

**AMERICAN BAR ASSOCIATION
CENTER FOR PROFESSIONAL RESPONSIBILITY
COMMISSION ON EVALUATION OF THE RULES
OF PROFESSIONAL CONDUCT**

MINUTES

**Friday, October 15, through Sunday, October 17, 1999
Chicago, Illinois**

Commission Members Present:

W. Loeber Landau, Chair Pro Tem
Lawrence J. Fox
Albert C. Harvey
Geoffrey C. Hazard, Jr.
Margaret C. Love
Susan R. Martyn (not present on Sunday)
David T. McLaughlin
Richard E. Mulroy
Lucian T. Pera
Judge Henry Ramsey, Jr. (not present on Sunday)

Liaison:

Seth Rosner, Board of Governors

Reporters:

Nancy J. Moore
Thomas D. Morgan
Carl A. Pierce

Staff:

Jeanne P. Gray
Susan M. Campbell
Charlotte K. Stretch

Observers:

See attached

The Commission meeting was held on Friday, October 15, 1999, from 9:00 a.m. to 4:00 p.m., on Saturday, October 16, 1999 from 10:30 a.m. to 4:00 p.m., and on Sunday, October 17, from 8:30 a.m. to noon in Chicago, Illinois.

I. Rule 1.13

The Reporter indicated that the only proposed amendment to this Rule is the restoration of language in paragraph (c) originally proposed by the Kutak Committee but defeated by the

House of Delegates. He stated that the proposed language would permit disclosure outside the organization where such disclosure is required in the best interest of the organizational client. He noted that such disclosure would only be permitted if the lawyer reasonably believes that the highest authority in the organization has engaged in self-dealing.

A member noted that having the option and failing to disclose could be a problem for lawyers. Another added that things often look worse in hindsight. A member asked if Rule 1.6 was sufficient to cover this situation. The Reporter stated that Rule 1.6 protects third parties while Rule 1.13 protects the client organization. A member stated that if shareholders are third parties, then Rule 1.6 would allow disclosure. A Reporter observed that under Rule 1.13 a lawyer could disclose even if the lawyer's services had not been used. He added that Rule 1.6 provides no guidance regarding to whom the lawyer should report.

It was moved and seconded to delete the proposed amendments to paragraph (c). A member commented that he supports the motion and opposes this amendment as well as any other changes to disclosure obligations. **The motion to delete the proposed amendments to paragraph (c) passed with a vote of 5 to 4.** The Commission agreed that the Comment should clarify the relationship with Rule 1.6. **A motion was made and seconded to approve the Rule as drafted without the changes in paragraph (c). The motion passed unanimously.**

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

II. Rule 1.X

The Reporter summarized the two parts of this proposed new Rule relating to the lawyer for a fiduciary. First, a lawyer may not counsel or assist in a breach of fiduciary duty. Second, a lawyer may reveal information to prevent or rectify a breach of fiduciary duty. He pointed out that the substance of the Rule could be divided into two parts and included within Rules 1.2(d) and 1.6(b) respectively.

A member observed that the last sentence of paragraph (b) seems to make it possible to circumvent the Rule. Another member argued that a lawyer for a fiduciary should not have different duties from other lawyers. He felt that the same confidentiality rule should apply. Other members agreed that it would be preferable to add Comments to Rules 1.2 and 1.6 that explain that under applicable law an act by a fiduciary may be fraudulent that would not be if done by a non-fiduciary. A member added that the concept of fiduciary is very amorphous.

A member suggested that the reason for having a separate rule on fiduciaries is to call attention to the lawyer's role in this area. The Commission agreed that the substance of this Rule should be incorporated into the Comments to Rules 1.2 and 1.6 and that the new Comments could have a separate heading in order to highlight them.

III. Rule 1.16

The Reporter stated that paragraph (b) (3) has been amended to conform with proposed changes to Rule 1.2 clarifying that clients may typically instruct a lawyer as to both the objectives and means of the representation. Thus, "pursuing an objective" in paragraph (b) (3) has been changed to "taking action." He stated that the draft also proposes changing the standard under which a client action allowing a lawyer to withdraw is evaluated from "imprudent" to "fundamental disagreement." He noted that the current Model Rule provision has been criticized as permitting a lawyer to threaten to withdraw in order to prevail in almost any dispute with a client.

A member asked if a lawyer could withdraw under paragraph (b) (3) if the lawyer thought what the client was going to do was just stupid. A member responded that the lawyer must live with client decisions in most cases and should not be permitted to withdraw unless he has a fundamental disagreement. A Reporter noted that the American Law Institute's Restatement of the Law Governing Lawyers attempts to define "imprudent" narrowly. The Commission agreed that the Restatement approach would not be appropriate in a disciplinary rule.

A member observed that Comment [7] does not help clarify what constitutes a fundamental disagreement. He felt that the new term should be explained.

A member noted that "repugnant" basically means morally repugnant or legally dubious. He agreed with the proposal in this draft of leaving in "repugnant" and deleting "imprudent." He stated that lawyers have different standards but this change would reduce the use of this Rule as a basis for a lawyer to withdraw. He did not feel it was possible to define "fundamental disagreement" precisely. **There was unanimous agreement to approve paragraph (b) (3) as proposed in this draft.**

The Commission agreed with a suggestion that paragraph (b) be restructured so that the second half of the introductory phrase would become subparagraph (1) and each subsequent subparagraph would be renumbered.

A Reporter pointed out the addition of "unforeseeable" in subparagraph (5), noting that courts have essentially written this into the Rule.

A member felt that the paragraph (c) should include both the proposed new sentence and the sentence the Reporter proposed deleting. There was a consensus to keep both sentences.

The Commission agreed with a suggestion that the word "wish" in the fourth sentence of Comment [3] be changed to "request" or "require."

The Commission next reviewed paragraph (d) and Comment [9] regarding retaining liens. Several members felt that the Comment was not in accord with the law in many jurisdictions. **The Commission unanimously agreed with a motion to delete the proposed changes in paragraph (d) and Comment [9] and return to the current Model Rule.**

The Commission agreed with the Reporter's suggestion to delete Comment [10].

A member pointed out that the last sentence of Comment [7] may need to be reconsidered after the Commission reviews Rule 1.2. Another member added that a client may have the authority to make a decision under Rule 1.2 but the lawyer may still have a fundamental disagreement. There was a consensus to delete the final phrase of the sentence as being too broad.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

IV. Rule 2.1

The Reporter advised the Commission that the only suggested change is an addition to Comment [5] highlighting that when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client about other forms of dispute resolution. The Reporter stated that the Commission had voted against including a provision in the Rule text that would require lawyers to inform clients of alternate forms of dispute resolution in cases involving litigation. The Reporter felt that a reminder of obligations under Rule 1.4 would be appropriate in the Comment.

A member felt that it was inappropriate to single out dispute resolution when there are many things about which a lawyer may have to advise a client under Rule 1.4. He suggested that the word "necessary" in the new sentence be changed to "appropriate." **The Commission voted to approve the draft as written by the Reporter.**

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

V. Rule 2.3

The Reporter advised the Commission that the change in paragraph (a)(2) was suggested by the Section of Business Law and is also the position of the American Law Institute's Restatement of the Law Governing Lawyers. They feel that consent should not be required for the many routine evaluations that pose no risk to the client.

A member argued that situations often appear to pose no risk at the outset but then something negative is found in the evaluation. Another member asked if implied authority in Rule 1.6 was sufficient to cover this issue since if something unanticipated came up the lawyer would have to inform the client. He questioned if there was any situation contemplated in Rule 2.3 that is not covered by implied consent in Rule 1.6. He felt that paragraph (a)(2) should refer to Rule 1.6.

Another member observed that the word "undertake" in paragraph (a) is curious. He noted that the client retains control until the evaluation is delivered. A Reporter pointed out that in practice an agreement following a complex negotiation might say that the lawyer will provide an opinion to a third party; the client would not necessarily give informed consent in the traditional sense. An observer added that "provide" was a better word than "undertake" in paragraph (a).

A member pointed out that a major reason for this Rule is to draw attention to a unique function of lawyers other than litigation.

A member proposed restructuring the Rule as follows:

paragraph (a): current (a)(1);

paragraph (b): proposed (a)(2);

paragraph (c): proposed (b).

Several members commented that the structure of the Rule should be reviewed but the standard should remain unchanged. A member added that there should be no implication that this Rule applies a test that is different from Rule 1.6. Another member questioned the need for the Rule. Several members felt that this Rule is useful for practitioners even though it may be redundant. The Commission requested that the Reporters prepare a revised draft for the next meeting.

VI. Rule 1.11

The Chief Reporter advised the Commission that even though Rule 1.11 had been approved for distribution for public comment, the Reporters found one issue that should be reviewed. The drafting Reporter stated that the issue is the scope of disqualification under the Rule. He noted that Rule 1.11(a) provides that, absent consent, a former government lawyer may not represent a client in connection with a matter in which the lawyer participated personally and substantially as a government lawyer. He added that Rule 1.11(b) provides that a former government lawyer must maintain confidential information consistent with Rules 1.6 and 1.9(c). He indicated that the issue for discussion is whether the requirement in Rule 1.9(c) expands the number of cases in which the lawyer would be disqualified.

A Reporter noted that a sentence has been added to the end of Comment [3] to indicate that the former government lawyer's ability to act in a subsequent matter is determined solely by paragraph (a) and not by Rules 1.6 and 1.9(c). The Reporter explained that a Commission member has said the sentence is confusing because it is inconsistent with a recent ABA Ethics Committee opinion.

A Commission member suggested that, if the proposed new sentence remains in Comment [3], it should be amended to read, "A former government lawyer's ability to act in a subsequent matter is determined by 1.11(a) alone and not by Rules 1.6 and 1.9(c)." The member felt that, without the change, the sentence could be interpreted to apply to lawyers who had previously worked for the government in a non-legal capacity.

A member pointed out that the Hazard and Hodes treatise takes the position that Rule 1.11(a) is an overflow section to cover situations not covered by Rule 1.9(a), e.g., subsequent representations that are not adverse to the government. She stated that an ABA Ethics Committee opinion disagreed with that position and said that Rule 1.11(a) is the sole conflict of interest provision applicable to former government lawyers. She added that the opinion also stated that former government lawyers have over and above that a general obligation of confidentiality under Rules 1.6 and 1.9(c) that may result in their disqualification. Although the

member participated in drafting the opinion, she now believes it does not adequately reconcile the two Rules and may in fact be erroneous.

A Reporter observed that the problem under discussion applies beyond former government lawyers; a lawyer may not be prohibited from representing a client under Rule 1.9(a) or (b) but may have confidential information as described in Rule 1.9(c). She added that courts have the power to disqualify in appropriate situations.

Another Reporter pointed out that one practical implication of a decision that Rule 1.9(c) applies to former government lawyers is that those lawyers would never be able to undertake representations against the government. He felt that the former government lawyer should not be limited unless the lawyer was substantially involved in the matter while in government.

An observer suggested that this issue should be addressed in black letter rather than the Comment. A member argued that the government should not be treated differently from other clients and that the government has the option of consenting.

Another member argued that there should not be separate standards for disqualifications and discipline. He felt that the Commission might indicate that there are other considerations in a disqualification matter than whether there has been a violation of a particular Rule. He added that two other problems should be considered. First, the concept of "matter" must be seen as different when talking about a public official. He felt that it would be a horrible result if the generality of a government lawyer's work bars all future representations in that area after leaving the government. Second, the concept of confidentiality is different in a private client like General Motors than in the Department of Justice. He concluded that a qualified definition of confidentiality for information acquired while in government would limit the scope of preclusion when applying Rule 1.9(c) so that it would not be too broad.

Another member noted that all provisions applicable to government lawyers should be located in Rule 1.11, even if the Rule restates provisions in Rule 1.9. Other members agreed with that approach.

A member indicated that a new ABA Ethics Committee opinion discusses when a former in-house counsel can take cases adverse to the lawyer's former employer. She indicated that the cases are split and very fact-sensitive, e.g., did the lawyer have information about general corporate strategy or a specific matter.

The Commission agreed that the Rule should not be circulated for comment at this time and asked the Reporters to prepare a new draft in light of this discussion.

VII. Rule 3.1

The Reporter reviewed several proposed changes in this draft: the addition of the duty to make reasonable inquiry (to eliminate any incentive for the lawyer to remain ignorant of the weaknesses of the client's case); the elimination of the term "good faith" in favor of the more

objective "non-frivolous;" the addition of a prohibition on actions taken for the primary purpose of harassing or maliciously injuring a person; the addition of a Comment about a criminal defense lawyer conducting the defense so as to require the prosecution to prove all elements of the offense; and the addition of a Comment regarding the filing of an *Anders* brief in a criminal matter.

A member argued that a lawyer should be able to engage in activity in which he is entitled to engage even though the primary purpose of doing so is to harass. Others felt it was not appropriate to do so. Some thought that such action could be categorized as frivolous. A member pointed out that the Model Code provided that if there was any legitimate reason for an action it was not frivolous. An observer stated that it is not possible for disciplinary counsel to prove "primary purpose." **A motion was made and seconded to leave the statement in Comment [2] even though it is discrepant from the text. The motion passed.** The Commission agreed that the phrase "if the client desires to have" should be deleted. A member requested that the Reporters consider finding a word other than "harassment."

A member suggested that the last phrase of Comment [5] be eliminated because state law and practice would dictate whether or not the lawyer must give notice to the prosecutor. The Reporter explained that the Comment meant to point out that the limitation in paragraph (b) does not apply to motions and defenses filed by criminal lawyers but only to the right to plead not guilty and make the prosecution prove the elements of the offense. Another Reporter pointed out that under this Rule a lawyer would not have to file notice of withdrawal of an alibi defense unless it was frivolous. The Commission voted to delete the last phrase of Comment [5] beginning with "and must give notice.... ."

A motion was made to delete all of Comment [5] because it restates the text of the Rule. The motion failed for lack of a second.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

VIII. Rule 3.2

A member advised the Commission that this was included in the Model Rules at the suggestion of the American College of Trial Lawyers. The Reporter stated that, if writing on a blank slate, all three Reporters would prefer the alternative language presented in the Reporter's Observations: "A lawyer shall not materially delay a proceeding unless the lawyer reasonably believes that the delay is necessary for a fair adjudication of the matter in dispute." A member observed that the alternative provides an objective rather than a subjective evaluation.

Several members noted phrases in the Comment that are not clear, such as "convenience of the advocates." Others noted that the Rule does not seem to be broken and should probably not be altered.

A member said that when this Rule was adopted many commentators indicated that the phrase

"consistent with the interests of the client" would be used as an escape valve and that it has in fact been used that way.

Several members felt that the phrase "securing a fair adjudication" would have to be defined if it is used. The Reporter indicated that the intent of the proposed change is to have a reasonable lawyer determine whether the client's interest in delay is legitimate.

It was moved and seconded to return to the current Model Rule text. The motion passed. The Commission reviewed the proposed changes in the Comment as well as the proposed Tennessee Comment and decided to make no changes from the current Model Rule.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

IX. Rule 1.17

The Reporter indicated his preference for deleting this Rule. He stated that it was adopted to provide a means for lawyers who want to retire or otherwise leave the practice of law to realize some economic benefit from the practice they built. He noted that partnership agreements provide a way to do this that is not available to solo practitioners. He stated that a solo practitioner might bring on a new person and then slowly phase out of practice or use a forwarding agreement which would require the consent of each client. He stated that Rule 1.17 allows the sale of an entire practice with some conditions.

The Reporter stated that, in addition to the above, under Rule 1.5(e) (as amended) a lawyer may divide fees with a new lawyer if the selling lawyer assumes joint responsibility for the representation. He felt that this provision provided a means for a lawyer to sell a practice without Rule 1.17. He explained that some differences between the two provisions are that Rule 1.5(e) does not require the seller to leave the practice of law and that the seller is not required to sell his or her entire practice. He noted that one perceived benefit of Rule 1.17 is that it adds a presumption of consent to the change of lawyers if a client does not object within 90 days of receipt of notice.

A member stated that there seems to be an impression that a lawyer would have no residual responsibility after a sale under Rule 1.17. He argued that the lawyer would still be responsible. Another member felt that the Rule is not clear on this point and is misleading. Several members felt that the Rule does not provide adequate client protection. One member noted that, if several people are interested in buying the practice, each would want to review the files, which raises confidentiality issues. Another member felt that clients should be made aware of their alternatives. He felt the Rule should focus on the client's case rather than the lawyer's practice. A member voiced concern over the provision relating to fee agreements. An observer asked if a lawyer should have to tell a client that the practice might be for sale.

The Commission asked the Reporters to consider these consumer protection issues and prepare

another draft for the next meeting.

X. Rule 5.4

The Reporter explained that the proposed draft is comparable to the rule in the District of Columbia which allows partnership with nonlawyers who perform professional services that assist the organization in providing legal services to clients. The Reporter indicated that he used the 10-year-old D.C. rule as a model in order to put the issue before the Commission. He noted that a major difference between the D.C. rule and this proposal is that this draft provides that the partnership or organization have "a" purpose of providing legal services rather than "its sole" purpose.

A member asked if the proposed change would require extensive changes in other parts of the Rules. The Reporter indicated that any necessary changes would not be difficult but that the main stumbling block for these types of organizations or partnerships is imputation. Some members questioned the need for this change since lawyers are already free to establish relationships with other professionals to deliver services either directly or through affiliations.

A member observed that adopting something like the D.C. rule does not solve the problem presented by multidisciplinary firms. He felt that the real problem is the regulation of lawyers who are employed by other organizations such as accounting firms. He added that it would be unproductive for the Commission to discuss the issue at this time. Another member agreed, stating that the legal profession should think about how to bring into its "tent" the many lawyers who practice in multidisciplinary settings. He stated that such lawyers currently argue that they are not practicing law or that they are providing legal services to the firm's accountants, not its clients. He feels it is preferable to include these individuals in the profession and call them lawyers, similar to the process that evolved with in-house counsel. He noted that while in-house counsel have some special considerations with respect to professional independence, they do a great deal to keep corporations attentive to their legal obligations.

Another member argued that unless some change is made to the imputation rules lawyers in accounting firms will continue to engage in civil disobedience.

Several members argued that Rule 5.4 is beneficial apart from any consideration of MDP. Others agreed but felt that any change to Rule 5.4 would be interpreted as related to the MDP debate. Several members felt that further discussion should be deferred pending developments with the ABA Multidisciplinary Practice Commission. **A motion was made to have the Commission state that its position is to leave Model Rule 5.4 unchanged. A motion was then made and seconded to table the prior motion. The motion to table the prior motion passed.**

XI. Rule 5.7

The Reporter indicated that he had not proposed any changes in this Rule. He felt that it would be best to consider it when Rule 5.4 is next discussed. An observer suggested that the Commission look carefully at the definition of "law-related service."

XII. Rule 3.3

The Reporter indicated that this Rule has been brought back to discuss two issues raised at the last meeting. First, the Commission had asked the Reporters to consider limiting paragraph (b) to situations where the witness knows his or her testimony is false. The Reporter stated that this draft suggests using the term "deliberately falsified evidence" to capture this limitation but added that all three Reporters would prefer to keep the current Model Rule language in paragraph (b). A Reporter explained that under the proposed draft, a lawyer may call a witness in a situation where the lawyer knows that the testimony will be false but the witness believes the testimony is true. Under the current Model Rule, the lawyer could not call the witness. A Reporter stated that the proposed change would make it easier for lawyers to avoid the Rule by arguing that they didn't know the witness knew the testimony was false.

An observer pointed out that under the proposed Rule, a disciplinary counsel would have to prove what the lawyer knew about what the witness knew which would be impossible. He agreed that the current Model Rule should not be changed. The Commission agreed to return to paragraph (b) of the last draft, including moving paragraph (c) back into paragraph (b). The Commission agreed that a Comment on the meaning of "false" was not needed.

The second issue for consideration was a broadening or reformulation of the current provision regarding disclosure necessary to avoid assisting a criminal or fraudulent act by the client. The Reporter indicated that proposed paragraph (d), which replaces Model Rule paragraph (a)(2), presents a more positively formulated requirement and is not limited to acts by the client. It also proposes expanding the disclosure requirement to "unlawful" conduct rather than "criminal or fraudulent" conduct. A member felt that the draft was not clear that the paragraph applies to conduct in conjunction with a proceeding. The Reporter indicated that he would add a general introductory modifier for the whole Rule and one for paragraph (d). The Commission agreed to limit the applicability of the paragraph to "criminal or fraudulent" conduct.

An observer asked if the Commission would address whether an arbitration was a "tribunal." The Chief Reporter responded that the Commission had tentatively decided that court-annexed arbitration or mediation would be included in the definition of tribunal.

The Commission asked the Reporter to prepare another draft for the next meeting incorporating this discussion.

XIII. Presidential Initiatives

The Commission discussed steps it could take to advance President Bill Paul's diversity initiative. A member suggested reaching out to all minority bar associations to ensure their participation in the review of the Model Rules. A member who also belongs to the Commission on Opportunities for Minorities in the Profession indicated that he would ask that Commission if there were particular issues it wanted to bring to the attention of Ethics 2000. Another member suggested working closely with the General Practice Section and the Standing Committee on Solo and Small Firms since many minority lawyers practice as solos or in small firms. A Reporter added that the Commission should carefully consider whether to amend Rule 8.4 to

make it a disciplinary offense to engage in unlawful discrimination.

The Commission decided to send a letter to President Paul about its consideration of these issues. A member asked staff to collect information on state studies regarding discrimination, racism or sexism in the court system so the Commission can consider any recommendations contained in those reports.

XIV. Rule 4.1

The Reporter asked the Commission to consider whether "material" should be in both paragraphs (a) and (b). The Commission has voted to remove it from Rule 3.3. Her recommendation was that it be left in (a) but deleted in (b). A member made the case for leaving it in both paragraphs, saying that conduct under Rule 4.1 needs additional restrictions since it is not carried out under the supervision of the court. The Reporter replied that use of "material" as a qualifier simply leads lawyers to claim that any misstatements were not material.

A member suggested that "material" should be left in both paragraphs of the Rule. Several disciplinary counsel observing the meeting agreed strongly. **A motion to leave "material" in both paragraphs (a) and (b) passed.**

The Reporter proposed the deletion of "unless disclosure is prohibited by Rule 1.6" in paragraph (b) since Rule 1.6 as proposed by the Commission no longer prohibits this type of disclosure. She also suggested adding "or is required by law" to bring this Rule in line with the Commission's proposed Rule 1.6. A member was concerned that assisting a client with a criminal or fraudulent act would be interpreted too broadly. The Reporter replied that this term is also used in Rule 1.2 and should be defined, perhaps in the Terminology section.

A member stated her belief that the proposed draft seems to expand the obligations imposed on a lawyer under Rule 1.6. An observer agreed and pointed out that the lawyer's assistance of a crime or fraud would already be sanctionable under Rule 1.2. The Reporter replied that this provision is intended to help lawyers understand their obligations.

A member said that Rule 1.6(b)(2) gives greater permissive leeway than Rule 4.1 and characterized the provisions in Rule 4.1(b) as surplus. He did not believe the Rule should be amended and said that lawyers have to confront their clients in these situations. A member said the Commission should be careful about making duties mandatory and suggested that the Commission review Rule 1.6(c) which requires disclosure in some situations.

The member made a motion to make no changes to the black letter of Rule 4.1. The Reporter said that paragraph (b) seemed to be more confusing than helpful and suggested deleting it. Several Commission members said that would be politically foolish. A member suggested the Commission was overanalyzing the interplay between Rules 1.6 and 4.1. Confidentiality rules vary widely by jurisdiction, and the message sent by deleting paragraph (b) would differ according to those variations. He suggested flagging this issue for jurisdictions to address on their own. A member suggested that Comment [3] be expanded to explain the relationship

between Rules 1.6 and 4.1. **The motion to make no changes to the Rule's black letter passed.**

The Commission approved the proposed changes to Comment [1]: adding a reference to "partially true but misleading statements," substituting "omissions that are tantamount to an affirmative false statement" for the vague "failure to act" and adding a cross-reference to Rule 8.4.

New Comment [1a] is designed to address the "tester" situation, in which misrepresentation is used to gain information on possible misconduct. The Intellectual Property Section had previously asked the Commission for language in the Rule's black letter allowing lawyers to act as or direct testers. The Commission decided at its last meeting that it was not comfortable allowing knowing misrepresentations by a lawyer or an investigator working under the supervision of a lawyer. The new Comment tells lawyers they can advise their clients on lawful uses of misrepresentation.

A member moved the Comment be deleted. He did not believe lawyers should be involved in these practices. Another member said the statement was innocuous and wondered how lawyers could be forbidden to advise on lawful activities. The Reporter pointed out that lawyers would be able to advise in this area whether or not it is specifically mentioned in the Rules. Another member suggested that the problem is with the use of the loaded term "deception." He suggested "lawful means of investigation."

The motion to delete proposed Comment [1a] passed. A member wondered if there was anything the Commission could do to help the Intellectual Property Section with the issues they presented. He suggested that the ABA Ethics Committee consider writing an opinion on the subject.

The addition to Comment [2] is intended to clarify which types of statements would be deceptive in negotiation. A member wondered if there were enough abuses that a distinction needed to be made. Another member agreed that the Comment did not need to be changed, saying that the definition of misrepresentation can be very specific to a situation or region. **A member moved that the additional language be deleted with the exception of "ordinarily" in line 41. The motion passed.**

A member wondered if a sentence could be drafted in place of the language just deleted to inform lawyers of the possibility of misrepresentation in this area. Another member suggested mentioning the issue in the reporter's explanatory memo when the draft goes out for comment. A member said that misrepresentation is defined in criminal and tort law and any new language should reference such law. Another member mentioned the issue of a lawyer's fiduciary duty and the possibility that the absence of speech could be a misrepresentation.

The Reporter asked for guidance on including a definition of assisting in a crime or fraud. A member was against clarifying the term. He said it would be difficult to craft a different standard for disciplinary purposes than civil liability and that it could create a false feeling of safety for

lawyers. The real risk in such instances is a lawsuit, not a disciplinary proceeding.

A member clarified that the changes proposed in Comment [3] would not be made because the accompanying changes were not made in the black letter.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XV. Rule 4.3

The primary change proposed for this Rule is restoring to the black letter from the Comment the prohibition on giving advice to unrepresented persons contained in the Model Code. The Reporter believes that some lawyers attempt to intimidate and overreach when dealing directly with lay people. The Reporter explained that the proposal amended the original Model Code language by limiting the prohibition to legal advice. The proposal also clarifies the scienter requirement in the Rule.

A Reporter wondered if, under the proposed language, almost all statements by a lawyer to an unrepresented person would be construed as advice. A member agreed that the proposed language went too far. Another member said that it is in the profession's interest not to treat an unrepresented opponent the same as a represented one. Another member agreed, saying that, although the change from the Code to the Rules formulation was not meant to change the meaning, the current Rules do not specifically prohibit giving advice.

A member said that a lawyer's only obligation should be to ensure that the unrepresented person realizes that the lawyer is not representing him or her.

A member proposed: 1) removing the third and last sentences from Comment [2] and 2) leaving the proposed changes in the black letter and removing the brackets. The Commission discussed how class and educational differences sometimes factor into lawyer abuses of this type but agreed that it would be difficult to factor them into the Rule. A member also noted the interplay between this Rule and Rule 4.1.

The motion to remove the third and last sentences from Comment [2] and leave the proposed changes in the black letter, removing the brackets, passed. The Commission asked the Reporter to consider the suggestion that a lawyer has an obligation to inform the unrepresented person that the lawyer is not representing him or her.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XVI. Rule 6.1

The Reporter prepared a Rule for discussion requiring lawyers to perform pro bono work. Some Commission members were in favor of the proposal, saying that voluntary pro bono is not meeting the needs for these services and that the proposal should go out for comment to encourage debate. Others said pro bono is not really an ethics issue, that enforcement would be

difficult, that the proposal would never pass the House of Delegates and that fulfilling pro bono obligations would be an unfair burden on solo and small-firm lawyers. **A motion to keep pro bono voluntary as in the current Model Rule failed.** A member pointed out that the title of the Rule will need to be changed.

The Commission discussed the number of hours to be required yearly. One member said that 50 hours is the current ABA standard and a requirement of fewer hours would be seen as backing off. Other members suggested putting the number in brackets and leaving the amount to individual jurisdictions.

A member questioned the "two-tier" structure of the Rule, which seems to value the activities enumerated in paragraph (1) more highly than those in (2). The Commission debated the extent to which lawyers should be encouraged to provide their pro bono services only to people of limited means. The Reporter stated his belief that if pro bono is mandatory in the Rule, the details of how lawyers fulfill their obligations should be flexible.

A member pointed out that as presently drafted the proposal requires 50 hours of service but only encourages lawyers to provide those services to people of limited means. The Reporter noted that if the Commission wants to require that the majority of pro bono service be provided to people of limited means, the last part of paragraph (a) would have to read, "In fulfilling this requirement, the lawyer shall"

A member moved that "should" in line 7 should not be replaced with "shall." The motion passed. Another member moved to delete paragraph (2)(iii). The motion was defeated, but the Commission agreed to remove the paragraph's second sentence.

A member moved that paragraph (b), on carrying forward into successive years pro bono hours worked in excess of the minimum, should be moved to the Comment. The motion passed.

The Commission discussed paragraph (c) on fulfilling pro bono obligations by a monetary donation or allowing some members of a firm to fulfill the obligations of others. The Reporter said he had picked the buyout figure of \$50 per hour for discussion purposes. Some members pointed out that buyout and burden-sharing provisions can be unfair to lawyers who do not practice in large firms.

The Commission discussed the extent to which the "implementation" ideas in paragraphs (b), (c) and (d) should be contained in the Comment. **A motion that only paragraph (a) appear in the black letter, with the other material to appear in the Comment, passed.** Several members noted that the phrase "to the poor" should be deleted from paragraphs (b) and (c).

A member pointed out that, although the Commission had relegated the details to the Comment, it still had to decide what it would recommend. The Reporter was in favor of presenting a complete package covering all these issues, while another Reporter spoke in favor of simply flagging the issues. The Commission asked the Reporter to prepare another draft for the next

meeting incorporating this discussion.

XVII. Rules 6.2 and 6.4

The Reporter is not proposing any changes to these Rules. He believes they could be deleted with no adverse effects but does not believe it is worthwhile since the Rules are not causing any enforcement difficulties. The Commission agreed to make no changes and circulate a memo to that effect for public comment.

XVIII. Rule 6.3

The Reporter indicated that he wanted to discuss the Rule with the Commission's Access to Legal Services Subcommittee. His proposal is that a lawyer may render legal advice in a pro bono setting even if the advice would constitute a conflict of interest in another setting. If the matter goes beyond advice, the lawyer must do a conflicts check. If that reveals a conflict, the lawyer must discontinue work and help obtain other representation for the client. Under this proposal, the client against whom the pro bono representation was adverse would not be given notice.

A member favored non-imputation of conflicts rather than allowing lawyers "time out" from their practices for pro bono work. He did not believe low-income clients would be well served by advice from the other side's lawyer.

A Reporter suggested that another approach would be to allow the lawyer to do a limited conflicts check at the time of taking the pro bono representation; the representation would only be prohibited if the lawyer "knew" there was a conflict and the lawyer could be screened later. A member was against this. Another member said that Model Rule 1.11 offers a model of how to handle the screening and notice.

A member was unsure of the need for this provision. He thought the lack of notice to clients about the adverse pro bono representation would preclude lawyers from participating in these types of programs. The Reporter suggested handling these cases under the new prospective client rule. There was discussion on how far beyond an initial consultation a lawyer's actions are likely to go in a pro bono program.

A member stated that she preferred the approach of relaxing the rules on imputation for public sector lawyers and treating them more like government lawyers. Another member asked the Reporter to prepare two drafts for the next meeting: one would take the imputation approach and the other would see if this problem can be handled by the prospective client rule.

XIX. Rule 7.1

The Reporter proposed that the standards in paragraphs (a), (b) and (c) be moved to the Comment to pare down the limits on protected commercial speech to those absolutely necessary to protect the public. The Commission discussed the fact that lawyer advertising is a politically hot issue and many in the bar do not want to see the Rules changed.

A member moved that the proposed language [seeking employment as a lawyer] in line 4 be deleted. The motion passed.

The discussion turned to the proposed addition of a scienter requirement. An observer noted that this would be perceived as a major change in some jurisdictions. **A motion to return the first sentence to its current formulation passed.**

A member inquired on the rationale behind moving the standards in paragraphs (a), (b) and (c) to the Comment. The Reporter explained that they are just examples of false and misleading and are seen by some as overly broad. The ABA Advertising Commission has expressed concern that they are inappropriately restrictive. A disciplinary counsel observing the meeting said he did not believe moving the language to the Comment would cause enforcement difficulties, although any change in the advertising rules will be perceived by some as a relaxation. **A motion to move paragraphs (a), (b) and (c) to the Comment as proposed passed.**

A motion to add [knowingly] to the first sentence failed.

A member proposed deleting the clause beginning with [such as] and ending with [a specific matter] in the first sentence of Comment [3]. There was consensus on adopting this proposal.

The Reporter noted that the last sentence of Comment [2] would be deleted because of the changes in the Rule's black letter.

A member suggested that the phrase [the lawyer knows or should know] should be deleted in the second sentence of Comment [1].

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XX. Rule 7.2

A member pointed out that the correct term is [worldwide web site] not [internet website].

The Commission then discussed the type of records that should be kept of website changes. A disciplinary counsel observing the meeting said that no one ever asks to review the records required by the Rule. He thought the type of documentation to be kept should be tailored to the medium used and wondered if having to keep a copy of all website changes would be a disincentive to update sites. **A member said that record-keeping requirements had a good effect on an organization and moved that the first of the Reporter's proposed brackets in paragraph (b) be adopted. The motion passed.**

A member queried why the first sentence of paragraph (a) does not end after [services] in line 1 or [media] in line 2. While the term [public media] seems to exclude private media such as letters or e-mail, private media would seem to be included in the broader [written, recorded or electronic communication] used at the end of the sentence. The Commission discussed which

types of communication are meant to be covered by the Rule and agreed to remove the clause beginning with "such as" and ending with "or internet website" in line 2.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XXI. Rule 7.3

The Reporter explained that he had added and bracketed the term "live-time electronic" in the description of types of contact in paragraph (a). The ABA Commission on Advertising has suggested that chatroom conversations be treated the same as those by telephone. A member suggested that the distinguishing factor should be whether the contact was in-person. The chair of the Commission on Advertising, newly renamed the Commission on Responsibility in Client Development, was observing the meeting. He said that the term "real time" should be used and that there was potential for harm in chatroom conversations. The Commission agreed with this suggestion.

A Reporter suggested removing lawyers from the list in paragraph (a)(1) of people who could be freely solicited since they should be able to enjoy the same privacy as others. The Commission agreed.

The Commission discussed including organizations in paragraph (a)(1). The concern was that noncommercial enterprises or small businesses could be abusively solicited. **The Commission voted in favor of removing the reference to organizations from paragraph (a)(1).**

The Commission agreed with the Reporter's suggestion to add "close personal friend" to paragraph (a)(1).

The Reporter discussed his intention with this draft to tie the prohibition of solicitation to the potential risk of harm. He suggests replacing the current language in paragraph (a) on pecuniary gain with a new paragraph (a)(2) on solicitation under the auspices of an organization. For example, a lawyer could solicit clients for a lawsuit being filed by the American Civil Liberties Union, even if the lawyer expected the case to be profitable. An observer thought the current Rule would be easier to enforce.

The Commission discussed whether the current Rule was unconstitutional in this regard. Several members argued against changing the Rule. They believed this is an area where the Rules vary greatly by jurisdiction and that it would be impossible to fine-tune the Rule on a national level. An observer disagreed, saying that this is an area where the Commission could show leadership. He believed the standard should be that all solicitation was allowed unless it was abusive. The Commission on Responsibility in Client Development has recommended that there be no change.

A Commission member moved that the current language on pecuniary gain be left in paragraph (a) and that paragraph (a)(2) be deleted. The Reporter should add language to the Comment to alert lawyers to the constitutional issues. The motion passed.

The Reporter stated that he was not in favor of his proposed paragraph (b)(3) concerning a moratorium on contacting accident victims. **A motion to delete paragraph (b)(3) passed.**

The discussion turned to paragraph (c) on disclaimers. There is much jurisdictional variation on this issue, and the Reporter suggested deleting the paragraph. Several members spoke in favor of disclaimers and the format laid out in the Rule. The Commission agreed to keep the paragraph with the changes proposed by the Reporter to account for electronic communications.

The Reporter proposed deleting paragraph (d) on prepaid legal services plans. It has been suggested that it is unconstitutionally restrictive. The Reporter believes that if it was deleted, the inference would be that lawyers can legitimately participate in such plans. Another Reporter pointed out that there has been a history of jurisdictions attempting to restrict participation and that the paragraph is necessary as an affirmation of lawyers' rights to do so. **A motion to leave paragraph (d) in the Rule passed.**

The Commission discussed regulation of the intermediary organizations that offer such plans. A staff member suggested that this has similarities to multidisciplinary practice issues. The Reporter said that the proposed Tennessee rules are attempting to codify the ABA Ethics Opinion on this subject. A member said it would be difficult to regulate these organizations and that the Rules should not be changed.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XXII. Rule 7.4

The Reporter did not propose any changes to this Rule. The Commission agreed to make no changes and circulate a memo to that effect for public comment.

XXIII. Rule 7.5

The only change being proposed to this Rule is the addition of [website address] in paragraph (b) as suggested by the Commission on Responsibility in Client Development. The Ethics 2000 Commission agreed to a member's suggestion that this addition be made in the Comment.

The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XXIV. Rule 5.6

The Reporter is proposing replacing [partners or associates] in Comment [1] with [lawyers] to point out that practice restrictions are not an issue unique to law firms. A member pointed out that corporate counsel often use non-compete agreements and that this change would point out to them that such agreements are invalid. The Commission agreed with the proposed change.

The Commission agreed the Rule was ready to go out for public comment after final approval on

the Commission listserv.

XXV. Rule 3.6

The Reporter stated that the amendment to paragraph (a) is intended to clarify that the point of view to be used is that of a reasonable lawyer. The Commission agreed with the proposed change.

The Reporter explained that the proposed amendment deleting subparagraph (6) from the list of suspect subject matter in Comment [5] is based on an opinion of the Delaware Supreme Court, which decided it is "somewhat excessive" to require prosecutors "to add some sort of ritualistic statement about the presumption of innocence every time an arrest is made." He added that, although Delaware did not do so, deletion of this subparagraph would logically lead to an addition to paragraph (b)(7)(i) of a reference to "the offense with which the accused has been charged."

A member pointed out that the list in Comment [5] was moved from the text to the Comment in an effort to "clean up" the Rule after the Gentile decision. Another member stated that the ABA Ethics Committee came as close as possible to limiting pretrial publicity. He suggested that paragraph (b)(7)(i) was redundant because the prosecutor could state these things under paragraph (b)(1). The Commission agreed with the deletion of paragraph (b)(7)(i).

A motion to delete subparagraph (6) in Comment [5] failed for lack of a second. A member pointed out that the subparagraph should be moved to the text or deleted since it is not appropriate to limit the Rule in the Comment. A motion was made and seconded to move subparagraph (6) in Comment [5] to the text. A member suggested that the language is not appropriate for a disciplinary rule. **The vote on the motion to move subparagraph (6) in Comment [5] to the text was 4 in favor and 4 opposed.** The Commission asked the Reporters to consider this Rule along with Rule 3.8 and to consider alternative proposals for the next meeting.

The Reporter stated that the proposed modification of paragraph (c) would require the lawyer to judge the prejudicial effect of prior publicity by its effect on the proceeding rather than on the client. **The Commission agreed by a vote of 4 to 3 that the proposed limitation was consistent with the purpose of the Rule.** An observer who is a federal prosecutor indicated that his office would prepare comments relating to this issue and Rule 3.8. **Upon reconsideration the Commission decided unanimously against amending paragraph (c).** The Commission asked the Reporter to prepare another draft for the next meeting incorporating this discussion.

XXVI. Rule 3.7

Some members were concerned that lawyers do not understand that Rule 3.7 is for the protection of the tribunal and can prohibit a lawyer from testifying even if the lawyer is not prevented from doing so under Rule 1.7.

A member suggested adding an introductory sentence to Comment [1] explaining that

protection of the tribunal and conflicts of interest are both considerations. He added that Comment [4] could further explicate the relationship between Rules 1.7 and 3.7. The Commission agreed that with these changes to the Comment the current text of the Rule would not need to be changed. The Commission asked the Reporter to prepare another draft for the next meeting incorporating this discussion.

XXVII. Rule 8.1

The Commission decided to delete the proposed new sentence at the end of Comment [3] that stated that a lawyer must openly assert the fact of a non-disclosure of a client confidence. The Commission agreed to keep the cross-reference to Rule 1.6 and to add a cross-reference to Rule 3.3. The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XXVIII. Rule 8.2

The Reporter explained that the proposed change in paragraph (a) is to make this Rule parallel to Rule 3.6. A motion to leave the Rule unchanged from the Model Rule failed 6 to 2.

A member suggested deleting paragraph (b). There was a consensus not to do so. The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XXIX. Rule 8.3

The Reporter noted that comments from disciplinary counsel indicated that lawyers do report because of the obligation to do so even though there are not many prosecutions for failure to report. An observer pointed out that a recent study in Illinois found that approximately 9.8% of complaints are from lawyers and result in 16 - 20% of the hearings.

The Commission agreed with the proposed change from the passive to the active voice. The Commission did not agree with the proposal to change "shall" to "should."

The Reporter proposed expanding paragraph (b) to refer to a judge's "integrity, impartiality, or fitness for office in other respects..." The Commission voted not to make the change.

The Commission agreed with the proposed change at the end of paragraph (c) because the reference to attorney-client privilege is incorrect. The Commission agreed the Rule was ready to go out for public comment after final approval on the Commission listserv.

XXX. Public Comment Drafts

The Commission reviewed the list of drafts that are ready to be distributed for public comment: Rules 1.13, 1.16, 2.1, 3.1, 3.2, 4.1, 4.3, 6.2, 6.4, 7.1, 7.2, 7.3, 7.4, 7.5, 8.1, 8.2, and 8.3.

XXXI. Future Meetings

The Commission's next meetings will be December 10 - 12 in Amelia Island, Florida, and February 11 - 13 in Dallas in conjunction with the ABA Midyear Meeting. The Commission

made a tentative decision to have a meeting March 24 - 26.

Respectfully submitted,

Charlotte K. Stretch
Susan Campbell

MEETING OBSERVERS

William T. Barker, American Insurance Association
Robert L. Berner, Jr., ABA Section of Business Law
John Berry, State Bar of Arizona
Chris Bostick, ABA Section of Real Property, Probate and Trust Law
Laura Chastain, National Organization of Bar Counsel
Robert Creamer, Attorneys' Liability Assurance Society
Steve Csontos, Department of Justice
Mary C. Daly, ABA Commission on Multidisciplinary Practice
Robert F. Drinan, ABA Standing Committee on Professionalism
William Freivogel, Attorneys' Liability Assurance Society
John M. Gardner, National Association of Bond Lawyers
Arthur Garwin, ABA Professionalism Counsel
Donald Hilliker, ABA Standing Committee on Ethics and Professional Responsibility
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Brian Redding, Attorneys' Liability Assurance Society
Bob Saltzman, National Organization of Bar Counsel
William P. Smith III, National Organization of Bar Counsel
Raymond Trombadore, ABA Standing Committee on Professional Discipline
William Wernz, Association of Professional Responsibility Lawyers