discussed two potential following  
4 rules: Number 5, "To provide guidance to lawyers"; and  
5 Number 6, "To provide a basis for the discipline of  
6 lawyers." And the rationale, as discussed amongst our  
7 committee members, is we thought this expansion would better  
8 describe the complete purpose of all of these rules.

9 COMMISSION MEMBER LAMPORT: Guidance and what?  
10 I'm sorry.

11 This is Stan Lamport.

12 MS. PATRICK: "To provide guidance to lawyers"  
13 would be Number 5, and "To provide a basis for the  
14 discipline of lawyers" would be our proposed modification,  
15 Number 6.

16 COMMISSION MEMBER TUFT: Can I ask a question?  
17 Mark Tuft.

18 Would you then eliminate (b)(2), which reads, "A  
19 willful violation of these Rules is a basis for discipline"?

20 MS. PATRICK: We would not. We took -- I'm just  
21 trying to find (e)(2) -- but we took a lot of time --

22 COMMISSION MEMBER TUFT: You'd leave that in?

23 MS. PATRICK: I'm still trying to find (e)(2).

24 COMMISSION MEMBER TUFT: That's "B."

25 MS. PATRICK: Oh, (b)(2).

1 COMMISSION MEMBER TUFT: (b)(2) in the Rules.

2 Excuse me.

3 MS. PATRICK: Yes, we would. Thank you. I was  
4 looking for a subsection.

5 COMMISSION MEMBER TUFT: I'm sorry. You would --

6 MS. PATRICK: We would leave that in.

7 COMMISSION MEMBER TUFT: You would leave it in,  
8 okay.

9 MS. PATRICK: As simply -- we're proposing just  
10 the addition of Number 6.

11 COMMISSION MEMBER TUFT: I see. Thank you.

12 MS. PATRICK: The next one we discussed -- and I'm  
13 certainly not going to be taking up my five minutes on each  
14 of these rules. However, by the next time I comment on the  
15 next batch, we'll probably have far more extensive comments.  
16 This is our first shot at it.

17 COMMISSION MEMBER TUFT: Good.

18 MS. PATRICK: But the next rule is 1.2.1,  
19 "Counseling or Assisting the Violation of Law." And you may  
20 have heard this comment before. The one point of contention  
21 we discussed at our committee level was the word "tribunal."  
22 And there are always members that want that word defined.  
23 And we discussed amongst ourselves what type of word is more  
24 likely than not to have a working definition of "tribunal"  
25 already in their brain. Because we were asking for some

1 clarification, the starting point that we used was ABA Model  
2 Rule 1.0(m), which has a fairly lengthy definition of  
3 "tribunal" there itself. And we thought, if nothing else,  
4 perhaps some of the language in Subsection (m) could be a  
5 starting point.

6 But the one proposed modification we had to this  
7 was that there be some working definition of the word  
8 "tribunal" somewhere within the Rules.

9 COMMISSION MEMBER TUFT: Another question from  
10 Mark Tuft.

11 You know the ABA Model Rules has a terminology  
12 section. Does your committee -- did your committee discuss  
13 whether that is advisable for us to have that, or would you  
14 rather see the definition in the rule itself?

15 MS. PATRICK: We didn't discuss actually adding a  
16 separate terminology section. We simply referred to 1.0(m)  
17 as a starting point for a definition in this particular  
18 rule.

19 There weren't a lot of rules that we found needed  
20 a lot of clarification as it -- that would -- that would  
21 actually provide the necessity for a separate section. This  
22 is just one of those that, at our committee level, we've  
23 been discussing for years.

24 COMMISSION MEMBER TUFT: Okay.

25 MS. PATRICK: The next rule I'd like to touch on

1 briefly is 5.1. And I am barely going to need to say a  
2 thing here -- I'm sure all of the rest of you have noticed  
3 the typo in the Comment Section (4), the phrase "the  
4 resulting misapprehension" occurs twice in succession, in --  
5 one, two, three -- the third and fourth line from the bottom  
6 of that comment. And I'm -- that's probably already been  
7 corrected, but since we -- somebody pointed it out on our  
8 committee.

9 COMMISSION MEMBER TUFT: That came from the  
10 Department of Redundancy Department.

11 MS. PATRICK: Right.

12 (Laughter)

13 COMMISSION MEMBER TUFT: It was there for  
14 emphasis.

15 (Laughter)

16 COMMISSION MEMBER LAMPORT: He really meant it.

17 MS. PATRICK: Oh, okay.

18 Thinking that might be the case, I just wanted to  
19 clear that up. Thank you.

20 I'd like to move to the advertising rule,  
21 something we discuss all the time at our local committee  
22 level, starting with 7.1, "Communications Concerning the  
23 Availability of Legal Services."

24 The only proposed modification we had to this rule  
25 is concerning Subsection (c)(3). As currently phrased, it

1 states: "A communication is false or misleading if it . . .  
2 contains any matter, or presents or arranges any matter in a  
3 manner or format which is false, deceptive, or which  
4 confuses, deceives, or misleads the public." The only  
5 comment we had is we liked that "tends to" language that was  
6 previously in the rule. In other words, the last phrase of  
7 it read, "which tends to confuse, deceive, or mislead the  
8 public." And our rationale for that is we would be afraid  
9 that actual confusion or deception might be required in  
10 order to prosecute a violation under this rule.

11 Advertising has been one of those areas that we at  
12 the San Diego local committee level have been providing a  
13 lot of training on, because it happens to be one of the  
14 complaints we get most often, is lawyers complaining about  
15 other people's ads. So we took a very careful look at these  
16 advertising rules. And that's the only comment, however,  
17 that we had to proposed Rule 7.1. We liked all of the rest  
18 of it.

19 7.3 is the next advertising rule I'd like to  
20 discuss, "Direct Contact with Prospective Clients." We are  
21 very happy to see Subsection (a) including real-time  
22 electronic contact, as we've been reading and participating  
23 in the formulation of new ethics opinions that account for  
24 the fact that this is how it's being done in this day and  
25 age.

1           The only issue we had with this particular rule is  
2    Subsection (c), two short issues. We liked the 12-point  
3    type instruction that was in the previous rule. And again,  
4    dealing with many, many complaints about attorney  
5    advertising, at least we felt this was some measure of  
6    guidance as to what -- how small can your fine print be on  
7    the front of your materials.

8           The only other --

9           COMMISSION MEMBER TUFT: Can I ask you a question  
10   about that?

11          MS. PATRICK: Sure.

12          COMMISSION MEMBER TUFT: Mark Tuft again.

13          You notice that we did maintain some standards --  
14   not all of them. Would you want to see the 12-point type  
15   requirement in the rule or in a standard, or did you decide?

16          MS. PATRICK: We actually discussed it in the  
17   rule.

18          COMMISSION MEMBER TUFT: Okay.

19          MS. PATRICK: But if I were here speaking as an  
20   individual, which I know I am also allowed to do, if I want  
21   to wait until the end of the calendar to come back up, I  
22   think it would be fine either way. Part of the rationale we  
23   discussed for having things in the actual rule is we feel  
24   people are more likely to read the rule -- and  
25   unfortunately, they stop after the reading of the rule. So

1 I would probably say that they'd at least see it if it was  
2 in that Section (c) or somewhere defined in the rule itself.

3 COMMISSION MEMBER TUFT: Thank you.

4 MS. PATRICK: The only other comment we had with  
5 respect to this rule was "advertising material," quote, "or  
6 words of similar import." We felt that it is possible --  
7 again, seeing a lot of alleged violations -- it's possible  
8 that some lawyers might choose to look at this as being  
9 vague, and it invites -- invites some people to test the  
10 limits of what does that phrase actually mean.

11 We thought maybe one of the things we could do is  
12 provide some sort of a safe harbor provision, some sort of  
13 suggested definition to what might be "words of similar  
14 import" -- in other words, advertisement, solicitation --  
15 something that would make it plainly obvious but wouldn't  
16 have to be, quote, "advertising material." We thought maybe  
17 a small suggestion of a non-inclusive list, but nonetheless,  
18 a list that could -- people might be able to use if they  
19 didn't want say, quote, "advertising material."

20 COMMISSION MEMBER LAMPOR: This is Stan Lampor.

21 If you refer back to Standard 5, I think  
22 advertising material -- or it "advertising newsletter," I  
23 think was --

24 MS. PATRICK: Right. I think it was.

25 COMMISSION MEMBER LAMPOR: -- and we've modified

1 the rule some over the standards. But I think, you know,  
2 that kind of -- would be "of similar import." Do you want  
3 to see that reference back in there, or --

4 MS. PATRICK: We couldn't come to a consensus on  
5 that one --

6 COMMISSION MEMBER LAMPORT: Okay.

7 MS. PATRICK: -- because there were some folks  
8 that, as you can imagine, saw "newsletter" as -- not as  
9 close to the word "advertising materials" as they would have  
10 liked.

11 COMMISSION MEMBER LAMPORT: Right, yeah.

12 Well, and -- okay. I mean, I understand. I just  
13 -- how far back do we go to what we had, I guess, is the  
14 question.

15 MS. PATRICK: Again, speaking as an individual, I  
16 liked what used to be in there. I also like the idea of any  
17 combination of words, including "solicitation," "advertising  
18 material," "advertisement."

19 COMMISSION MEMBER TUFT: Yeah. Mark Tuft here.

20 A question and a comment. We have a comment on  
21 Paragraph (c) -- it's Comment (7). My question is, would  
22 the suggestions you're looking for fit in the comment rather  
23 than the rule? In terms of a place is what I'm asking for.

24 MS. PATRICK: You know, I agree. And I see all  
25 the comments, as do we all.

1           COMMISSION MEMBER TUFT: But you think the rule  
2 would be better, or --

3           MS. PATRICK: What we discussed as far as the  
4 insertion of this is simply that the words "of similar  
5 import," we thought, should be defined somewhere in the  
6 rule, only, again, so people would read it.

7           COMMISSION MEMBER TUFT: Read it.

8           Okay. My second comment is really a request, and  
9 that is, the excellent people in San Diego, please send us  
10 the proposed wording that you think would be appropriate,  
11 since we can't think of everything. We'd really appreciate  
12 that.

13          MS. PATRICK: Oh, absolutely. And hopefully,  
14 that's one of the things we'll be able to work on once we  
15 get Bar Board approval, is not just telling you what's wrong  
16 with a rule, but with suggesting some sort of proposed  
17 addition --

18          COMMISSION MEMBER TUFT: Excellent.

19          MS. PATRICK: -- if, in fact, we find something we  
20 want to discuss.

21          COMMISSION MEMBER TUFT: Thank you.

22          COMMISSION MEMBER LAMPOR: You can tell -- from  
23 Stan Lampor's perspective, you can tell Ross Simmons I will  
24 eagerly read anything he has to write.

25          MS. PATRICK: All right. I certainly will. He's

1 done a lot of work on this project.

2 COMMISSION MEMBER LAMPOR: I've known him for a  
3 long time.

4 MS. PATRICK: The very last rule I have to discuss  
5 in this first batch is Rule 8.3. We are thrilled to death  
6 to see a rule like this on the books. We are very pleased,  
7 and we love it. The only comment we had is really a  
8 semantic issue, an easier to read proposal. And that would  
9 be, in Comment Number (2), it reads like a paragraph as  
10 currently phrased; the only suggestion we had would be,  
11 again, to make it easier to read. And we have a suggestion  
12 that's already drafted you'll be receiving, but the way it  
13 reads would be: "This Rule is not intended to allow a  
14 lawyer to report a violation of these Rules or the State Bar  
15 Act if doing so would: a) violate the lawyer's duty of  
16 protecting confidential information; b) prejudice the  
17 interests of the lawyer's client" -- I'm paraphrasing a bit,  
18 because you can see we're using the same language you used  
19 in the comment -- "c) involve the unauthorized disclosure of  
20 information received by the lawyer in the course of  
21 participating in an approved lawyers' assistance program."

22 So that is our response to the first batch of  
23 rules. We intend to repeat this process with the second  
24 batch, and we hope to time it in such a fashion that we'll  
25 have the Bar Board approval we need before I appear at your

1 next meeting, so I'll be able to provide written materials.

2 Thank you very much.

3 COMMISSION MEMBER TUFT: Very helpful.

4 COMMISSION MEMBER LAMPORT: Thanks a lot.

5 CHAIR SONDHEIM: Thanks very much.

6 Let me ask if there's anybody else that wants to  
7 speak, other than Mr. Falk.

8 COMMISSION MEMBER LAMPORT: There was another  
9 person here before that wasn't planning to speak. Is he  
10 here?

11 CHAIR SONDHEIM: Right.

12 MS. McCURDY: He chose to submit them in writing.

13 CHAIR SONDHEIM: Okay.

14 You have the floor, Mr. Falk.

15 MR. FALK: Thank you for -- thank you for giving  
16 me the opportunity to speak again on general comments that  
17 don't fit neatly into one of the rules. They either apply  
18 more broadly, or they apply to rules that don't exist, and  
19 so on.

20 You know, some of the examples I gave for the  
21 rules were directly -- or directed primarily at activities  
22 defense attorneys would do, but there are clear situations  
23 of prosecutorial lack of integrity, at least -- at least  
24 partly due an absence of certain rules of conduct. I mean,  
25 not that the absence of the rules causes it, but certainly

1 it's not as clear if the rules aren't there.

2           For example, there's no rule -- and you might --  
3 Mr. Lamport or others might tell me that there's another  
4 section of the law that says this -- but there's no rule  
5 against a prosecutor bullying a defendant during plea  
6 negotiations by threatening to indict their innocent  
7 relatives if the defendant did not agree to the proposed  
8 plea offer. Now, I know it gets picky about, okay, what  
9 kind of rules do we do, and I'll talk about that later. But  
10 these are actual things that -- from three different  
11 witnesses that I talked to say that this kind of thing  
12 happens. So, you know, something needs to be done about it.

13           Another area of possible abuse by prosecutors is  
14 in the withholding of evidence from the defense that could  
15 indicate innocence. Now, currently, my understanding is, is  
16 that it's up to the prosecutors to decide what evidence to  
17 turn over and when. And the -- you know, my opinion is that  
18 I don't understand why there's just not a rule that all the  
19 evidence --

20           CHAIR SONDEHEIM: Let me just stop you there.  
21 There's also the United States Constitution, which requires  
22 prosecutors to do certain things, including turning over  
23 evidence relating to innocence. So -- and there's also some  
24 statutory provisions, so that's an area that is really  
25 covered.

1           MR. FALK: Okay. So, perhaps the modifications  
2 need to go there.

3           CHAIR SONDHEIM: Well, the Constitution already is  
4 there, and it has resulted in reversals where prosecutors  
5 have not turned over evidence to the defense.

6           MR. FALK: But the way it is now -- well, maybe  
7 it's -- the way it is now, it's up to the prosecutors to  
8 decide what is --

9           CHAIR SONDHEIM: No.

10          MR. FALK: No?

11          CHAIR SONDHEIM: If it relates to innocence, it  
12 has to be turned over.

13          MR. FALK: So it's an absolute standard, outside  
14 of what the prosecutor does.

15          CHAIR SONDHEIM: That's correct.

16          MR. FALK: Okay. Well, then, maybe that's just  
17 not being prosecuted enough.

18          All right. I'll just skip to the next item, then.

19          Yet another area of possible abuse by prosecutors  
20 is in the determination of the number of counts, first for  
21 indictments and later for charges, in a trial. Due to the  
22 minimum and standard sentencing guidelines, even a  
23 relatively minor involvement in a crime can lead to a  
24 situation where a judge must deliver a sentence with  
25 significant jail time.

1           And I am familiar with the, you know, combining of  
2 multiple counts and so on, but it still leads to certain  
3 minimum sentencing that you can't get away with doing  
4 anything else about.

5           Juries are not given the opportunity to render a  
6 guilt of a smaller degree, so if there's a technical guilt  
7 for aiding and abetting, and even of a small amount, then a  
8 minor participant in a crime can nevertheless be charged  
9 with dozens of counts resulting in decades of jail time.  
10 Now, the particular trial I was on, fortunately, the judge  
11 had the presence of mind to actually throw out 48 or  
12 whatever of the counts out of the 57 -- I forget the exact  
13 number -- but there were eight left that we decided on. And  
14 he did it mostly on the basis of insufficient evidence.  
15 And, in fact, it looked like some things didn't have  
16 evidence. But there was probably some that was, and I think  
17 part of it was it was just good judgment in it.

18           But obviously, there's a -- there's a flaw here in  
19 the system that I don't know exactly where it needs to be  
20 addressed, but it does need to be addressed somewhere,  
21 because it's a -- there's too much potential for abuse of  
22 power.

23           COMMISSION MEMBER LAMPOR: Just so you --

24           MR. FALK: Yeah.

25           COMMISSION MEMBER LAMPOR: This is Stan Lampor.

1           So you know, there is a model rule that deals with  
2 prosecutor responsibilities. And we have not gotten to it  
3 yet, but there is no counterpart to it in the California  
4 Rules at the moment. But it is one of the things that we're  
5 charged with doing, is to look at those rules and decide  
6 whether to --

7           MR. FALK: So you can consider adding to the  
8 California Rules. Okay.

9           COMMISSION MEMBER LAMPORT: Yeah. Yeah. So we  
10 haven't -- we haven't gotten there yet, but there is a rule  
11 at the ABA level, and we have the ability to accept that.

12          MR. FALK: Okay.

13          COMMISSION MEMBER LAMPORT: As well as crafting  
14 anything else we want to add.

15          MR. FALK: Right. Okay. So I suggest this is --  
16 suggest taking a look at it, because it is something -- I'm  
17 only bringing up the things that seem the most pressing and  
18 common, not the things that are very infrequent.

19                 An example of a problem that occurs -- now, this  
20 one, I don't know how to solve, to be honest with you, but  
21 it was an issue -- an example of a problem that occurs due  
22 to a lack of action on the part of both the defense and the  
23 prosecution is when a witness with material information is  
24 not called by either side because the witness can relate  
25 some evidence that is helpful to one side and hurtful to the

1 other, while that same witness -- because there's a body of  
2 evidence, right -- can relate other evidence that has the  
3 exact opposite effect. And the attorneys, my perception in  
4 general is that they tend to be risk-averse in the courtroom  
5 and focus -- partly because of the focus on winning the  
6 cases -- they prefer to present evidence that is clean and  
7 forceful to their side.

8           So what ends up happening is some materially  
9 important information may not be presented to the jury, who  
10 therefore may render an improper and unjust verdict. And,  
11 now, maybe the shift of focus away from winning the cases  
12 and more toward the justice aspect I described earlier might  
13 address this particular issue. Hopefully, it would.

14           CHAIR SONDEHEIM: Let me just make one point to you  
15 so you understand --

16           MR. FALK: Yeah.

17           CHAIR SONDEHEIM: -- what the Rules of Professional  
18 Conduct are. They're not designed to totally create the  
19 circumstances under which lawyers operate. They're designed  
20 to provide the circumstances under which lawyers are subject  
21 to discipline.

22           MR. FALK: Okay.

23           CHAIR SONDEHEIM: And you have to understand that,  
24 that we don't cover the universe in our Rules of  
25 Professional Conduct.

1 MR. FALK: Right. Right.

2 CHAIR SONDHEIM: This is Harry Sondheim again.

3 MR. FALK: Yeah. And you're right. That would  
4 not be something that would be -- this would be more of the  
5 -- what was it called? -- best practices or some guideline  
6 of that sort, like what it means to be the best lawyer, and  
7 this is what we want everyone to be. So I'm not sure where  
8 that would go, but that's -- and there's talk about a  
9 preamble and other things, so maybe perhaps that's someplace  
10 where that could go, and not in a rule specifically.

11 In fact, this brings me down to my next point,  
12 which is, in fact, I'm sure, there are many types of conduct  
13 that are not explicitly codified in the rules. It is an  
14 impossible task to attempt this, you know, to codify every  
15 single thing that a person can't do. And it points to a  
16 problem that's much more fundamental that needs to be  
17 discussed -- I'm going to do it in this section.

18 It should be made explicitly clear somewhere in  
19 the description of what the Rules of Conduct are that these  
20 are not best practices or represent any conduct that is  
21 desired, as you pointed out, you know. Instead, they  
22 generally represent -- especially when they're in the form  
23 of "shall not" -- behavior that is so far beyond what is  
24 desirable that discipline is required. That's exactly your  
25 point. This is similar in most of criminal law, where the

1 line is drawn not where the behavior is desirable, but where  
2 the behavior is so egregious that incarceration or other  
3 forms of punishment are required.

4 Now, from what I've been seen or told, some  
5 attorneys operate close to the edge of the Rules of Conduct.  
6 And you've even heard other attorneys here tell you today  
7 that if you don't tighten this up, a person's going to  
8 interpret it and move to the edge, and so on. And again,  
9 that's probably because of the focus on the winning of the  
10 case. That's why that was so important to get that paradigm  
11 shifted.

12 But, you know, when I brought this up to my wife,  
13 she said -- because I said, "Imagine, in the general public,  
14 if everyone was right on the edge of law," I mean --  
15 criminal law in particular. You walk through a grocery  
16 store and somebody is just about to assault and batter you,  
17 just about to steal from you -- you know, right on the edge  
18 of being nasty and rascally and all that. It would be awful  
19 to live in a -- in a society like that.

20 So, clearly, you don't want people to operate on  
21 the edge of criminal law. But she said that people do that  
22 all the time, in going over 55 or 65 miles an hour --

23 COMMISSION MEMBER LAMPOR: On the freeway.

24 MR. FALK: Yeah, exactly. And -- and that's when  
25 it hit me. That's exactly the problem here. Many attorneys

1 treat these Rules of Conduct as if they're traffic laws, not  
2 criminal law. There's a difference, right?

3 COMMISSION MEMBER LAMPOR: These are -- this is  
4 Stan Lamport -- these are rules that are enforceable by the  
5 State Bar through its disciplinary system, so that there is  
6 a consequence to the violation of these rules. But, if your  
7 point is that we should draw -- this is a question of line-  
8 drawing, I think -- it's a -- if you draw the line in one  
9 location, people will do -- you know, if it's 55, they'll go  
10 60 --

11 MR. FALK: Right.

12 COMMISSION MEMBER LAMPOR: -- rather than, you  
13 know -- but they know that 10 miles over the speed limit  
14 will get them ticketed.

15 MR. FALK: Right.

16 COMMISSION MEMBER LAMPOR: So if you lower the  
17 speed limit to 50, they'll -- where the desire is always --  
18 they really want to go to 55, and so they'll go at 55 --  
19 that kind of thing. It's hard -- it's hard to do that. I  
20 mean, it's one of those things that -- it's an interesting  
21 point that we need to think about, but it's hard to deal  
22 with.

23 MR. FALK: I -- I -- there's two ways -- I should  
24 have said this -- two ways of addressing it. The more  
25 difficult is, I think, what you're talking about, which is

1 to try to draw the line in the Rules of Conduct to be closer  
2 to -- assuming that everyone's going to be kind of going to  
3 that edge -- because that's not what we want people to do.  
4 You can't draw -- we want people to be so far away from  
5 this, to be of the utmost integrity. That's the goal.

6           You know, it's not like traffic law. You don't  
7 want people to go zero miles an hour. I mean, that doesn't  
8 make -- so, I think that that's not the way to solve it. I  
9 don't think it's a moving of the line. I think it's a  
10 perspective -- and again, whether it's preamble, comments,  
11 general feeling from the way you read the rules, some sort  
12 of -- the rules are written, you know -- I'm not sure  
13 exactly how you get it across, but you want the point to be  
14 -- to come across that the "shall not" piece, we don't -- it  
15 is not intended that this is -- that you can do what you  
16 need to do to get closest to this. That is not what the  
17 rules are about.

18           These rules are about that this is so bad, if you  
19 do this, there will be serious consequences. We want the  
20 opposite. The intention is that the opposite is the ideal  
21 behavior. And I'm not sure how you get that across, but  
22 that's what I think needs to somehow be stated somewhere in  
23 this, because that is the context in which these rules are  
24 there.

25           I mean, these rules are -- because they're more

1 like criminal law, it's more like -- you know, most criminal  
2 law is just one rule, you know, "Do not harm."

3 COMMISSION MEMBER LAMPORT: A little more than  
4 that.

5 MR. FALK: Do not harm the environment by  
6 polluting it, do not harm a person by -- you know,  
7 financially by stealing from them or defrauding them, do not  
8 harm a person by killing them, do not harm -- you know.  
9 Yeah, there may be some exceptions, but the criminal law,  
10 for the most part, is "Do not harm." That essence of -- in  
11 this case is "Operate with the utmost and highest integrity,  
12 not focus on winning, focus on justice."

13 Somehow, that -- that import needs to be in here,  
14 that feeling needs to be in here. And I'm not -- and I -- I  
15 thought about how to do it and how to word it, and I just  
16 can't -- I tried, but I haven't done it yet. But if I come  
17 up with something, for sure I'll send it.

18 COMMISSION MEMBER TUFT: Get it to us.

19 MR. FALK: But -- but I ask you to think about it  
20 and do what you can.

21 Okay. So let me go on for just a couple more  
22 things.

23 Sorry for losing my place.

24 Okay. We talked a little bit about there are not  
25 rules regarding the proper conduct of -- but, again, this is

1 not necessarily the Rules of Conduct here, what Mr. Sondheim  
2 says -- I understand that, in terms of what attorneys should  
3 do when their clients are guilty, in terms of counseling and  
4 that sort of thing, what's appropriate behavior. So  
5 somewhere, I think that needs to be done, but maybe that's  
6 not in these rules.

7           But I want to state, it should be remembered that  
8 -- this is a power thing, and this relates to that. You  
9 know, there was the sexual -- the rule of not having sex  
10 with clients and such that -- and it was talked about  
11 earlier. Well, there's a -- there's a more general aspect  
12 of power here that I think needs to be understood. Since  
13 you have the rule about not having sex, I think it's  
14 appropriate to have either a rule or some discussion about  
15 the relationship -- the power relationship between an  
16 attorney and client, and delicacy of that nature -- of it,  
17 and therefore drawing some lines about what's appropriate  
18 and what's not, because it should be remembered that many  
19 clients are first-time offenders, and they're very scared,  
20 in spite of what -- you know, they may act tough. But the  
21 fact is, they're scared. Their first time especially, they  
22 are scared, if it's their first time in the legal system.  
23 And when people are scared, they give up their power.

24           And in this case, they will give the power to the  
25 attorney, who becomes much more than a legal counsel. And

1 in some cases, they're like a guidance counselor. Attorneys  
2 may not like it, but that doesn't absolve them of the  
3 responsibility of being sensitive to the power which they go  
4 to. And like it or not, they're very much in control of  
5 another person's life.

6 An example of where this comes into play, I gave,  
7 which happened on this trial I was on -- it's still  
8 happening, actually, because it hasn't -- something hasn't  
9 happened yet. Sometimes the time between the hiring of  
10 counsel and a trial is very long -- in this case, it was  
11 over five years for this particular trial that I was jury  
12 foreman. In a situation where it's not disputed in a case  
13 that people have been hurt, physically, financially, or  
14 otherwise, independent of the legality of the circumstances,  
15 it's important for the healing process to begin as soon as  
16 possible.

17 From my discussions with attorneys, it appears  
18 that risk aversion has most attorneys give advice of, "Do  
19 not communicate with anyone about the case, especially not  
20 anyone involved with the case." Obviously, this prevents  
21 any form of apology or restitution to occur. It surprises  
22 me that attorneys could possibly think that a jury would  
23 consider someone apologizing or paying restitution for  
24 undisputed harm as an admission of guilt for different  
25 disputed activities in a legal sense. And yet, this is what

1 attorneys tell me, that that -- "Oh, yeah, we're not going  
2 to tell the jury because you're going vote -- you know,  
3 you're going to think, 'Oh, the person's guilty, because  
4 they apologized.'"

5 I cannot imagine anyone thinking that a regular  
6 criminal, a career criminal, is actually going to go around  
7 and apologize to people, unless they're going to try to get  
8 off, maybe, or something like that, but -- you know, try to  
9 imply something that's not true.

10 By preventing communication, the attorney causes a  
11 first-time offender to literally, you know, sit with the  
12 pain that they have caused in others. And if a person is  
13 found guilty and sentenced to jail, they'll often be locked  
14 into that pain, suppress it along with their conscience,  
15 transforming it into anger, resentment -- you know what  
16 happens to people. Contrast that with someone who does  
17 everything that they can to heal those who are hurt, and  
18 then they face possible jail time if they're found guilty.  
19 But they go in being clean, as clean as they can be. You  
20 know, much more likely that person's going to get through  
21 their incarceration intact, return to society as the  
22 productive and lawful members that they once were.

23 The difference between these two scenarios often  
24 rests solely with the advice from the attorney, which is why  
25 I bring it up -- I mean, I wouldn't bring it up if it wasn't

1 related to that -- you know, which a scared client takes  
2 that as an order often, not as advice, and he pays the price  
3 of that bad advice. So I don't know where -- since you have  
4 rules that say attorneys should not have sex with their  
5 clients because of the various relationship shifts and so  
6 on, well, the fact is, is that there's a -- especially for  
7 first-time clients, there's an additional power relationship  
8 that's there, and there needs to be an understanding of that  
9 and a care and a line drawn in terms of bending over  
10 backwards and doing whatever it takes to make sure the  
11 attorney does not take the power, even accidentally, which  
12 so easy to do in terms of decisions, and really takes the  
13 extra step. I'm not sure exactly how to codify it, but I  
14 think it needs to be -- to be there somewhere.

15           And I just want to thank you again for -- for the  
16 comments. And I honestly -- you know, I know sometimes like  
17 I'm not very tactful, and stuff may sound like whatever, but  
18 I just want the system to improve, because -- I mean, even  
19 my contact with attorneys that I totally disagree with in  
20 some cases, in their opinions, or in -- the defense  
21 attorney, which I disagreed with some of the things he did,  
22 and he actually teaches ethics. So, you know, I -- these  
23 are good people, and I think people are trying to do the  
24 right thing, and for a variety of reasons, in some cases  
25 they realize they're not doing the right thing and they feel

1 they're trapped, in other cases they don't even realize it  
2 because you step off the, you know, integrity a little bit  
3 and you get used to it, you don't really realize it. But  
4 deep down, I think people do want, you know, to get back to  
5 something that is just incredible integrity -- which you  
6 guys in this room, I think, are doing, because you're  
7 looking at ethics, you know. So maybe I'm preaching to the  
8 choir type of thing.

9 But there's a -- there's a serious problem out  
10 there, and I think it needs to be addressed. And you guys  
11 can, to the degree that the Conduct -- the Rules of Conduct  
12 can address some of these issues, I think you can do it.

13 So, thank you. Thank you.

14 CHAIR SONDEHEIM: We thank you for coming and  
15 encourage you to submit any comments you have in the future  
16 about things that we're proposing.

17 MR. FALK: Okay. Thank you.

18 COMMISSION MEMBER LAMPORT: Thank you.

19 COMMISSION MEMBER PECK: Thank you.

20 CHAIR SONDEHEIM: Is there anybody else, Lauren,  
21 that you're aware of?

22 MS. McCURDY: No.

23 CHAIR SONDEHEIM: Well, we'll stay here till --

24 MS. McCURDY: And we still have a half an hour,  
25 about.



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