

ATTACHMENT 3

Transcripts of the Public Hearings Held
for Proposed Rules in Batches 1, 2 & 3

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

--000--

Commission Members

HARRY SONDEHEIM, Chair, Hearing Moderator

STAN LAMPORT

ELLEN PECK

IGNAZIO RUVOLO

MART TUFT

Commission Consultant

KEVIN MOHR

State Bar Staff

RANDALL DIFUNTORUM

LAUREN MCCURDY

I N D E X

	<u>Page</u>
Proceedings	4
Introductory Remarks	4
Public Comments:	
MICHAEL JUDGE, Public Defender, Los Angeles County, California Council of Chief Defenders, California Public Defenders Association	8
GARY WINDOM, Public Defender, Riverside County, California Council of Chief Defenders, California Public Defenders Association	25
DOREEN BOXER, Chief Public Defender, San Bernardino County	37
TIMOTHY CHANDLER, Chief Public Defender, Alternate Public Defender, San Diego County	40
EDWARD POLL, past chair, Executive Committee, Law Practice Management and Technology Section; incoming co-chair, State Bar Council of Section Chairs	44
JUDGE JOHN KENNEDY, California Judges Association	53
CAROL LANGFORD, Law Offices of Carol Langford	57
RICHARD FALK	72
KAREN HAWKINS, Katin, Muchin, Rosenman	101
WENDY PATRICK, Co-chair, San Diego County Bar Association	119
RICHARD FALK	131
Adjournment	147
Certificate of Reporter/Transcriber	148

P R O C E E D I N G S

--o0o--

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

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

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

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

This proceeding is being audio recorded and will be transcribed by a certified court reporter. Please speak clearly and state your name when you are recognized and called to the podium, and if there are any intervening speakers, we ask that you restate your name so that your 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 SONDEIM: 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 SONDEIM: 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 LAMPORT: 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 supervisorial 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 LAMPORT: This is Stan Lamport.
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 LAMPORT: Let me ask you a
16 second question.

17 When I was reading your letter --

18 CHAIR SONDHEIM: That's Stan Lamport.

19 COMMISSION MEMBER LAMPORT: I'm sorry. I was
20 hoping the tape would somehow -- Stan Lamport -- 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 LAMPORT: 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 LAMPORT: Okay.

20 CHAIR SONDHEIM: 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 SONDEIM: 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 SONDEHEIM: 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 SONDEHEIM: Right.

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

11 CHAIR SONDEHEIM: 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 SONDEHEIM: 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 so. 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 LAMPORT: 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 LAMPORT: No.

12 (Laughter)

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

15 (Laughter)

16 COMMISSION MEMBER LAMPORT: 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 SONDHEIM: 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 SONDHEIM: 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 SONDEHEIM: 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 SONDEHEIM: 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 SONDEIM: 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 LAMPORT: 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 LAMPORT: Sure.

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

10 COMMISSION MEMBER LAMPORT: 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 LAMPORT: 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 SONDEHEIM: 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 LAMPORT: This is Stan Lamport.

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 LAMPORT: 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: -- 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 SONDEHEIM: That's fine. Very helpful.
10 Thank you.

11 Any further questions?

12 COMMISSION MEMBER LAMPORT: 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 LAMPORT: -- 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: -- 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 LAMPORT: 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 LAMPORT: -- 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 LAMPORT: 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 LAMPORT: 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 LAMPORT: Yeah.

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

25 COMMISSION MEMBER LAMPORT: 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 LAMPORT: 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 LAMPORT: 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 SONDHEIM: 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 SONDHEIM: 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 LAMPORT: This is Stan Lamport.
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 LAMPORT: This is Stan Lamport.

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 LAMPORT: 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 LAMPORT: -- 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 LAMPORT: This is Stan Lamport.

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 LAMPORT: -- 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 LAMPORT: You can tell -- from
23 Stan Lamport'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 LAMPORT: 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 SONDEHEIM: 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 SONDEHEIM: Right.

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

13 CHAIR SONDEHEIM: 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 SONDEIM: 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 SONDEHEIM: 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 SONDEHEIM: No.

10 MR. FALK: No?

11 CHAIR SONDEHEIM: 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 SONDEHEIM: 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 LAMPORT: Just so you --

24 MR. FALK: Yeah.

25 COMMISSION MEMBER LAMPORT: This is Stan Lamport.

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 LAMPORT: 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 LAMPORT: 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 LAMPORT: -- 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 LAMPORT: 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 SONDHEIM: 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 SONDHEIM: Is there anybody else, Lauren,
21 that you're aware of?

22 MS. McCURDY: No.

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

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

1 CHAIR SONDHEIM: Yeah. We'll stay here till two
2 in case somebody does come over.

3 (Off-the-record pause)

4 CHAIR SONDHEIM: This is Harry Sondheim. It is
5 now two o'clock, and there appear to be no additional
6 persons who desire to speak. And therefore, we will close
7 this public hearing.

8 Thank you very much for coming.

9 (At 2:00 p.m., the public hearing was adjourned.)

10 --o0o--

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CERTIFICATE AND DECLARATION OF TRANSCRIBER

2 --000--

3 I, Cynthia M. Judy, a duly designated transcriber,
4 do hereby declare and certify under penalty of perjury under
5 the laws of the State of California that I have transcribed
6 the recording of the State Bar of California public hearing,
7 held on October 7, 2006, in Monterey, California, and that
8 the foregoing pages constitute a true, accurate, and
9 complete transcription of the recording, to the best of my
10 ability.

11
12 Dated: November 10, 2006_____
13 CYNTHIA M. JUDY, Transcriber

STATE BAR OF CALIFORNIA

PUBLIC HEARING
PROPOSED AMENDED RULES OF PROFESSIONAL CONDUCT

September 29, 2007
2:00 p.m. - 4:00 p.m.

Anaheim Marriott Hotel
Anaheim, California

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

--000--

Commission Members

HARRY SONDEHEIM, Chair, Hearing Moderator

MART TUFT, Commission Co-Vice-Chair

PAUL VAPNEK, Commission Co-Vice-Chair

JOELLA JULIEN, Commission Member

ROBERT KEHR, Commission Member

State Bar Staff

RANDALL DIFUNTORUM

LAUREN MCCURDY

I N D E X

	<u>Page</u>
Proceedings	4
Introductory Remarks	4
Public Comments:	
ROSS SIMMONS, San Diego County Bar Association Ethics Committee, The Simmons Law Firm	8
Adjournment	27
Certificate of Reporter/Transcriber	28

P R O C E E D I N G S

--o0o--

(Time noted: 2:05 p.m.)

MR. DIFUNTORUM: Welcome. Good afternoon. It's about 2:05 on Saturday, September 29th, 2007, and we are here for a public hearing of the State Bar of California to receive testimony on proposed amendments to the Rules of Professional Conduct.

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

The State Bar staff has caused notice of this hearing to be issued by several methods, including a posting at the State Bar Website, email notifications to approximately 14,000 interested persons, and a press release to the media.

This proceeding is being audio and video recorded and will be transcribed by a certified court reporter. Please speak clearly and state your name when you are recognized and called to the podium, and if there are any

1 intervening speakers, we ask that you restate your name so
2 that your comments can be properly attributed.

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

8 This public hearing has been authorized by the
9 Board of Governors' Committee on Regulation, Admission and
10 Discipline, which oversees the work of the Commission. The
11 Commission is a sub-entity of the Board of Governors. The
12 public hearing, as well as the 90-day public comment period
13 on the proposed rules, which ends on October 26th, have been
14 authorized by the Board.

15 I want to introduce to you the chair of the
16 Commission, Harry Sondheim. He is a two-time chair of the
17 State Bar's Committee on Professional Responsibility. He is
18 the retired head of the Los Angeles County District
19 Attorney's Appellate Division, where he founded their Ethics
20 Responsibility Wing. And will yield the remainder of this
21 proceeding to Mr. Sondheim.

22 CHAIR SONDEHEIM: Good afternoon. As we get
23 started, I'd like the other members of the panel here to
24 introduce themselves. Randy has indicated what I currently,
25 so to speak, do, which is Commission work. And I'm retired

1 from the Los Angeles District Attorney's Office, but I do a
2 few other legal things. I'm on a committee that prepares
3 jury instructions in criminal cases, otherwise known as
4 CALJIC, and occasionally I do some expert witness testimony
5 or depositions. That's my legal career at the present time,
6 and I do lots of other things unrelated to the law.

7 So, let me start from my right here. JoElla
8 Julien.

9 COMMISSION MEMBER JULIEN: I am JoElla Julien. I
10 am the public member on the Commission, the only public
11 member on the Commission. And I'm a retired educator.

12 COMMISSIONER MEMBER TUFT: Mark Tuft. I'm one of
13 the two vice-chairs, along with Paul Vapnek, and along with
14 Paul, I'm a co-author of *The Rutter Group Practice Guide on*
15 *Professional Responsibility*. My practice centers on
16 representing lawyers in all kinds of matters involving the
17 law of lawyering. And I have the good pleasure of serving
18 with many of my colleagues on many committees involving
19 state and local bar activities.

20 CHAIR SONDEHEIM: And to my left is Paul Vapnek.
21 And we'll go down the line here.

22 COMMISSION MEMBER VAPNEK: I'm Paul Vapnek. As
23 Mark mentioned, I'm a co-vice-chair of the Commission. I've
24 been a member of the Commission since its inception about
25 twenty -- roughly twenty years ago. I -- my practice

1 involves primarily intellectual property law, but I also
2 have a substantial practice giving advice to lawyers,
3 representing lawyers in State Bar matters, and doing work in
4 disqualification motions and what have you.

5 Bob?

6 COMMISSION MEMBER KEHR: I'm Bob Kehr, another
7 member of the Commission, former member and former chair of
8 COPRAC, former member -- I'm sorry -- current member and
9 former chair of the Los Angeles County Bar Ethics Committee.
10 I'm a partner in a Los Angeles firm called Kehr, Schiff, and
11 Crane, and my practice is business corporate, a non-
12 litigation attorney. And I, of course, also advise lawyers
13 on professional responsibility issues and serve as an expert
14 witness and consultant with litigation.

15 CHAIR SONDHEIM: I'm aware that Ross Simmons is
16 going to be talking for however long or however short it may
17 be. And I just wonder if there's anybody else here in the
18 room who does want to speak at this time.

19 (No response)

20 CHAIR SONDHEIM: Well, Ross, I think the floor is
21 yours for as long as you want. We also have some written
22 material --

23 COMMISSION MEMBER TUFT: Don't take until dinner
24 time.

25 (Laughter)

1 CHAIR SONDHEIM: We also have some written
2 material presented to us by Ross Simmons on behalf of the
3 San Diego County Bar Association.

4 MR. SIMMONS: I've been asked by the fire marshal
5 to make sure that crowds don't congregate near the doorways.

6 (Laughter)

7 MR. SIMMONS: Obviously, now that you've received
8 my written materials, I'm a little chagrined that I'm here
9 at a public comment section, and yet four of the five rules,
10 I think, are quite clearly in bold print saying there's no
11 comment. So, surely I should have followed the lead of my
12 colleagues and perhaps deferred comment as well.

13 I guess more -- more than anything else, I wanted
14 to let you know that on behalf of San Diego County, we're
15 extraordinarily grateful. We understand how -- what a
16 burden this is on us once a year, to rally around and try to
17 support you and provide you with productive feedback. And
18 every time that this comes through, it certainly is not lost
19 on us, the amount of time that you're spending on it away
20 from your practices and away from your personal lives,
21 candidly, and the importance of what we're all striving
22 towards. And so, if I'm here for nothing else, it's to
23 publicly comment that we are -- we, from San Diego County,
24 are extraordinarily grateful for all the efforts of everyone
25 on the Commission and thank you very much.

1 In my handout, I've just briefly listed what our
2 time constraints are. And as you can see from the San Diego
3 County Bar timing, we have plenty of time -- and we
4 appreciate that -- before the public comment deadline. And
5 we will come in on time. And, of course, it makes sense for
6 me to also inject that my board of directors -- the board of
7 directors of my association will not be reviewing this until
8 the 10th of October, so, at some level, everything I say is
9 of no consequence, but they are -- they listen to my sage
10 wisdom periodically, and so I'd like to think that there
11 will be no -- nothing coming up that we're not aware of.

12 Also, consistent with my written materials, the --
13 as it relates to the substantive comments that we'll be
14 providing, the only one that we were really -- that we had
15 substantive comment related to -- and I say substantive, I
16 suspect, loosely, because we're not necessarily coming to
17 the Commission asking -- or providing advice as to what our
18 alternatives should be, but we had some concerns as to some
19 of the vagueness with respect to proposed 1.8.3, which is a
20 carryover from existing Rule 4-400. And my materials
21 summarize it briefly.

22 And as you can see from my materials, I don't
23 believe that our comments are going to -- I think we just
24 perhaps need to share the lament, and to the extent that we
25 revisit that rule, perhaps there is something we could do in

1 the comment. For instance, the American Bar Association
2 equivalent actually has reference to a rule of reason, and
3 there is a sort of a standard within the comments that I
4 don't think was carried over into the California rules. And
5 I suspect, even though -- even though we could -- it's a
6 vague rule that would give some strength to the vague terms
7 that we have, I suspect that it's something that the
8 Commission might want to consider, adding a comment that
9 perhaps we consider that ABA concept. Is it a rule of
10 reason? Is it a reasonableness standard? What is that
11 standard?

12 Words such as "substantial," obviously, are moving
13 targets. "Modest" is a moving target. And I -- and as it
14 relates to that, those vagueness, to have a standard
15 somewhere within the comments, I think, would be helpful.
16 Even if it's vague, it would be something that perhaps
17 practitioners could put their arms around.

18 The other thing that was a comment as to this rule
19 in particular was this -- this idea of "attempting to
20 induce. And it seems to me -- certainly the discussion at
21 our committee level was focusing on this idea that
22 "inducing" is sort of an inexact thing in its own right, but
23 even stretching that further to an "attempt to induce" is --
24 is perhaps detaching it even further. And I think that the
25 ABA -- and I may be wrong -- I don't have the ABA rule in

1 front of me -- but I think the ABA rule -- and, in fact,
2 this is something that I could seek input from and take back
3 to my committee -- when we approach rules like this, as
4 we're all aware, there are language differences between the
5 American Bar Association Model Rules and California rule
6 equivalents, or at least parallel rules. And I think that
7 this would be one of them. I believe that the American Bar
8 Association has used the word "solicit," whereas, in our
9 context, we're using the word "induce."

10 And, I guess, in micro fashion, one might say, you
11 know, is "attempt to induce" -- is there any benefit to sort
12 of perhaps gravitating to an ABA equivalent and, in all
13 candor, taking full advantage of whatever authority might be
14 developed under the auspices of that authority, as opposed
15 to creating some sort of an "attempt to induce," and not
16 necessarily having any benefit of precedent with which to
17 judge exactly what that's intended to do, especially if you
18 take away -- you know, I'm not a criminal practitioner, but
19 I always think of *mens rea* and whether an "attempt" requires
20 some sort of attempt, whether -- is there such a thing as
21 negligent attempt to induce? So, I mean, you know, we're
22 all lawyers, and if we extrapolate that term in isolation, I
23 think we end up being essentially dogs chasing our tails
24 around.

25 So, that would be a term that perhaps we would

1 like to see revisited. And, in fact, to be more specific,
2 we might -- I suspect that our eventual response to the rule
3 when it's presented in writing will make specific reference
4 to the American Bar Association equivalent. And whether
5 it's this rule -- and I would say that in the more macro
6 fashion, to close that loop -- whether there are reasons to,
7 you know, really examine, I suspect, you know, as exhaustive
8 as the Commission's work is, obviously -- I'm sure that
9 you've had occasion to do that as every rule has come and
10 gone -- but in this instance in particular, I believe that
11 it may make some sense to do just that.

12 That's the only comment I have. As you can see,
13 the other four will be one-page responses that say "Approve
14 without comment."

15 I will say -- I don't know if anybody else wants
16 to speak -- I'm -- boy, I sure don't like getting involved,
17 from a personal standpoint, but I would -- I should tell the
18 Commission that this will be one of the first times that I
19 will personally be responding to a rule, and that will be
20 the proposed 8.4.1. I had -- I personally -- and, again,
21 now I'm taking off my San Diego County hat and I'm putting
22 on my -- The Simmons Firm hat, and I would like to say that
23 I -- perhaps my response is fifteen years in the making, and
24 I certainly won't bore anyone with it -- the analysis will
25 be what it is, and it certainly is an important topic --

1 it's an important subject matter as it relates to the
2 California Rules of Professional Conduct -- in opposing, or
3 at least speaking to that rule, I would like to make it
4 clear to the Commission that I would -- I'm not suggesting
5 anything contrary. It really is a procedural, sort of an
6 intellectual trouble that has been haunting me now for
7 fifteen years since its adoption. And since it's being
8 carried forward into the new rules, I thought this might be
9 an opportunity for me to -- oh, I don't know -- finally
10 purge myself and speak my mind on that. But that will come
11 in the written comment, and there's no need to be -- to
12 spend a whole lot of time on that now.

13 Are there any questions? Yes, please.

14 COMMISSIONER MEMBER TUFT: Is it your suggestion,
15 then, that 1. -- this rule on gifts, 1.8.3(a) read "induce
16 or solicit a client to make a substantial gift"? Is that --
17 is that what you're suggesting? Are you suggesting take out
18 "induce" as well?

19 Your comment is focused on "attempt to induce."
20 I'm wondering if -- you referenced the ABA "solicit."

21 MR. SIMMONS: Right.

22 COMMISSIONER MEMBER TUFT: Would -- if the rule
23 read "induce or solicit a client to make," what would you --
24 what would you think of that?

25 MR. SIMMONS: Well, the comment at the committee

1 level, at least at this stage of our development, is not --
2 is the question about moving to the "solicit" standard as
3 opposed to the existing language. I don't believe that our
4 comment is developed enough -- far enough to say "induce and
5 solicit." And candidly, I -- you know, we do have a team
6 that's still working on this and is trying to determine
7 exactly what -- if there is a substantive difference.

8 And I know that the Commission has to wrestle with
9 the semantics of these rules, almost on an hourly basis. Is
10 there a true difference between "induce" and "solicit"? And
11 I suspect you folks have talked about it. And that's the
12 discussion we're having at our site.

13 So, I -- Mark, I don't necessarily have an answer
14 to that right now.

15 COMMISSIONER MEMBER TUFT: Yeah. I would just --
16 I mean, let -- is it "induce" or "attempt to induce"? I'm
17 just trying to take --

18 MR. SIMMONS: It's not -- the "attempt to induce"
19 is -- "induce" is a troublesome word, I think.

20 COMMISSIONER MEMBER TUFT: Okay. So, you're
21 troubled with "induce" as well.

22 MR. SIMMONS: Right. And as we go -- as we
23 extrapolate from it, "attempt to induce" starts becoming
24 even more distracted.

25 COMMISSIONER MEMBER TUFT: Okay. You're troubled

1 with both.

2 MR. SIMMONS: What we would probably be coming
3 back with would be, "A lawyer shall not solicit or attempt
4 to solicit" --

5 COMMISSION MEMBER TUFT: Okay.

6 MR. SIMMONS: -- as perhaps an alternative to the
7 word "induce.

8 COMMISSION MEMBER TUFT: Got it. Thank you.

9 CHAIR SONDEHEIM: Let me just say, on behalf of the
10 Commission, that we really do appreciate the work that your
11 bar association puts into looking over our shoulder, so to
12 speak. And we look forward to whatever comments you may
13 have, and any drafting, especially, is important to us, so
14 that if you have any particular suggestions as to how the
15 language might be changed, that has proven to be helpful in
16 a number of instances where persons who are not on the
17 Commission have provided us with possible drafting language,
18 and the Commission, in fact, has adopted that in some
19 instances. So, I encourage you to continue doing that.

20 Let me ask you a question to follow up Mark.
21 Going beyond the word "induce," I take it there's some
22 trouble with using the word "substantial." But that's in
23 the ABA rule as well. And then, when the ABA tries to
24 explain it, they say, "A lawyer may accept a gift from a
25 client if the transaction meets general standards of

1 fairness." I'm not sure if that would be any more
2 comforting than perhaps what we have done.

3 I'm just wondering, when you do consider that and
4 you try perhaps to figure out what is a substantial gift, if
5 you can give us any language other than what I've just read,
6 which I don't think gets us, personally, very far in trying
7 to figure out what is "substantial."

8 MR. SIMMONS: It's sort of a defining it by
9 saying, "I know it if I see it" kind of thing, which, of
10 course, doesn't resolve the "substantial" issue. I know
11 that part of our discussion, Harry, really resolved around
12 -- or revolved around the idea that I don't necessarily --
13 have never focused on that language -- this is what we're
14 going on now -- before, but I think that part of the idea of
15 -- perhaps this is a rule where the California unique terms
16 are things that, you know, perhaps may have outlived their
17 usefulness. And to the extent I -- we have a standard
18 embodied -- and I -- you know, as I sit here and look at
19 that standard, I'm not sure how long it's been on the books
20 at the ABA level, and it is, obviously, as frail as the
21 words themselves. Now, having said that, to be able to take
22 advantage perhaps of 49 or what-not other jurisdictions who
23 might be looking at this same rule, and see what their
24 authorities are, which we may or may not follow, I think
25 that the -- in words where there are vagueness and

1 confusion, or at least the potential for confusion, that the
2 more sort of tribunals that have the opportunity to look at
3 very specific language, I think that there's some benefit to
4 that. And I think that that's the tenor of our comment.

5 I don't think we'll cure the ills, nor, I think,
6 are they ills that are capable of being cured, because there
7 are elements of sliding scales when you're talking about
8 gifts to clients. And as a consequence, how do you quantify
9 that? And, you know, that -- the ABA language does not do
10 it artfully perhaps, but, then, perhaps it will be the
11 tribunals within those jurisdictions that will help us as we
12 move forward as well.

13 COMMISSION MEMBER VAPNEK: Some of that language
14 to which you've commented appears in current Rule 4-400,
15 "induce" -- not "attempt to induce" -- and "substantial."
16 And that has been around at least since 1992. I don't know
17 what, if any, prosecutions there have been under the rule.
18 But I -- I just wonder if we should -- since the rule -- the
19 very language has been around for fifteen years, whether we
20 should look to change it, as opposed to keeping what has
21 been in existence for fifteen years without any apparent
22 problems, at least none that were called to the attention of
23 the Commission.

24 MR. SIMMONS: Well, it's the Commission's -- it
25 has to be the Commission's lament: the problem with asking

1 for public comment is you may actually get it.

2 (Laughter)

3 CHAIR SONDEHEIM: And we appreciate it, believe me.

4 MR. SIMMONS: And I -- and I hear the comment, and
5 I think that there is some strength -- and, in fact, I mean,
6 I believe that perhaps the dearth of public speakers today,
7 and, in fact, the dearth of response in the body of my own
8 work, or at least our association's own work, where we're
9 speaking to one instead of five rules, is the fact that
10 there -- there is the very element to which you speak.
11 There's this element of, "Well, it's been there for a long
12 time; all we're doing is we're assigning a new number to it
13 and nipping and tucking." And -- and I can say, you know,
14 having -- having led a team on some of the other rules that
15 we have approved, if I were king for a day, I -- I suspect
16 that I would have nipped and tucked differently. But having
17 said that, based upon what they were and, as you say, sort
18 of the inertia of the fact that they pre-existed and perhaps
19 even may have their own authority, let's just go ahead and
20 leave them as is. And so, some of our no-comment provisions
21 reflect that very comment.

22 It was this team and it was the committee that
23 thought this might be a good time to revisit this rule in
24 particular, only because, since there is this sort of
25 opportunity to, you know, red-line against the ABA rules,

1 let's renumber and things like that, let's really take a
2 look. Again, the Commission, I suspect, has already done
3 precisely that. But it's -- it's our process, perhaps being
4 three, six, nine months behind your process, where we're
5 saying, "Well, we've looked at this and, you know, really,
6 some of the things that the ABA is doing might be some
7 things we might want to consider in this context."

8 So, I think that the comment -- I mean, if the --
9 if the rule were to go forward in its current state, would
10 San Diego be sending a lob to COPRAC saying, "Hey, let's
11 change 4-400?" I think the answer would probably be no. To
12 the extent that we are given this valuable opportunity to
13 participate in the process that you folks have undertaken,
14 those are the comments that we make.

15 CHAIR SONDEHEIM: Let me just follow up on Paul's
16 comment. And that is, if you or other members of the San
17 Diego Bar Association are aware of any problems that have
18 been created as a result of the word "induce," we'd be
19 interested in hearing about that, because that might be
20 persuasive that maybe that's not the right term. Maybe the
21 ABA has found the right term.

22 MR. SIMMONS: Well, and I don't -- I would say
23 that the, you know -- we have a saying in the San Diego
24 County Bar, and I suspect it can be empathized with all of
25 you, that anecdote is the bane of the ethicist, you know,

1 because there's always an anecdote, and there's always the
2 hypothetical that could be -- and I know that that's the
3 things that we are talking about.

4 What I will do is I'll go back to the group, and
5 if there has been an actual situation that has implicated
6 those kinds of topics, then it's something that we'll --
7 we'll be -- we'll pass along.

8 CHAIR SONDEHEIM: Yes. JoElla, did you want to say
9 something?

10 COMMISSION MEMBER JULIEN: Thank you. If you are
11 capable of telling me in layman's terms, what is it your
12 group expects? How do they expect for this particular rule
13 to work? What is your feeling about gifts from clients?
14 What should it be, just in simple, layman's terms?

15 MR. SIMMONS: I think it's from a policy
16 perspective. And, in fact, the worksheet we have internally
17 reflects that the policy is a sound policy. And we want to
18 restrict, you know, or at least monitor, I think perhaps is
19 the better word, this idea of gifts from clients. And so,
20 from just a -- strictly a policy perspective and the fact
21 that this rule is going towards that policy, I would say
22 that we have nothing to contribute as it relates to how that
23 rule works. It needs to be here. We want it in place. And
24 from a policy perspective, we're behind the Commission 100
25 percent.

1 If there are, you know, concerns from our
2 association's perspective, it would only be in the context
3 of -- let me give you a hypothetical -- if I were to be
4 talking to a client about the ability -- you know, the value
5 of tax deductions, and then, the next day, I got a check in
6 the mail which was a tip, which was a tax deduction, was
7 that an inducement? Was it an attempt to induce? It's sort
8 of the -- I want to say, and it's an overused expression --
9 but it's the practitioner in the trenches, that when they're
10 in an everyday environment, are these terms -- do they have
11 meaning to them? And if -- if they are doing nothing wrong,
12 if they're really purposefully trying to comply with the
13 rules, what our objective is is to give them the tools, and
14 by way of the words, that allow them to do that.

15 And so, it is -- it's almost a shared problem
16 between us and the Commission. It's -- we do want to
17 provide rules. And from my worksheet, you can see we
18 haven't given you any new words, so we share your lament.
19 And I suspect that when we get it to the written response,
20 we'll be able to come back with some very specific
21 proposals, even a standard in the comment, which may be no
22 better, but every little bit helps, I suspect.

23 So, from a policy perspective, I think we're
24 reading off the same figurative page.

25 COMMISSION MEMBER JULIEN: Thank you.

1 COMMISSION MEMBER TUFT: I have two questions for
2 you. The term "solicit," which is the ABA word, is your
3 recommendation that that might be better than "induce,"
4 motivated from an interest of uniformity in our rules? By
5 uniformity, I mean there is the ABA rule and there's the
6 rules of various jurisdictions that adopt the ABA rules, and
7 then there's California. Are you motivated from trying to
8 create greater harmony, or do you think there's another
9 reason why "induce" is better -- excuse me -- "solicit" is
10 better than "induce"?

11 MR. SIMMONS: It's difficult to speak for a group,
12 isn't it? You know, I -- yeah, I don't know that
13 necessarily I could --

14 COMMISSION MEMBER TUFT: Speaking for yourself.

15 MR. SIMMONS: Yeah. I don't necessarily -- speak
16 for myself.

17 CHAIR SONDEHEIM: We'll deem this your own personal
18 views.

19 MR. SIMMONS: I will say that -- I will say that
20 the -- I don't know that we want to go to the ABA rules,
21 Model Rules, solely for the sake of going to the ABA Model
22 Rules. But the converse, I suspect, is also true: we don't
23 necessarily want to stay away from the ABA Model Rules
24 solely for the purpose of staying away from the ABA Model
25 Rules.

1 So, in looking at the word "solicit" and in
2 looking at the word "induce" -- and again, I mean, break out
3 Webster's dictionary, right? -- the word "solicit" does tend
4 to have some -- is a little bit better to -- at least in our
5 view, of quantifying. "Inducement" can be -- it seems to us
6 to be a very subjective word. And, in fact, I mean, I -- I
7 suspect that -- I'm standing here before you, and I suspect
8 I'm inducing you to try to bring this to a close now. So,
9 at some level --

10 (Laughter)

11 MR. SIMMONS: At some level, the word "induce" is
12 something that -- I mean, we're persuasive lawyers, that
13 we're a persuasive --

14 COMMISSION MEMBER TUFT: Well, we try to be.

15 MR. SIMMONS: Yeah, exactly. We're --

16 COMMISSION MEMBER TUFT: We'll let you know if you
17 succeed.

18 MR. SIMMONS: We're a persuasive sort of
19 profession. And as a consequence, when we look at the word
20 "induce," "induce" is pretty much what people pay us the
21 amount they pay us to do. It's precisely to induce certain
22 outcomes. And so, everything could be construed to be
23 inducing something else.

24 Now -- now, that may be precisely what it's
25 intended to be. Well, don't induce gifts. It could be that

1 black and white.

2 COMMISSION MEMBER KEHR: But, Ross, could I --

3 MR. SIMMONS: "Solicit" seems to be a little bit
4 more of an affirmative, a little bit more tangible, a little
5 bit more objective than the word "induce."

6 Go ahead. I'm sorry.

7 COMMISSION MEMBER KEHR: I was -- I was going to
8 raise the same point that Mark was going to raise, in a
9 slightly different way. It seems to me, from -- from what
10 you were saying before, that -- that if the Commission chose
11 the word "induce" because it is broader, your reaction was
12 the breadth of it is -- has less clearly defined edges. And
13 the word "solicit" might strike you as being narrower and
14 more clearly defined, that there's something more strident
15 about, more emphatic about a solicitation than there is
16 about conduct that might be deemed to be an inducement. So,
17 perhaps if we were reaching for breadth, maybe what we got
18 were -- were unclear edges as a result.

19 COMMISSION MEMBER TUFT: Yeah. I think I hear
20 what you're saying, and -- and "solicit" seems to be more --
21 require more active perhaps action from the lawyer, versus
22 "induce," which may be implied, may be more subtle, I think
23 is what -- is what you're telling me.

24 Last, my second question -- and it's just a
25 suggestion, really, in your committee's consideration of the

1 right wording -- is whether or not -- certainly the ABA
2 comment suggests, anyway, that -- that there is an element
3 of undue influence in this rule. I don't know exactly how
4 our comment describes it, if at all, but if you read the ABA
5 comment -- and we keep parts of it, but not all of it -- for
6 example, we keep the language here, in the event -- due to
7 concerns about overreaching and imposition on the clients.
8 We always look behind the rule. What's the objective of
9 this rule? What is it -- what are we trying to prevent?
10 And if, in fact, one of the functions of this rule is to
11 prevent the overreaching and the undue influence aspect, is
12 "solicit" a better word than "induce"? And I don't -- I
13 don't expect an answer from you. But when you go back to
14 your committee, you might -- you might just give that some
15 thought if -- if you agree with the proposition.

16 MR. SIMMONS: Right. To tie it to -- really, to
17 tie it to the comment. I mean, I think one of the --

18 COMMISSION MEMBER TUFT: Right. What is the
19 function? What's the purpose of this rule?

20 MR. SIMMONS: Right.

21 COMMISSION MEMBER TUFT: What are we trying to
22 achieve by it?

23 MR. SIMMONS: Yeah.

24 COMMISSION MEMBER TUFT: So, that's all I had.

25 MR. SIMMONS: Okay.

1 CHAIR SONDHEIM: Anything further from the panel?

2 (No response)

3 CHAIR SONDHEIM: Anything further that you might
4 have?

5 MR. SIMMONS: Okay. Now I get to the real good
6 stuff.

7 (Laughter)

8 MR. SIMMONS: No, I -- literally, I do have
9 nothing else, and I appreciate the time that you've given
10 me.

11 CHAIR SONDHEIM: Again, we thank you for coming.

12 MR. SIMMONS: Okay. We'll see you -- probably see
13 you in a year, I suspect.

14 COMMISSION MEMBER TUFT: I hope so.

15 MR. SIMMONS: Thanks very much.

16 COMMISSION MEMBER TUFT: Or less -- less than
17 that, I hope.

18 CHAIR SONDHEIM: And hopefully, your communication
19 will be less than a year away.

20 (Laughter)

21 CHAIR SONDHEIM: Anyone else in the audience who
22 would like to speak today?

23 (No response)

24 CHAIR SONDHEIM: Then why don't we go off the
25 record for a short period of time? We'll see if anybody

1 else arrives.

2 (Thereupon, a short pause occurred off the
3 record.)

4 CHAIR SONDHEIM: We're back on the record again.
5 We've been waiting approximately fifteen minutes to see if
6 anybody else is interested in making any comments. And it's
7 about nine minutes to three at the present time. And unless
8 there is anybody in the room here who would like to speak,
9 I'm going to adjourn our public hearing.

10 Seeing no one who desires to speak, we will
11 adjourn the public hearing. We have looked outside to see
12 if there is anybody on their way, and there appears to be no
13 one.

14 So, thank you for -- those who are -- have been in
15 our audience. Have a good afternoon.

16 Off the record.

17 (At 2:52 p.m., the public hearing was adjourned.)

18 --o0o--

19

20

21

22

23

24

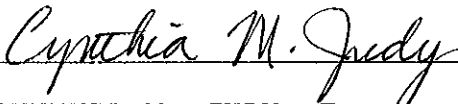
25

1 CERTIFICATE AND DECLARATION OF TRANSCRIBER

2 --o0o--

3 I, Cynthia M. Judy, a duly designated transcriber,
4 do hereby declare and certify under penalty of perjury under
5 the laws of the State of California that I have transcribed
6 the recording of the State Bar of California public hearing,
7 held on September 29, 2007, in Anaheim, California, and that
8 the foregoing pages constitute a true, accurate, and
9 complete transcription of the recording, to the best of my
10 ability.

11
12 Dated: October 22, 2007


13 CYNTHIA M. JUDY, Transcriber

STATE BAR OF CALIFORNIA

COMMISSION FOR THE REVISION OF THE
RULES OF PROFESSIONAL CONDUCT

---o0o---

PUBLIC HEARING
THURSDAY, MAY 22, 2008

---o0o---

REPORTER'S TRANSCRIPT OF PROCEEDINGS

---o0o---

Held at:

Hyatt Regency Hotel
Tahoe Room
1209 L Street
Sacramento, California

1 APPEARANCES

2 ---000---

3

COMMISSION MEMBERS:

4

5 HARRY SONDEHEIM

JEROME SAPIRO

6

KEVIN MOHR

RAUL MARTINEZ

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INDEX
2 ---000---

3		
4	Public Speaker	Page
5	MARTIN JAMES MARTINEZ	6
6	STEVEN LEWIS	28, 72
7	THOMAS GREENE	56

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 SACRAMENTO, CALIFORNIA

2 THURSDAY, MAY 22, 2008

3 ---000---

4 COMMISSION MEMBER MOHR: Good morning. My
5 name is Kevin Mohr. It's about 10:04 a.m. on Thursday,
6 May 22nd, 2008, and we are here for a public hearing of
7 the State Bar of California to receive testimony on
8 proposed amendments to the Rules of Professional
9 Conduct.

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

19 The State Bar staff has caused notice of this
20 hearing to be issued by several methods, including a
21 posting at the State Bar website, public notices in the
22 Daily Journal, the Daily Recorder, and the Sacramento
23 Bee; e-mail notifications to approximately 14,000
24 interested persons and a press release to the media.

25 This proceeding in being transcribed by a

1 certified court reporter. Please speak clearly and
2 state your name when you are recognized and called to
3 the podium, and if there are any intervening speakers,
4 we ask that you restate your name so your comments can
5 be properly attributed.

6 If you have any written materials that have not
7 been submitted, please hand them to Lauren McCurdy of
8 the State Bar staff. If there is anyone here that is
9 not signed in, we ask that you sign in with Lauren
10 before you begin to speak.

11 This public hearing has been authorized by the
12 Board of Governors' Committee on Regulation, Admission
13 and Discipline, which oversees the work of the
14 commission. The commission is a sub-entity of the Board
15 of Governors. The public hearing, as well as the 90-day
16 public comment period on the proposed rules, which ends
17 June 6th, have been authorized by the board.

18 I want to introduce you to the Chair of the
19 commission, Harry Sondheim, sitting to my left. He is a
20 two-time chair of the State Bar's Committee on
21 Professional Responsibility. He is the retired head of
22 the Los Angeles County District Attorney's Appellate
23 Division.

24 I will now yield the remainder of this
25 proceeding to Mr. Sondheim.

1 COMMISSION MEMBER SONDHEIM: As Mr. Mohr
2 mentioned, this meeting is being recorded -- is being
3 transcribed, also recorded, and eventually the
4 transcription of the meeting will be put into hard copy
5 and will be made available for all the commission
6 members so that whatever you say today will not only hit
7 the ears, so to speak, of the three of us sitting here
8 from the commission, that is, Jerry Sapiro and Raul
9 Martinez and Kevin Mohr, but also will be available to
10 the eyes of the other members of the commission.

11 With that, what I'd like to do is start, and I
12 think you're here on 1.5?

13 MR. MARTINEZ: Yes, sir.

14 COMMISSION MEMBER SONDHEIM: You are here, sir,
15 on --

16 MR. LEWIS: I have actually comments on several
17 of the rules. I have comments on 1.7 and 1.8.1.

18 COMMISSION MEMBER SONDHEIM: Let's start with
19 1.5.

20 MR. MARTINEZ: Distinguished members, my name
21 is Martin James Martinez.

22 Madam Court Reporter, I do tend to speak fast.
23 If I do, you will not insult me by telling me to slow
24 down.

25 I'm here basically to, I guess, post my

1 comments -- I guess, my objections to the proposed
2 rule. I'll begin with, I guess, a brief introduction.

3 My office is called Martinez Law Office. I was
4 admitted in California in 1981, admitted in New York
5 state 1991. I've been in private practice since the day
6 I passed the bar. My practice has pretty much been
7 sole, criminal defense, personal injury, and right now
8 I'm engaged in what's called the vaccine cases in
9 Washington, D.C. federal court. Approximately 50
10 percent of my practice is federal.

11 I'm a former professor of legal ethics in the
12 mid '80s. That's why I tend to like these type issue
13 because they're academic, but they force us all to look
14 at what we as practitioners do. I think whatever rules
15 are set forth, the 200,000 sworn members of our
16 profession have to follow.

17 I'm also a former duly sworn bar member on the
18 commission of criminal defense, was on a three-year
19 term. I'm a board certified criminal law specialist.
20 My colleague on the commission, Barry Tarlow had asked
21 me to come here expressing Barry's concerns about the
22 new rule.

23 COMMISSION MEMBER SONDHEIM: We all have copies
24 of that letter and have perused it.

25 MR. MARTINEZ: Thank you, sir. Most of the

1 points I have are pretty much my points incorporating
2 Barry's. My practice, I think, pretty much ties in
3 because I began my practice in the City of Los Angeles
4 for 13 years. Then I moved north, practiced in San
5 Francisco. I've practiced in Sacramento, Napa County,
6 Contra Costa County and Solano County. So I believe I
7 have a pulse of what I think best represents the sole
8 practitioner criminal defense lawyer.

9 My personal injury practice, I don't believe
10 this rule affects it whatsoever because a PI practice
11 has always been you settle a case, it's segregated.
12 From the day I passed the bar, that's clear.
13 Unfortunately, as we know, the PI practice has pretty
14 much drained -- there is no PI practice, for lack of a
15 better word. It's probably affecting the whole
16 profession.

17 At this point, this rule then, I think, it
18 applies to, I guess, anyone in business or practice who
19 takes a retainer from a client. Attorneys have always
20 engaged in the use of nonrefundable retainers.
21 Presently the Rule 4-200 does not address it.

22 But the way the new rule is written now, it
23 says you cannot enter into a nonrefundable retainer with
24 exception if it's for a true retainer; simply meaning,
25 you're hiring the lawyer to ensure that counsel will be

1 there and available. Very fine line. Very fine line.

2 For example, I mean, presently, due to the
3 economy, I can see my fees dwindling. I'll give you an
4 example. Last year a typical misdemeanor retainer would
5 be about 2500. Typical felony retainer would be about
6 5,000.

7 Now, the client gives me \$1500. The way I
8 conduct myself, I don't particularly like to withdraw as
9 counsel. I tell a client, you give me \$1500, we go to
10 trial, it probably will be more, triple, double,
11 whatever I figure at that point. That issue, have I
12 earned the \$1500 when the client sits down at my table?
13 Does that money go in my pocket or in the trust account?
14 Because the whole issue right now is really is a
15 retainer a true engagement retainer or an advance
16 retainer on costs.

17 Well, I argue against that because really I
18 understand why this has come up. This particular
19 problem is pretty much throughout the country, and I
20 believe the flagship case is from the jurisdiction I'm
21 also licensed in, New York state. In re Cooperman set
22 the tone with -- where the court said the court was
23 concerned, and I think rightfully so, of chilling a
24 client's right.

25 Simply, the client has given counsel \$1500.

1 Whatever reason -- as we know, in the attorney-client
2 relationship there's also a possibility of a sourness,
3 and the client wants their money back. The New York
4 court was concerned that, if it says nonrefundable
5 retainer, that the client will be forced to be stuck
6 with counsel not of their choice.

7 In addition, they also talked about misleading
8 the client by saying we -- you're supposed to spell it
9 out in writing, for example, this is a nonrefundable
10 retainer and these are the conditions. Client signs.
11 You're both at arm's-length. So, obviously, the court
12 was concerned in New York with those two issues,
13 chilling the right to counsel and misleading the
14 client.

15 In New York -- I might like their -- I like
16 that bar better, the dues are a third of what I pay
17 here. It's a volunteer bar. I'm admitted in the third
18 district for out of state attorneys. In New York state
19 you're not called before gentlemen such as yourself.
20 The court is my licensing agency. It's a different
21 standard.

22 But, rest assured, they don't have the
23 mechanism as we do in California of discipline. When I
24 first started practicing -- I think I pay now \$150 a
25 year. We pay every two years to the office of court

1 administration. But the disciplinary proceeding is not
2 like ours. You don't have a State Bar court.

3 Let me give an example. I, Joe Jones, hereby
4 retain Martin James Martinez to represent me in a drunk
5 driving case. The initial retainer is \$1500, of which
6 the balance is another \$1500 due on Friday.

7 You remember the Paper Chase, the TV series?
8 It was a movie. There was a professor of contracts. He
9 told the students, a contract is not worth the paper it
10 is written on if the parties do not believe in each
11 other.

12 That's the way I try to do it, it doesn't
13 always work, but I think it's our reputation -- I mean,
14 I've never had a bar complaint in my 27 years. The
15 reason being is, if a client is mad at me, I tell him
16 right there. If I can't deal with it, take your money
17 and get out of here.

18 I'm not going to -- if my client is truly
19 dissatisfied -- I make mistakes like everybody else.
20 I'm in trial in court all day. You're bound to make
21 mistakes. Clients are not always happy. But if I've
22 done all the work, I'm finished, I'm not going to give
23 the money back.

24 But the normal issue that will come up, maybe
25 three or four weeks into the case where the client is

1 dissatisfied. At that point, say, a client gave me
2 \$5,000. No matter where I put it in the calendar or my
3 retainer, I'm not entitled to some of it -- I'm entitled
4 to some of it, but I'm not entitled to all of it.

5 I think, among the members of our criminal
6 defense firm, we all pretty much apply to that.
7 Although if a criminal defense is basically a flat fee
8 because -- my clients, if I tell them hourly, they never
9 are going to pay me. You can even tell them \$75 an
10 hour, they're going to go through the sky.

11 Unfortunately, my clients are not that well
12 educated. Most of my clients are farm workers. My
13 retainer is always in Spanish because the Civil Code
14 requires that. I speak Spanish so I let them know.

15 COMMISSION MEMBER SAPIRO: Mr. Martinez, in
16 your fee agreement, have you described a partial refund
17 after three weeks or no refund after so long? Do you
18 spell that out in your fee agreement?

19 MR. MARTINEZ: I probably don't. I don't know
20 if I do. If they asked me that point, I probably would
21 give me some back.

22 Gentlemen, the bottom line is, if a client is
23 mad at me -- I'll give you a perfect example. I had a
24 case where I was trying a kidnap case here in
25 Sacramento. At the same time, I had a client that paid

1 me 750 to do, I think, a probation violation in Solano
2 county. I cannot be in two places at the same time.

3 I had a friend of mine who was a former
4 prosecutor in San Francisco who was in private practice,
5 I paid her partially my fee, she made the appearance for
6 me. The client was unhappy, said I hired you, not your
7 friend. I said, what can I do to make it better? I
8 want my money back. Here's your money back. I was out
9 the money I paid my friend.

10 Two things I could not interfere mentally with
11 a kidnap robbery trial that was taking place here in
12 Sacramento. Mentally you had to be clear for that. The
13 stakes were too high. At the same time, I fought for
14 the people because it was true, they hired me. I told
15 them I cannot be there. So I guess I take the hit.

16 I always give the benefit of the doubt to the
17 client. In PI, for example, I always make sure my
18 client gets a little more than I promised him.

19 COMMISSION MEMBER MARTINEZ: It sounds like
20 you're charging a flat fee as opposed to a nonrefundable
21 fee.

22 MR. MARTINEZ: Correct.

23 COMMISSION MEMBER MARTINEZ: There is a
24 distinction between a flat fee and a nonrefundable fee.

25 MR. MARTINEZ: I guess the bottom line is that

1 nonrefundable fee -- I'm here really for the abstract.
2 I'm really here because, like I said, the client always
3 has a right to recovery. If you never saw a client, you
4 have to give the money back. My primary concern of
5 being here is I do not want to see attorney-client money
6 go into the trust account.

7 COMMISSION MEMBER SONDEIM: Isn't that a
8 different issue, though? The issue here is, how do you,
9 in a sense, obtain your fee. The other issue is, what
10 happens to the fee when you obtained it.

11 There's a different rule that we're working on
12 right now which relates to what happens to the fee after
13 you get it because there are concerns and -- for
14 example, Mr. Tarlow raised the issue it could be seized
15 and so forth.

16 So that if we can put to one side for the
17 moment the question of what must be done with the fee
18 after you get it from the client and focus just on the
19 question of what type of fee, so to speak, are you going
20 to get, how are you going to designate it in your
21 agreement with the client. And if you say nonrefundable
22 but you really don't mean nonrefundable, why should you
23 say nonrefundable to a client who may now believe that
24 he or she can never get it back because it really isn't
25 nonrefundable. It is refundable. I think you've

1 indicated that.

2 MR. MARTINEZ: I understand that, Mr.
3 Sondheim. That's the next part of the argument. Whose
4 money is it? Because whether I want to give the money
5 back or not, I still want that option. Because if you
6 clearly say that's an advance retainer, that goes into
7 your trust account. That goes in your general account.
8 That goes in your firm's account.

9 And that's where the issue of -- right now I'm
10 involved in a federal forfeiture in Nevada, I'm involved
11 in one in San Francisco where they took over \$300,000 of
12 my client's money. The feds are notorious right now.
13 They're seizing -- I mean, on that particular Nevada
14 case, they found money and nothing else, they still
15 seized the money. F. Lee Bailey, a noted imminent
16 lawyer was disbarred for that issue of forfeited money.

17 So what I'm thinking the rule should really
18 decide whose money is it. If you look at the new rule
19 and say, okay -- say tomorrow I get a \$10,000 retainer.
20 I tell the client, okay, 3,000 is the true retainer,
21 7,000 is the advance retainer. That's the way the rule
22 would read. How else could you bifurcate what the rule
23 is. The new rule.

24 The old rule kept it silent. We, as members of
25 the member, have followed the spirit of that because the

1 old rule simply said you cannot charge an excessive fee.
2 That has not changed. We will be disbarred if we charge
3 excessive fees.

4 COMMISSION MEMBER SONDEIM: So isn't it
5 really a reasonable fee that is nonrefundable?

6 MR. MARTINEZ: Absolutely, sir.

7 COMMISSION MEMBER SONDEIM: So why call it
8 nonrefundable if, in fact, it is refundable? Doesn't
9 that in a sense mislead somebody who reads the words on
10 the document that you have that person sign? They're
11 thinking, perhaps I can never get this money back, and
12 that may be a factor in how much money they're going to
13 be able to afford.

14 MR. MARTINEZ: Mr. Sondheim, I have to agree
15 with you, sir. That's basically what the New York case
16 is talking about.

17 COMMISSION MEMBER SAPIRO: Can I ask you to go
18 back to that \$10,000 retainer. You gave an example, if
19 you work it out 3,000 and 7,000 --

20 MR. MARTINEZ: Under the new rule.

21 COMMISSION MEMBER SAPIRO: I'm sorry?

22 MR. MARTINEZ: That's the way I would interpret
23 the new rule.

24 COMMISSION MEMBER SAPIRO: What do you
25 attribute 3,000 to and what do you attribute the 7,000

1 to in that example?

2 MR. MARTINEZ: That's why I'm here. How do you
3 do it? Because you're saying, okay, this \$3,000 will
4 guarantee you that I'm your lawyer.

5 COMMISSION MEMBER SONDHEIM: That's a true
6 retainer. In other words, that's what you're saying --

7 MR. MARTINEZ: Correct. You keep it a true
8 retainer. That's what the new rule says. Do you call
9 the whole \$10,000 a retainer?

10 COMMISSION MEMBER SAPIRO: As you're using the
11 phrase today, what do you mean by the phrase
12 nonrefundable retainer?

13 MR. MARTINEZ: A deposit. Like I order a room
14 here at the Hyatt. If you don't show up for your room
15 at the Hyatt, we're keeping your money.

16 Put it this way, especially a federal case
17 where there might be -- there are very few lawyers who
18 do federal -- so if you have a major RICO, 50
19 defendants, rest assured one of three might get caught
20 with 20 people. You know, what do you pay for that?
21 You can't get anybody else.

22 I think Barry's concern maybe is more of an
23 issue in the federal cases because retainers tend to be
24 higher in federal. I have a federal murder case I've
25 been on since 2000. They don't go away. They stay

1 there. You can't get out of them.

2 Using your rule, how do you guarantee --
3 because I have heard judges tell counsel, Your Honor, we
4 would like to withdraw because the client has not paid
5 my retainer. The judge will say, well, that's your
6 fault for not getting the whole retainer.

7 I guess what we're asking is, don't tie the
8 hands of the defense bar because -- another issue, too,
9 why I'm here, I do not want that money in trust. I'll
10 tell you why.

11 I do PI. You know PI lawyers, you have to
12 watch that trust account like a hawk because everybody
13 else is watching it. Let's say I have 15 clients with
14 PI cases and \$75,000 of client money is in the trust
15 account. So by some miracle somebody gives me \$15,000,
16 which never happens, but maybe it does. Of that 15, I'm
17 going to take two and make it a true retainer, take the
18 other 13 and put it in the trust account.

19 All of a sudden the feds come and they have a
20 forfeiture hearing. Where is the money? It's in the
21 trust account. Immediately they get a federal order to
22 stay all disbursements from the trust account. At that
23 point now my PI clients are suffering.

24 COMMISSION MEMBER SAPIRO: Why do you think you
25 have to split it that way?

1 MR. MARTINEZ: I'll give you an example. I
2 guess -- I don't know how else it's going to be split.

3 COMMISSION MEMBER SAPIRO: But my question is,
4 why do you believe, if we adopt this rule, you would
5 have to split it at all?

6 MR. MARTINEZ: That's the way the rules said.
7 You cannot have nonrefundable retainers. At that point,
8 it's either a true retainer or an advance retainer. The
9 advance retainer, from my understanding, belongs in the
10 trust account.

11 COMMISSION MEMBER SAPIRO: Not necessarily.

12 COMMISSION MEMBER SONDEHEIM: Let's just
13 assume -- and you may recall, there are two separate
14 rules involved.

15 MR. MARTINEZ: Right.

16 COMMISSION MEMBER SONDEHEIM: Let's just assume
17 that, in the situation of what has to go into the trust
18 account, the rules would not require advance fees to go
19 into the trust account. Under those circumstances,
20 would there be any problem in precluding you or any
21 other practitioner from calling a fee a nonrefundable
22 fee in your agreement with the client?

23 MR. MARTINEZ: For me, no, because, like I
24 said, I don't put nonrefundable fee for that very
25 reason, but other attorneys do. I don't do that.

1 What you're saying, if that could happen, that
2 would be great. How could you put an advance fee in
3 your general account? My understanding, every time I
4 take a civil case and I get a retainer, I bill it
5 hourly, I put it in the trust account and then take the
6 money out of there. That's what I'm trying to prevent
7 on a criminal case.

8 COMMISSION MEMBER SAPIRO: Even in the current
9 rules, if Harry is correct when you said you were
10 considering the new rule on the trust account situation,
11 my interpretation is that, even under current rules, a
12 lawyer is not required to put in the trust account a
13 fixed fee that's paid in advance.

14 MR. MARTINEZ: Perhaps I'm wrong. Before I
15 came here, I started reading cases in other
16 jurisdictions, Colorado, Kentucky where this issue has
17 come up. The court there has said flat fee only. No
18 matter what you call it, it's still an advance fee and
19 goes in the trust account.

20 COMMISSION MEMBER MOHR: Could I just make a
21 note -- Kevin Mohr -- and that is, that in the other
22 states their trust account rule is modeled after the
23 American Bar Association model rule that expressly
24 requires that advance fees be placed in the trust
25 account. We don't have a provision that expressly

1 requires that advance fees be placed in the trust
2 account.

3 MR. MARTINEZ: That's good to know. Perhaps
4 I've been playing it a little too safely.

5 The last thing I'd like to talk about, when I
6 taught ethics, there was -- from the textbooks there was
7 the ethical trilogy: duty to self, duty to client, duty
8 to system. Do I think by putting that provision --
9 after hearing everything here, that's what's been said.
10 For my practice, I don't think it will affect my
11 practice, but I think it will affect people in federal
12 court involved in big retainers.

13 The Rule 4-200, as it stands now, has worked
14 for years. I ask this particular committee not to
15 change the rule.

16 I have nothing further. Do you have any
17 questions?

18 COMMISSION MEMBER MARTINEZ: I have a question.
19 At what point in your practice do you see the fee as
20 being earned under your practice -- your arrangement
21 with your clients?

22 MR. MARTINEZ: Say a client -- this is always
23 usually criminal -- client has given me \$1500, I show up
24 in court, case has been dismissed. Have you earned your
25 fee? I haven't earned the \$1500. I've earned

1 something.

2 Say the case is in Sacramento. I drive from
3 Napa to Sacramento, I prepare to come here, I've earned
4 something. I haven't earned it all, but I've earned
5 something. Say through my own creativity or lawyering
6 ability I got the case dismissed that day, I think I'm
7 entitled to it.

8 COMMISSION MEMBER MARTINEZ: I think Mr. Tarlow
9 takes a different view. I think his position is that
10 the fee is earned upon receipt by the lawyer. I think
11 your view is completely different.

12 MR. MARTINEZ: I think that position Barry's
13 taking is not so much for my pocketbook or his
14 pocketbook, Barry -- and that's why I'm here, to back
15 Barry up -- is the seizure issue. I believe -- and I
16 think the out of town bar is opposed to this rule for
17 basically similar reasons.

18 Also, if IRS gets wind your client has funds,
19 wants to seize it. If it's not your funds, you have not
20 earned them, yet IRS will take them. That's what
21 Barry's position is. Because at that point he's using
22 that money to benefit the client, not the pocketbook of
23 members of our trade. Because doing federal, FCC will
24 come in, IRS will come in, DEA will come in, you name
25 it. If they smell money, they come in and take it.

1 They'll still fight you because they have
2 attorney forfeitures to get your money, your retainers
3 back. But it's much harder because usually that money
4 is mine. I have no way to know it came from contraband.
5 I have no -- the client comes in, tells me the money is
6 from his mother's mortgage, I believe him, I put in ten
7 hour's worth of work and not get it back. At that
8 point, the only thing that will protect that is a
9 nonrefundable retainer because anything else will say
10 you have not earned it, it's not your money, it's the
11 client's money, we're creditors, we want the money.

12 COMMISSION MEMBER MARTINEZ: If it was just a
13 battle between the lawyer and the IRS or the DEA, maybe
14 the State Bar should stay out of it. This is a rule for
15 all lawyers and all clients. So how do you protect the
16 client who loses his retainer fee in a situation when
17 there is not really a battle between the feds and the
18 lawyer. The client is the one who is being hurt.
19 How --

20 MR. MARTINEZ: Through the same mechanism that
21 has been in force called disbarment, called discipline.

22 You charge -- okay, let's go back. I charge
23 the client \$30,000, the miracle retainer I'm never going
24 to receive. Next day the client comes in, I don't like
25 you, Mr. Martinez, I don't like your haircut, give me my

1 money back. I say, I'm keeping your money, get out of
2 my office, I will not keep my license. California will
3 take my license, call up New York, I will lose my New
4 York license. That is an inherent protection the client
5 has. So what I'm saying is, whatever bad apples were
6 doing that are no longer practicing their trade. We
7 have that mechanism.

8 How do we keep -- if your statement, Mr.
9 Martinez, is that seizures is not the issue here, the
10 issue is only the client, I still think discipline will
11 be taken. Of course, you have a breach of contract, I
12 mean, fraud, misrepresentation. You cannot just take a
13 \$50,000 retainer, have a client interview and keep the
14 money. It doesn't happen that way.

15 COMMISSION MEMBER SONDHEIM: Isn't that also
16 really true with regard to Mr. Tarlow's position
17 that it's earned upon receipt, which he mentions in his
18 correspondence, but at the same time he recognizes that
19 there are situations where it has to be reasonable so
20 that the bottom line, it seems to me, it is not truly
21 earned upon receipt. It's still a matter of whether it
22 complies with the standards set forth for fees.

23 MR. MARTINEZ: Why don't any of you think that
24 Rule 4-200, the way it presently stands, doesn't have a
25 built-in protection already? Why does it have to be

1 spelled out?

2 COMMISSION MEMBER SAPIRO: May I respond to
3 that? To me, the only difference between the proposed
4 new rule that you're addressing and 4-200 is the draft
5 of the proposed new rule we have moved from Rule 3-700
6 the provision that says that a lawyer must promptly
7 refund any part of the fee that has not been earned.
8 That's the same thing as saying the fee is not
9 refundable.

10 If you take at a look at Rule 3-700(D)(2), what
11 it says is that a lawyer must promptly refund any part
12 of a fee paid in advance that has not been earned, and
13 then it has the true retainer exception. All we've done
14 is taken it out of 3-700 and moved it into the
15 counterpart of 4-200.

16 The rules exists now. All we're doing is
17 moving it from one rule to another. So that, frankly, I
18 think it's easier for lawyers to find the concept if we
19 have all the rules regarding fees in one place as
20 opposed to split out in two places.

21 MR. MARTINEZ: You're basically saying the
22 rule's there already?

23 COMMISSION MEMBER SAPIRO: Exactly. And I
24 think Harry was correct when he said earlier that the
25 question of whether it goes into the trust account as

1 opposed to your general account or put it in your
2 personal bank account or just put it in your jeans,
3 that's a different subject under a different rule.

4 MR. MARTINEZ: You're saying we can do that
5 now?

6 COMMISSION MEMBER SAPIRO: Exactly.

7 COMMISSION MEMBER MARTINEZ: I think Mr. Tarlow
8 would think he can't do that under the new rule because
9 I think he reads the new rules as taking away the wiggle
10 room under 3-700(D)(2). 3-700(D)(2) says a member shall
11 promptly refund any part of a fee paid in advance that
12 has not been earned. The operative word is earned.

13 So Mr. Tarlow takes the position that it's
14 earned immediately upon receipt and, therefore, we're
15 within 3-700(D)(2). No rule says you can't charge a
16 nonrefundable fee. So the new rule is more explicit in
17 that regard and takes away this whole idea of what is
18 earned and not earned.

19 COMMISSION MEMBER SAPIRO: I would appreciate
20 it -- I don't mean to put you on the spot this
21 morning, but I'd appreciate it if you would take a look
22 at a couple disciplinary cases. There's the Fonte case,
23 F-o-n-t-e, and the Lais case, L-a-i-s, which really --
24 and I think there's also Brockway, if I remember the
25 names correctly.

1 Those cases spell out that how the lawyer
2 labels the fee doesn't determine whether it's refundable
3 or not. It's what's the substance of the fee
4 agreement. And if the fee is for services to be
5 rendered, whether it's a flat fee or not, it's
6 refundable under those cases.

7 For example, those cases come up where the
8 lawyer abandoned the client and then claimed, oh, wait a
9 minute, that was a naming retainer or a true retainer,
10 so I don't have a duty to refund the fee. So they look
11 at what was the fee really for.

12 And the client's expectation, just as you've
13 described with your fee agreement, is that the lawyer
14 would be rendering the services. Therefore, it was not
15 just a naming retainer. It was an advance fee for
16 services to be rendered. So that when the lawyer didn't
17 render the services and didn't make a refund under the
18 fee, that lawyer was disciplined.

19 So take a look at those --

20 MR. MARTINEZ: I will.

21 COMMISSION MEMBER SAPIRO: -- and if you can
22 let us know whether the opinions you've expressed today
23 are the same after you've looked at those, I would
24 appreciate it.

25 MR. MARTINEZ: Sure. All right. Thank you

1 very much.

2 COMMISSION MEMBER SAPIRO: Thank you very much
3 for taking the time to come here today.

4 COMMISSION MEMBER SONDEIM: Thank you.

5 Mr. Lewis, if you'll state your name for the
6 record so that the reporter will be able to attribute
7 the words to you. And, by the way, I don't know if you
8 were here when I mentioned that it is being recorded by
9 the reporter and also being transcribed -- it is also
10 going to be transcribed so that the words you say to us
11 which we hear will be read by the other members of the
12 commission.

13 MR. LEWIS: Okay. Thank you very much. My
14 name is Steve Lewis. Very briefly, I have been
15 representing lawyers for about 32 years as the primary
16 focus of my practice.

17 The first rule is I would like to address is
18 Rule 1.7(d)(4). 1.7(d)(4) is the rule that requires
19 written disclosure in the event that the lawyer has or
20 had a legal business financial or professional interest
21 in the subject matter of the representation.

22 I guess, before I begin with that and the other
23 rules I want to talk about, I want to commend the
24 commission for the work that it's done. Having gone
25 through this, I think it's an excellent body of rules.

1 With regard to 1.7(d)(4), I believe it does not
2 include adequate quality client protection, and I
3 believe that when a lawyer has a financial or
4 professional or personal interest in the subject matter
5 of the representation, that that is very akin to a Rule
6 3-300 situation, in that that is a situation where a
7 client should be advised in writing of the opportunity
8 to consult, the right to consult with independent
9 counsel and given an opportunity to do so.

10 In that regard, I would address you to Comment
11 [1] of Rule 1.8.1. And Comment [1] of Rule 1.8.1 talks
12 about the situation -- or talks about the rationale
13 behind the rule requiring notification of the right to
14 independent counsel, and it talks about the situation --
15 well, it talks about the fact that the lawyer is in a
16 situation where the lawyer could, quote, "influence the
17 client for the lawyer's own benefit, could give advice
18 to protect the lawyer's interest rather than the
19 client's, and could use client's information for the
20 lawyer's benefit rather than the client's."

21 That is the rationale behind Rule 1.8.1, and it
22 implies, in my opinion, the full and legal force in the
23 situation described in Rule 1.7(d)(4). I will tell you
24 how I came to this conclusion as well as just in terms
25 of it strikes me as a logical follow through from the

1 analysis and Comment [1] to Rule 1.8.1.

2 A large part of my practice involves giving
3 advice to lawyers who have found that they have made a
4 mistake in representation of a client and want to know
5 what to do. And that is, I believe, kind of the classic
6 situation that is addressed by Rule 1.7(d)(4) is a
7 lawyer's professional interest is at stake, a lawyer's
8 financial interest is at stake when the lawyer may have
9 made an error or has made an error.

10 In a large number of those situations, it is in
11 the best interest of the client and the lawyer for the
12 lawyer to continue with the representation of the client
13 and that has been recognized by the courts. It's a
14 common approach to take.

15 However, there is room in those situations for
16 the lawyer to look at, even innocently, or even
17 unconsciously to protect his or her own interests over
18 the interests of the client, and I will give you an
19 example.

20 In most of these situations, when I counsel a
21 lawyer to do a conflict disclosure letter to a client, I
22 say one of the things you can explain is that you both
23 are on the same page, are both seeking the same result,
24 which is the client's best result given the fact that
25 you made this mistake. So there is not a conflict that

1 precludes you from going forward with client consent.

2 But let's take the situation where the lawyer
3 has made a mistake and the case is up on appeal, and
4 this is pretty typical, and then the other side makes a
5 settlement proposal to the client that is discounted,
6 taking into consideration the posture of the case having
7 been adversely affected by the lawyer's own conduct.

8 Is the lawyer in a situation to really give
9 undivided loyalty and independent advice to the client
10 in making that decision? Some lawyers are. Some
11 lawyers may not be.

12 In any event, what I tell every lawyer who
13 comes to me in that situation is put in that conflict
14 disclosure letter the right for that client to consult
15 with independent counsel, particularly about issues such
16 as settlement proposals. Is it appropriate to make an
17 offer? Is it appropriate to accept an offer? How to
18 negotiate when the lawyer's conduct has compromised or
19 potentially compromised the client's interest.

20 So I believe that -- and I think you recognize
21 in the comments to Rule 1.7 that this situation
22 generally, you know, arises in that context when the
23 lawyer's own conduct, such as questions about the
24 correctness of the lawyer's early advice to the client
25 are at issue, and that's in your conflict disclosure

1 letter at that point.

2 So I am a little hesitant -- I was a little
3 hesitant to make this recommendation to the committee
4 because it would put California lawyers -- a greater
5 burden on California lawyers than exists under the ABA
6 rules or that exists nationally, and I do believe there
7 is benefit to lawyers operating on rather thinly uniform
8 rules throughout the nation.

9 Notwithstanding that, I happen to believe that,
10 in the context of a lawyer making a mistake and
11 continuing to represent the client, that that is a
12 critical situation where the advice of independent
13 counsel is necessary.

14 COMMISSION MEMBER SAPIRO: Can I ask for a
15 clarification?

16 MR. LEWIS: Certainly.

17 COMMISSION MEMBER SAPIRO: You're focusing on
18 the situation where the lawyer has made a mistake. I
19 appreciate the way you're approaching it. Would you
20 also apply it to (d)(4) when the lawyer hasn't made a
21 mistake --

22 MR. LEWIS: Yes, I would.

23 COMMISSION MEMBER SAPIRO: -- but just has an
24 interest in the subject matter?

25 MR. LEWIS: I would because I think, in any

1 situation where the lawyer has an interest in the
2 subject matter, I find the protection of 3-300 to be
3 warranted in terms of advice of independent counsel.

4 I would add something else here, which is kind
5 of a different rub. I agree that I wouldn't make client
6 written consent a condition, and the reason that I
7 wouldn't is because my experience is that mistakes
8 happen, often right before trial, during trial, in
9 time-sensitive situations, and the client is confused as
10 to whether to give consent and just says, I want you to
11 stay on here, I'm not signing anything, and I would say
12 that happens more often than not.

13 I wouldn't make it the full panoply of 3-300
14 requiring the client to consent in writing, but I would
15 just add in (d)(4) that, in the (d)(4) situation, the
16 client needs to be advised in writing of the right to
17 independent counsel and given an opportunity.

18 COMMISSION MEMBER SAPIRO: Can I ask a
19 follow-up?

20 MR. LEWIS: Certainly.

21 COMMISSION MEMBER SAPIRO: How do you
22 distinguish what you just said (d)(1) from (d)(4)? It
23 seems to me that the lawyer's self-interest applies in
24 (d)(1), also.

25 MR. LEWIS: To me, (d)(1) is one step removed.

1 There it's the lawyer has an interest, you know, or
2 relationship with a party's own interest; it's not the
3 lawyer's own interest. To me, the critical issue is
4 where it's the lawyer's own interest.

5 When you look at 3-300 or you look at new
6 1.8.1, I mean, it really is the situation where it's the
7 lawyer -- there it's a business relationship or a
8 transaction. And the fact to me that it is the lawyer's
9 own interest that's at stake, it's taking a financial
10 relationship directly, not indirectly, not one step
11 removed, but directly, makes it important to have that
12 step -- that additional requirement.

13 I say this because, in my general approach to
14 legal ethics is to try to look at a situation, and when
15 I counsel lawyers -- and I've counseled hundreds and
16 hundreds of lawyers and law firms -- I try to look at it
17 from the perspective of, if I were a client, if I were a
18 nonlawyer client, who do I really need to be
19 protecting?

20 To me, in this context, once a lawyer's made a
21 mistake, which is the typical situation, what I tell
22 lawyers in this situation is I tell lawyers not to go
23 through this process by themselves. I tell them that
24 they should -- and one of the things I do is I answer
25 what are called hot line calls for several national

1 insurance companies where the lawyers who made the
2 mistake get counsel on how to proceed.

3 And when I teach continuing education classes
4 to lawyers -- I just did a videotape of one last week in
5 Los Angeles -- my mantra is, when you've made a mistake,
6 consult with your insurance company or consult a lawyer
7 to communicate effectively with your client and to make
8 sure you're acting appropriately both to protect the
9 client's interest and your own.

10 If I'm counseling lawyers to do that, it sure
11 seems to me that they should be telling their clients to
12 do the same thing.

13 COMMISSION MEMBER MARTINEZ: It sounds to me
14 like this problem is something different than a
15 1.7(d)(4), and maybe there should be a (d)(5) or a
16 different part of the rule.

17 MR. LEWIS: That would be fine with me. My
18 focus is the situation where a lawyer has made an
19 error. And in your Paragraph 20 you note that's kind of
20 a common (d)(4) scenario.

21 COMMISSION MEMBER MARTINEZ: But you have an
22 interest in the subject matter in the real sense and you
23 have a conflict of interest with the client, you haven't
24 made a mistake, but it's not an interest in the subject
25 matter. The subject matter A versus B or --

1 MR. LEWIS: I guess I respectfully disagree
2 with that. I think you do have some financial or
3 professional interest in the subject matter. If the
4 subject matter is the representation of the client in A
5 versus B and you're at risk because you've made a
6 mistake in A versus B, I think you have an interest in
7 the subject matter.

8 COMMISSION MEMBER MARTINEZ: I don't disagree
9 with you. I don't think it's apparent to the average
10 lawyer, and I think if you're going to say that concept,
11 you've got to do say it in a different rule or a
12 different subpart.

13 I represent lawyers in legal malpractice cases
14 and they make mistakes, they go to their insurance
15 company, they go to us for claim repair, we try to
16 repair the claim, and in the meantime you've applied to
17 withdraw from the case or advised the client there's a
18 conflict so it's all aboveboard because that winds up
19 being an additional cause of action in a legal
20 malpractice case. They'll say you continued to
21 represent me with a conflict.

22 MR. LEWIS: I am certainly in concurrence with
23 you. Making it a (d)(5) where the situation -- where
24 the lawyer has or arguably has made a mistake, I think
25 that's important.

1 In the -- certainly, you know, in the -- I
2 believe it's in the Milbank case the supreme court
3 expressly stated, when the lawyer has made a mistake,
4 they have a duty to tell the client they've made a
5 mistake.

6 COMMISSION MEMBER SAPIRO: Can I ask you to
7 extend the analysis. It seems to me that if a lawyer
8 has a case on a contingent fee the lawyer has an
9 interest in the subject matter. Would you require the
10 client to get the advice then?

11 MR. LEWIS: Absolutely not.

12 COMMISSION MEMBER SAPIRO: How would you
13 distinguish that in drafting the kind of rule you're
14 suggesting?

15 MR. LEWIS: Because, to me, there is a
16 phenomenal difference between entering into an
17 engagement agreement with the client, on the one hand,
18 and a lawyer making a mistake on the other.

19 To me, to suggest that every client that enters
20 into a contingent fee agreement should be told to go
21 spend money to consult with a lawyer about entering into
22 a contingency fee agreement is, to me, sort of
23 reminiscent of walking into office buildings that say,
24 you can get cancer walking into this building.

25 I'm not a believer in warnings that would apply

1 in every single scenario that exists so the warnings
2 become part of some massive document that gets
3 completely ignored. Sort of what happens with all the
4 people who sign 800 pages of loan documents and all the
5 disclosures and don't look at any of them because there
6 are so many.

7 Entering into a fee agreement is, to me, apples
8 and oranges to the situation where the lawyer has made a
9 mistake.

10 COMMISSION MEMBER SAPIRO: In the amended rule
11 we proposed, we make it explicit it does not apply in
12 that situation.

13 MR. LEWIS: It would apply in a situation where
14 a lawyer has -- I believe the rules, there is nothing
15 that's ever suggested that Rule 3-310(B)(4), as it
16 stands now, applies to fee agreements. I don't think
17 you need that -- I think it's understood that
18 3-310(B)(4) doesn't apply to fee agreements. I've never
19 seen it construed to apply to a fee agreement.

20 COMMISSION MEMBER SAPIRO: So you wouldn't make
21 that exclusion?

22 MR. LEWIS: I don't think you need to. I think
23 if people are concerned about, I'd be happy to spell it
24 out -- if you think it's ambiguous, spell it out and
25 say, this conflict of interest rule -- and I believe

1 there's case law to support it -- does not apply to fee
2 agreements.

3 So put it in the rule -- maybe put it in the
4 comment to the rule, just like we have it in the comment
5 to Rule 3-300 right now, because I'm a big believer in
6 subscribing to clarity. So if you think that -- I
7 certainly would think that would be fine to do.

8 COMMISSION MEMBER SONDHEIM: Putting to one
9 side the question of fee agreements, if I understood you
10 earlier, you would apply the disclosure to the client of
11 consultation to another attorney to all situations under
12 (d)(4) irrespective whether there has been a mistake
13 made by the lawyer. Is that still your position in
14 light of the discussion we've had so far about maybe
15 just having a (d)(5) that relates to mistakes?

16 MR. LEWIS: What I can tell you is my focus is
17 on the mistake situation. I haven't, candidly, thought
18 through I think that Mr. Martinez's suggestion of a
19 (d)(5) is probably safer, as I think about it, because I
20 have not thought through all the other (d)(4) scenarios,
21 and I wouldn't want to create an unnecessary mess.

22 COMMISSION MEMBER SONDHEIM: Because from
23 (d)(4), as Jerry Sapiro has suggested, what about (d)(1)
24 and --

25 MR. LEWIS: (d)(1) is very different, yes, so I

1 maybe a (d)(5) would be fine. I think that's kind of
2 the most important issue in my mind that I was here to
3 talk about today.

4 COMMISSION MEMBER SAPIRO: When I heard your
5 response about (d)(1), the thought went through my mind
6 that a lawyer who has a daughter who has an interest in
7 the same matter may put that daughter's interest ahead
8 of even the lawyer's own interest. So the fact that it
9 might be a third person, to me, doesn't distinguish the
10 (d)(1) situation.

11 MR. LEWIS: Okay. And to me I think overall,
12 in my 32 years of doing this, the scenario I have seen
13 over and over again that raises its head on a regular
14 basis is the mistake situation where I can't get away
15 from the fact that when a lawyer makes a mistake I tell
16 them to call an independent lawyer to deal with it when
17 nobody is telling their client to do the same. To me,
18 what's good for the goose is good for the gander. Even
19 more important for the client than for the lawyer.

20 COMMISSION MEMBER MARTINEZ: You might have
21 some difficulty defining what the, quote, mistake is. A
22 lot of mistakes can be corrected in the course of the
23 litigation. The case is settled, a lot of different
24 things can happen.

25 MR. LEWIS: But that's exactly the situation is

1 they may be corrected. But if settlement issues surface
2 in between, then that's exactly where it arises.

3 Certainly I counsel lawyers all the time on how to
4 correct their mistakes. But, again, they get somebody
5 from the outside helping them through, somebody
6 independent. Most clients aren't going to feel a need
7 to avail themselves of that if a lawyer has been very
8 candid with them, very upfront with them, laid out the
9 potential conflict with them, then I think in this
10 situation the majority won't go to independent counsel.

11 But what I do say is -- in these letters I have
12 I say particularly if you want to make a settlement
13 proposal or one comes in that could that you feel could
14 be affected in any way by the situation I described to
15 you, please know you have the right to consult with
16 independent counsel about that. I also try to beat into
17 the lawyer their need to try to look at this
18 objectively.

19 COMMISSION MEMBER MOHR: Steve, in other words,
20 when you first become aware of the mistake, you might
21 disclose that to the client. Would you then say there
22 would be a continuing obligation of disclosure? For
23 example, when the settlement actually comes in, that you
24 perhaps disclose again just to make sure. In other
25 words, you might say, well, this might happen,

1 particularly the settlement, do you want the lawyer to,
2 as best practice at least -- I know it's hard to try to
3 put it into a rule.

4 MR. LEWIS: If a lawyer has done it in writing
5 the first time and has discussed the potential scenario
6 the first time and laid out, you know, this is where a
7 real conflict is likely to arise, I would not think it
8 would be necessary to put a burden on the lawyer and to
9 make it potentially a disciplinable offense for the
10 lawyer not to do it again.

11 COMMISSION MEMBER MARTINEZ: I think the lawyer
12 has the obligation to tell the client about significant
13 developments in the litigation, so there's already
14 somewhat of a rule regarding that. I mean, if you go to
15 your carrier and report a potential claim of
16 malpractice, that I think is a very significant
17 development in the case and the client should know about
18 it.

19 MR. LEWIS: Of course. They have to know about
20 it now. If they didn't catch it from 3-500 before, the
21 Supreme Court directly said it in B of A. I think
22 that's a given that they have to do that. And I would
23 even -- when you talk about what comment you would use
24 in terms of describing what language you should use, I
25 didn't bring it with me, but it's different to tell them

1 about it, on the one hand, than to say you have the
2 right to consult with independent counsel about -- one
3 thing I say to lawyers is, I say, given the situation,
4 do you feel that you can continue to exercise
5 independent judgment on behalf of the client? Do you
6 feel you can, you know, put the client's interest ahead
7 of your own and to -- and as they go through that
8 analysis with an independent lawyer before you decide
9 whether it's appropriate to even stay on.

10 COMMISSION MEMBER SONDHEIM: I know you haven't
11 considered the other scenario other than the mistake
12 situation. Wouldn't that rationale really carry over to
13 (d)(4) in general?

14 MR. LEWIS: You know, Harry, I haven't thought
15 it through. So I am always hesitant to speak on issues
16 I haven't thought through because I always regret it
17 when I do.

18 COMMISSION MEMBER SONDHEIM: The reason I ask
19 is, because if we do adopt a (d)(5), for example, it
20 seems to me we would need to give some rationale for
21 distinguishing the mistake situation where the lawyer
22 may not be able to act independently on behalf of the
23 client because he or she has his or her own interest and
24 those other situations that fall under (4) we have to
25 find some basis for distinguishing the two.

1 MR. LEWIS: And that's why I would presume you
2 make the big bucks on the commission.

3 COMMISSION MEMBER SONDEIM: Why don't we go on
4 to some of the other issue that you have.

5 MR. LEWIS: I have a couple brief comments on
6 1.7. In Paragraph (10) of the discussion there is --
7 you know there's a word clearly that one of your panel
8 members doesn't care for? There's a word "might" that I
9 don't care for.

10 In Paragraph (10) it says that, paragraph (d),
11 requires a lawyer to make disclosure to and/or obtain
12 written consent from each client whenever the lawyer's
13 full performance of the duties owed to one of the joint
14 clients might or does interfere with the lawyer's full
15 performance of the duties.

16 I can't think of a situation where it might
17 not, but I don't think that's the intent of what we're
18 going for. Usually what we're going for is whether it's
19 reasonably foreseeable.

20 So I would suggest adding the words after
21 "might," "might reasonably be expected to" or "does
22 interfere" with the lawyer's full performance. "Might"
23 mean every situation. What I can tell you is, I'm a
24 very careful practitioner. I don't always do a
25 disclosure representing -- and I'll give you an example.

1 I've represented a husband and wife who have
2 been married 30 years who had a boundary dispute with a
3 neighbor. Now, theoretically, a conflict might develop
4 between that couple who have been married 30 years, but
5 it's so remote.

6 "Might" says to a lawyer, every case where you
7 ever represent more than one person you should do this
8 because it might happen. So I just think adding the
9 words "reasonably be expected to" would then make it
10 also consistent with paragraph (11), which talks about
11 reasonable foreseeability and is consistent with my
12 understanding with the law.

13 The next comment I have very briefly is in
14 paragraph (21), and I just think that if you buy a
15 mutual fund that buys and sells stocks on a regular
16 basis is a bit overramping and unnecessary disclosure.
17 But that's just my personal opinion. I just thought it
18 struck me as excessive.

19 COMMISSION MEMBER SONDHEIM: So you suggest
20 deleting (21)?

21 MR. LEWIS: Yeah. I just think that people
22 read their -- might read what the top ten holdings are
23 and they might be in the top ten holdings from March to
24 June, and then they have to notify every client and then
25 it's not the top ten holdings in July, and their mutual

1 fund, you know, has 1/100th of a percent of the stock of
2 General Motors and they have a lawsuit against General
3 Motors and this particular lawyer has 1/1,000,000th of a
4 share of the mutual fund, it's just really not worth it.
5 I don't think it will be complied with.

6 COMMISSION MEMBER MOHR: So are you suggesting
7 that the mutual fund disclosure might be over the top?

8 MR. LEWIS: Just a touch.

9 I would like to now move to Rule 1.8.1, and my
10 concern here is there's a little bit of ambiguity and
11 I'm -- so I will point out where I see the ambiguity,
12 and I don't know what the commission's view is on this,
13 so I would appreciate it if you would enlighten me and I
14 could make my comments pending.

15 Comment [5] says, in the very last sentence:
16 "This rule is not intended to apply to an agreement with
17 a client for a contingent fee in a civil case."

18 Now, I don't know whether that means the rule
19 also does not apply to a contingent fee in a civil case
20 that has a charging lien, as all contingent fees do. It
21 does not say one way or the other.

22 And then Comment [7] references that it does
23 apply when a lawyer obtains an interest in a cause of
24 action or subject matter of litigation or other matter
25 the lawyer is conducting for the client, which could

1 arguably apply to a charging lien in a contingency fee
2 case.

3 So I feel that there is a lack of clarity for
4 the practitioner between the comments in Rule [5] and
5 Rule [7] because I wasn't clear and, you know, this is
6 an issue with which I have worked intimately, as at
7 least Kevin knows, and so I'm curious as to what the
8 intent of the comments is and if it's -- so, I guess, I
9 have a question to begin, and then I'll be happy to
10 address or respond to the questions.

11 COMMISSION MEMBER SAPIRO: I will turn the
12 question around and ask: What do you think the rule
13 should be? Should it apply to the charging lien
14 situation or not?

15 MR. LEWIS: Absolutely.

16 COMMISSION MEMBER SAPIRO: I happen to agree
17 with you.

18 MR. LEWIS: I think that I am a big proponent
19 of the COPRAC opinion that addresses this and, again, I
20 am a huge believer that sending people -- sending every
21 contingency fee client in the State of California and
22 tell them they should consult an independent lawyer
23 makes no sense, and I think that the rules have to make
24 sense.

25 It is not a client protection issue. It is to

1 me one of those situations where the more you tell
2 people to consult lawyers where they're not going to and
3 don't need to, the less likely they are to go to
4 independent lawyer when they really do need to. Because
5 it just becomes part of this boiler plate like walking
6 into the building, saying don't walk in here, it could
7 cause cancer, which is about 90 percent of the buildings
8 in Sacramento. I wonder if I could go avoid going to a
9 deposition and tell the court, I couldn't walk in the
10 building because it might cause cancer.

11 I think we should be pragmatic. I have strong
12 feelings about this. But I, also, most importantly,
13 think that practitioners need clarity and this is one
14 place where I found the comments to be a little bit
15 confusing.

16 COMMISSION MEMBER SONDHEIM: Okay. What else?

17 MR. LEWIS: Again, Rule 1.8.1, paragraph [15],
18 I would like to see something -- a little amendment to
19 it. I agree 100 percent with the commission's
20 conclusion that, if a client already has an independent
21 lawyer, the lawyer shouldn't have to explain to the
22 client in writing of the right to an independent
23 counsel.

24 However, I believe that what I would put into a
25 comment here is, to me, the lawyer should be

1 communicating with the independent counsel about the
2 matter, and there is nothing here that suggests that the
3 lawyer should. And, to the contrary, it kind of
4 suggests that the lawyer should be communicating with
5 the client directly and telling the client, you know,
6 you can take some time to go talk to your independent
7 lawyer.

8 And I think, if we're talking about a business
9 transaction or any of these matters, that if the client
10 has independent counsel, the lawyer should be
11 communicating about it with the independent counsel, and
12 that should be pointed out. And I don't consider that a
13 best practices. I consider that as something that
14 should be regulated.

15 I'm almost done taking up your time.

16 COMMISSION MEMBER SAPIRO: In many situations
17 which you said may be absolutely right, but isn't how
18 the lawyer -- the client and the independent lawyer
19 communicate and when and about what, a decision for the
20 client to make? The client might say, I don't want you
21 bringing up my fees with the other lawyer by talking to
22 him every time he gets a letter.

23 MR. LEWIS: That's fine. I should have been
24 more clear about that. Obviously, that would be
25 tempered by, if the other lawyer said, you have absolute

1 right to speak directly with the client on this, then
2 that's fine. I would treat it more like -- almost more
3 like a represented party situation where you can
4 certainly get consent. So I would say either
5 communicate with the lawyer or obtain consent from the
6 independent lawyer.

7 I'm not a hundred percent there on this, but
8 I'm 98 percent there on this, that this is what's
9 necessary for client protection here.

10 COMMISSION MEMBER SONDHEIM: All right. Thank
11 you.

12 MR. LEWIS: 1.13, and I bring this up because I
13 had a case on this a number of years ago. 1.13(f), now,
14 this is a situation I thought when you had the "might"
15 it was too broad. I think when you have the "are" at
16 first it's too narrow.

17 So what I would say here is that where -- "In
18 dealing with an organization's directors, officers,
19 employees, members, shareholders or other constituents,
20 a lawyer representing an organization shall explain the
21 identity of the lawyer's client whenever the lawyer
22 knows or reasonably should know, that" it is reasonably
23 foreseeable that the organization's interests are or
24 will be adverse to the constituents.

25 I just think to say that the standard is are

1 adverse is too limiting. I think a lawyer dealing with
2 constituents of an organization, when a lawyer
3 represents the organization, needs to make that
4 disclosure whenever it's reasonably foreseeable that the
5 interests of the organization and the, you know,
6 employee/constituent to whom the lawyer is speaking may
7 be adverse.

8 I think that, otherwise, employees in that
9 situation -- it just gets insufficient protection to
10 employees in that situation. You have a right to know
11 even if it is just reasonably foreseeable that they will
12 be adverse, and I'll give you the scenario where this
13 does arise.

14 It arises when employees are interviewed in
15 harassment cases or discrimination cases and witness
16 employees are interviewed. I think in those
17 situations -- because when this really does happen
18 there, tends to be a pattern to it, even though you
19 can't say that the organization views are adverse to
20 that person, you don't know, you haven't heard anything,
21 it's certainly reasonably foreseeable that they will
22 be.

23 I think in that context, before the lawyer
24 interviews that employee, the lawyer should explain that
25 anything that person says is going to go to the

1 organization and could be used against them.

2 COMMISSION MEMBER MARTINEZ: The conflict rules
3 don't take care of this employee situation, 1.7, 1.8,
4 that whole line --

5 MR. LEWIS: I don't believe so. I think this
6 is a situation where you have something very specific
7 that, I think, would be controlling in construction of
8 those rules. And because it specifically deals --
9 because these are not clients. These are not even
10 prospective clients. These are witnesses, but witnesses
11 who could be confused when they're talking to the
12 company lawyer.

13 And, fortunately, when I had this issue, I
14 testified on behalf of a lawyer whose practice was to do
15 what I described to you, and she told all of them up
16 front and the client admitted that and they won summary
17 judgment in a breach of fiduciary duty case.

18 I think it is incumbent upon the lawyer --
19 again, I think this is not a best practice situation. I
20 think it's a fairness situation. When you get lay
21 people in an organization, lay employees who are going
22 to consulting with a lawyer and it's reasonably
23 foreseeable -- I'm not saying every employee in every
24 context, but it's reasonably foreseeable that their
25 interest may become adverse to the organization you

1 represent, you need to be up front with them.

2 COMMISSION MEMBER MARTINEZ: You're saying
3 reasonably foreseeable that they may become adverse?

4 MR. LEWIS: Right.

5 COMMISSION MEMBER MARTINEZ: So you're adding
6 another layer of almost speculation that they --

7 MR. LEWIS: No, where it's reasonably
8 foreseeable that they will be. Not they will be. Where
9 it's reasonably foreseeable that they are or it's
10 reasonably foreseeable that they will be. I would stay
11 away from the "mays" and the "mights" clearly.

12 COMMISSION MEMBER MOHR: You would also -- I
13 mean, it would be that are or it is reasonably --

14 MR. LEWIS: Of course, if they are, there's no
15 question. I'm almost done taking up your time.

16 COMMISSION MEMBER SAPIRO: Don't apologize.

17 MR. LEWIS: Rule 1.16. I was surprised to see
18 that the commission continued the phrase "papers and
19 property" in light of the fact that this rule is now
20 being promulgated in the electronic era. And when we
21 did 2007-174, we issued the opinion because -- and felt
22 the need to issue the opinion because the issue was
23 raised by a lot of members of the bar -- it says "papers
24 and property," one of the rules regarding electronic
25 data, and to continue in 2008 with the phrase "papers

1 and property" seems to be an anachronism. And, at the
2 very least, I think there should be a comment
3 referencing 2007-174, but I think that there -- and the
4 application of this rule to electronic data, but I think
5 that it would be appropriate to come up with a different
6 phraseology. I apologize that I didn't develop
7 recommended phraseology there.

8 COMMISSION MEMBER MOHR: You might want to hold
9 off in coming up with the language because I think we
10 already have that language in Rules 1.17.1 and 2 and
11 also Rule 1.4 where we talk about communicating -- it
12 wouldn't necessarily be in the package, but we have
13 already crafted language that addresses those issues and
14 this may have been an oversight on our part.

15 MR. LEWIS: Okay. With that, I'm done.

16 COMMISSION MEMBER SAPIRO: Can I ask a question
17 about your last remarks?

18 MR. LEWIS: No. Sorry.

19 COMMISSION MEMBER SAPIRO: There's been some
20 resistance on the commission to citing COPRAC and other
21 ethics committee opinions in comments to the rules. Do
22 you have your own attitude toward that?

23 MR. LEWIS: Yes, I do. I understand the
24 hesitancy as they are not a binding authority. On the
25 other hand, I think they are very useful tools to

1 practitioners, and so I would not say that I am
2 uniformly opposed. I certainly would not cite any that
3 have been criticized by a court. But those that
4 haven't, I would seriously consider. Particularly ones
5 that I guess, Jerry, what I would say is I probably
6 wouldn't think they're controversial. I don't think
7 2007-174 is controversial at all. I think it's a -- it
8 is in many respects just kind of a beneficial
9 modernization opinion. But I probably wouldn't steer
10 away from the controversial opinions.

11 COMMISSION MEMBER SAPIRO: Would you go so far
12 as to include opinions from other jurisdictions if
13 they're, quote, not controversial, unquote?

14 MR. LEWIS: I would only as a, you know, see
15 for example, and indicate in there, but I would be
16 careful about that. ABA I would be more inclined than I
17 would other jurisdictions, Colorado particularly. But
18 if they're noncontroversial, I wouldn't have a big
19 problem. But I want relative -- and I hate to use these
20 words, relative unanimity, on the condition that they
21 were not controversial before.

22 COMMISSION MEMBER MOHR: Thank you.

23 MR. LEWIS: Thank you.

24 COMMISSION MEMBER SONDHEIM: Let me ask if
25 there are going to be any other speakers and if you can

1 give me some idea as to how long it may take you to make
2 a presentation because, in deference to the reporter, I
3 would want to figure out when we might want to take a
4 break.

5 MR. GREENE: Mr. Chairman, Tom Greene with the
6 Attorney General's Office. Probable ten minutes or so.
7 I just wanted to highlight some points we've made in
8 written comments.

9 COMMISSION MEMBER SONDHEIM: Anybody else who
10 intends to speak at this point?

11 All right, Mr. Greene, and then we'll take a
12 break.

13 MR. GREENE: Good morning, Mr. Chairman,
14 members. Thank for the opportunity to speak to you
15 today. I am here actually on behalf of the Office of
16 the Attorney General as well as the California District
17 Attorney's Association and Statewide Public Defenders
18 Association.

19 On the first point, we will be speaking to you
20 more specifically in written form the lack of need for
21 the change proposed in Rule 4.2. We still regard the
22 shift from party to person as unnecessary. It's highly
23 mischievous in that, from our perspective, that will
24 roil, frankly, prosecutors and the process of
25 prosecutorial offices across the state for no obvious

1 good reason. We have made that point before, but I want
2 to just mention --

3 COMMISSION MEMBER SONDHEIM: Let me just ask
4 you a question in that regard.

5 MR. GREENE: Certainly.

6 COMMISSION MEMBER SONDHEIM: Are you aware of
7 any jurisdiction where this has presented a problem for
8 prosecutors?

9 MR. GREENE: We are checking again. I am
10 particularly familiar with problems in Oregon. I know
11 their office has problems and they're increasingly
12 concerned about what we call here the vertical
13 prosecution model. In Oregon they have investigators
14 attached to the consumer fraud unit and the
15 investigators basically work for the lawyers so when
16 they send them out subject to the knew ABA rule there's
17 increasing concern that the normal sort of investigative
18 practices, that is, an investigator posing as a consumer
19 to get the straight talk on what may be a fraudulent
20 operation, they are holding back on those because
21 they're concerned about the rule. I know that is a very
22 real problem there. I am checking with other states.

23 COMMISSION MEMBER SONDHEIM: Are there any
24 instances -- when you're checking, you may want to look
25 into this -- where the prosecutor has been the subject

1 matter of discipline because of the change from party to
2 person? I'm just suggesting that --

3 MR. GREENE: I understand. What we have seen,
4 at least in the states that have adopted some version of
5 the ABA rule, the more likely course is for
6 investigators and attorneys to step back basically
7 reducing or curtailing their investigation, so it's that
8 more subtle problem as opposed to someone running into
9 an ethical issue which rises to the level of being
10 disbarred by the State Bar.

11 COMMISSION MEMBER SONDHEIM: Let me focus on
12 the stepping back. The exception is, as I recall,
13 Utah. I don't think any other jurisdiction that I'm
14 aware of has tried to be as explicit of what prosecutors
15 can do in spite of the rule. Do you feel in some ways
16 there will be a defect in what we will to do here in
17 California?

18 MR. GREENE: Sure. Two points, Mr. Chairman.
19 We certainly applaud the fact that Comment [20] seeks to
20 address the concerns in the past. From our perspective,
21 since our bar tickets may be on the line as we direct
22 our investigators or go out in certain circumstances
23 ourselves, the question is what is authorized by law, in
24 quotes, means.

25 It's not clear from the text, at least to me,

1 of Comment [20] what authorized by law means. It could
2 take a couple of broad meanings. One meaning, since I
3 work for the Office of the Attorney General, the
4 Attorney General of California is the chief law
5 enforcement officer of the state he has investigative
6 authorities and he can delegate those investigative
7 authorities to his deputy attorneys like myself or to
8 his agents. If that is the authorized by law being
9 considered, then authorized by law is a more or less
10 complete solution to the problem because Deputy District
11 Attorneys also have similar kinds of authorities and
12 from statute at hand and case law.

13 If, however -- here's the cause for concern --
14 the authorized by law is some prior affirmative, for
15 example, statute or appellate decision that allows me to
16 direct a consumer fraud investigation, then the prior
17 rule and what it did or did not do becomes very
18 problematic.

19 Let me suggest, under the prior Rule 2-104
20 amendment, the rule is violated only if someone is a
21 party that is technically a party to a lawsuit. If the
22 person is not a party to a lawsuit, then I can make
23 contacts, have my agents make contacts without violating
24 the rule. But there is no obviously affirmative piece
25 of statute or case authority that says Deputy Attorney

1 General Greene can contact or have investigators contact
2 people. The reason I can do this without being
3 concerned about my bar ticket is there is no rule that
4 applies to contacts outside the situation to which
5 someone is a party.

6 So it's really a question of if the
7 commission's intent actually is to provide comfort.
8 Those of us that do the people's work in these regards
9 certainly would applaud that. But since it is our bar
10 tickets on the line and, in particular, because our
11 activities, particularly the most complex environmental
12 cases, antitrust cases and fraud cases all involve
13 essentially this vertical prosecution model, that we
14 need clarity in terms of what does authorized by law
15 mean.

16 COMMISSION MEMBER SONDHEIM: Let me follow-up
17 on what you've just said. If you look at the last
18 sentence of Comment [20], it says: "This change also is
19 not intended to preclude the development of the law with
20 respect to which criminal and civil law enforcement
21 communications are authorized by law."

22 So you're concerned, if I understand you, that
23 you may not be able to find any, quote, prior case, for
24 example, that explicitly takes into account your
25 situation that you now are concerned about, but that you

1 do feel there are general statutes giving certain
2 authorities to the Attorney General, District Attorneys
3 under which that type of communication could be
4 developed. Wouldn't that last sentence then encompass
5 your concern?

6 MR. GREENE: Well, it's cause for concern,
7 frankly, Mr. Chairman. It seems to be an invitation to
8 be a test case, and my job is not to be a test case in
9 terms of the scope of the ethical rules of State Bar of
10 California. My job is to prosecute people for violating
11 antitrust laws, environmental laws, consumer laws.

12 So the fact that this rule and specific comment
13 does not foreclose future development, there will be
14 necessarily a chilling effect if it's not necessarily
15 clear what I can do.

16 I can certainly speak in greater detail of how
17 we actually do our business in terms of how I would run
18 a business, for example, but I think that, given the
19 importance of the prosecutorial function both to the
20 State Bar and the public in general in California,
21 clarity here is of the essence.

22 So I think that we would very strongly commend
23 to the attention of the commission the notion that this
24 should be clarified to make it clear that, as I'm doing
25 my job and my colleagues are doing their jobs as most

1 people understand them, that we are not running afoul of
2 State Bar rules because I'm actually running
3 investigators into companies constantly. If we can't do
4 that, then we will not be able to do the job.

5 COMMISSION MEMBER MARTINEZ: Comment [19]
6 addresses the authorized by law. Do you have any
7 suggestions as to how to explain that further?

8 COMMISSION MEMBER SONDHEIM: In other words,
9 help us find the clarity that you're seeking. You don't
10 have to do it right now on the spot, but submit whatever
11 you would like.

12 MR. GREENE: I think, Mr. Martinez, this
13 conceivably could get there, probably just a little bit
14 of a tweak. This could conceivably be -- for example,
15 me invoking the Constitution and Government Code with
16 respect to the roles of the Attorney General and his or
17 her deputies, that language could conceivably support
18 that. If I have to look for some affirmative ethical
19 rule or ethical opinion that says I can do these
20 undercover investigations or direct them, then --

21 COMMISSION MEMBER MARTINEZ: I think those
22 authorities may not exist, is my understanding. The
23 first sentence is intended to suggest that is
24 authorized -- that these kind of investigation
25 activities are authorized by law without specifically

1 referring to any specific case or body of law.

2 MR. GREENE: Okay. Well, that's --

3 COMMISSION MEMBER MARTINEZ: I think that's the
4 intent.

5 COMMISSION MEMBER SONDEHEIM: But if your office
6 or the other groups you represent feel that isn't clear
7 enough, give us the language you would like.

8 MR. GREENE: That is an invitation we would
9 happily respond to.

10 COMMISSION MEMBER SAPIRO: I would like to
11 augment that. I haven't done a criminal case in a long
12 time so I don't have a say in that particular dialogue.
13 To me, the problem I have with the constant litany we've
14 been hearing, don't change party to person, is that on
15 the civil side we run into this problem and are likely
16 to run into this problem repeatedly unless we make a
17 change because of the Dale case.

18 Suppose one of my clients is subpoenaed to a
19 deposition. I go to the deposition and my client is a
20 witness but not a party to the case. The lawyer taking
21 the deposition and the other lawyers in the room know
22 that I represent that witness. They should be able to
23 pick up the phone and contact my client directly without
24 my consent in that context. But if we don't make the
25 change party to person, Dale suggests that's not the

1 violation, but it should be a violation if they knew I
2 represented that nonparty witness in that context.

3 MR. GREENE: The points are very well taken. I
4 do think that I have a little bit of a difference with
5 you potentially on Dale. It seems the problem with Dale
6 was less the 100.7 issues but, quite frankly, fraud on
7 an incarcerated inmate. The lawyer got his comeupance
8 on another rule which was much tighter. Where there's a
9 clear representation, then that certainly makes sense.

10 The context should be something -- I'm more
11 concerned with contact with either my employees, my
12 deputies, my investigators with somebody who is making a
13 sales pitch to some little lady and what she's buying or
14 not buying.

15 COMMISSION MEMBER SAPIRO: That's why I agreed
16 with the comment.

17 COMMISSION MEMBER MARTINEZ: Corporate
18 transactional situations where the lawyer represents a
19 party but the client isn't a party to any transaction,
20 to reach those kinds of lawyers, protect that
21 relationship as well.

22 MR. GREENE: Actually, the case authority in
23 terms of that is allowing privilege to be raised in.
24 Thank you. This is very helpful.

25 Let me mention one other thing. I defend

1 people as well as prosecute people as well as folks in
2 my office do. We would love some comfort actually and
3 change to 4.3 expanding on this notion. A couple of
4 points.

5 The first is one this appears to be a free-fire
6 zone. It is not at all clear to me if this is
7 necessary. The ABA rule contains no similar provision.
8 As I understand the rationale for this, there is a 1st
9 Amendment notion in play here. I'm assuming that. I
10 have not researched this carefully. I have not at least
11 on quick search been able to find cases on a 1st
12 Amendment right to add where someone is represented by
13 counsel.

14 But the easy fix here might be just to strike
15 this particular section and leave it to the development
16 of case law because, as someone who represents high
17 officials throughout state government, I think certain
18 conversation I should be there for. This should not be
19 a free-fire zone.

20 COMMISSION MEMBER SONDHEIM: That's in a
21 current rule. It's not something we've added. That's
22 something all public agencies have had to deal with, so
23 to speak, under current rules. So why should we delete
24 something that is there now?

25 COMMISSION MEMBER MARTINEZ: Is the word public

1 official or public office --

2 COMMISSION MEMBER MOHR: Public officer.

3 COMMISSION MEMBER MARTINEZ: So now we have the
4 phrase public official.

5 MR. GREENE: I think my sense of this, frankly,
6 is that public officer seems to resonate with a notion
7 in terms of the private world in terms of the control
8 group but official board or body, that's very broad.

9 COMMISSION MEMBER SONDEIM: It's just official
10 has been changed from the current officer.

11 MR. GREENE: And, arguably, anyone in state
12 service is an official.

13 COMMISSION MEMBER SONDEIM: In any event even,
14 if we weren't to delete it, it would be too broad in
15 your view?

16 MR. GREENE: It does seem too broad, Mr.
17 Chairman. Unless there's some major reason, returning
18 to your original language would seem to make sense to
19 me. I don't understand the policy driver here
20 particularly. I raise it to your attention because
21 we --

22 COMMISSION MEMBER MOHR: One possibility, you
23 might want to check with your county counsel and city
24 attorneys. Their concern was using officer because --
25 on the grounds that they are public officers.

1 MR. GREENE: Sure. You, obviously, are the
2 experts, but I'm presuming that the original notion that
3 was you could contact a high official but anyone else
4 would be potentially subject to --

5 COMMISSION MEMBER MARTINEZ: We were looking at
6 what a public officer was and couldn't get a handle on
7 what that meant. But, you're right, it might be too
8 broad.

9 MR. GREENE: This is very helpful. I will
10 certainly focus our institutional attention on finding
11 the right word or at least some history.

12 COMMISSION MEMBER SAPIRO: When you send your
13 comments, we also would like you to take into
14 consideration a very common type of situation. If we
15 delete (c), one would be impliedly prohibited -- suppose
16 I have a claim and lawsuit pending against the City and
17 County of San Francisco. If we delete this, I couldn't
18 appear before the board of supervisors and urge them to
19 settle this dispute without the permission of the city
20 attorney, and yet I've got a 1st Amendment right to do
21 that in a public forum. I should be able to exercise my
22 1st Amendment rights.

23 MR. GREENE: Well, that does not seem
24 particularly problematic to me just as a citizen. My
25 concern is the quiet conversation that takes place in an

1 official's office where I'm not present, it's not
2 public, it's a quiet moment, representation are made,
3 our lawyers are not present for that conversation.
4 That's dangerous. It seems like it should be prohibited
5 by the rule.

6 COMMISSION MEMBER SAPIRO: But you've got the
7 ability to tell your client, if Jerry Sapiro comes in
8 your office, don't talk, call me instead. It's an easy
9 solution.

10 MR. GREENE: It could be somewhat
11 straightforward, but public officials, at least the kind
12 like that, they meet with people constantly, their
13 appointment secretaries are just bringing people in on a
14 regular basis. This is not a situation typically where
15 they think about lawyers very frequently, particularly
16 if it's not clear what the meeting is about. Especially
17 a conversation on the initial agenda.

18 COMMISSION MEMBER MARTINEZ: I think I agree
19 with you to the extent that (c)(1) makes it sound like
20 the 1st Amendment right is an absolute right. It's
21 limited to time, place and manner. There are restraints
22 on it. There's no qualification to that 1st Amendment
23 right. What I don't know is what limits could we put in
24 in (c)(1) that would still be consistent with the 1st
25 Amendment?

1 COMMISSION MEMBER SONDHEIM: In other words, if
2 you can help us in that regard, that is your office.

3 MR. GREENE: We will make every effort. I'll
4 focus our efforts initially on whether I can find a
5 word, and then hopefully that's broader with the 1st
6 Amendment issue. We'll see what we can do.

7 COMMISSION MEMBER SAPIRO: It may be that the
8 decision you come to is maybe we can't adequately
9 clarify (c)(1), but if you have suggestions for
10 appropriate comment, that's worth considering, too.

11 COMMISSION MEMBER MARTINEZ: (c)(1), except for
12 the initial part, was the default we have reverted to.
13 So (c)(1) is similar to the present rule.

14 MR. GREENE: Okay.

15 COMMISSION MEMBER SONDHEIM: Let me ask you an
16 entirely different question. You mentioned at the
17 inception that you were here on behalf of your office,
18 the CDAA and California Public Defenders.

19 In regard to the change from party to person,
20 there has been some concern expressed that I'm aware of
21 that in doing what has been done in Comment [19],
22 especially Comment [20], there's been a tilt in the view
23 of some toward giving the prosecutors things that they
24 don't have or shouldn't have.

25 In fact, I personally believe that a lot of

1 that already is there in the law so that there isn't any
2 change. It simply is a clarification for the benefit of
3 the practitioner who looks at the rule now.

4 Having said that, there is, therefore, some
5 concern by public defenders and defense attorneys as to
6 why there isn't something comparable for that branch of
7 the bar. I just wonder if you have any thoughts. I
8 don't especially expect you to answer if you don't want
9 to. It's kind of the other side of the coin.

10 MR. GREENE: Let me start with at least my
11 understanding of the problem. I do understand that both
12 the state association and the chief appellate division
13 in Los Angeles have extensive comments which will
14 probably get into both 5th and 2nd Amendment rights
15 which is beyond my capacity to speak to.

16 My understanding, having been a very long time
17 ago a public defender, I think they're most concerned
18 with that practice is very busy. There is very little
19 time to prepare. I think they're very concerned about
20 being essentially in the lock-up being able to talk to
21 somebody else that may be relevant to their particular
22 situation.

23 Currently, their understanding is that the
24 current rule is implications to the word party would
25 allow them to have that conversation in lock-up without

1 violating the rule so they are able to talk to someone
2 who may be a co-participant in the alleged crime or
3 knows about the crime and getting some information
4 without going through the attorney. So they have a real
5 and pretty grave problem. So that's the problem they
6 are really at the end of the day trying to address with
7 some of their comments.

8 The easy way to fix that is stay with the
9 current rule, which they're reasonably comfortable
10 with. As a second best situation, whether they could
11 suggest language that would allow them to do that
12 particular thing in a way that's consistent with a lot
13 of ethical constraints on the profession, I think that's
14 a hard thing.

15 I've been chatting with the lead person for the
16 L.A. County group who is their chief appellate person,
17 Minaster. I know they've got a 20-plus page document
18 being prepared. But I think that's fundamentally the
19 issue. Ours is a different one because we are running
20 undercover investigations constantly.

21 COMMISSION MEMBER SONDHEIM: In terms of your
22 conversation, again, we've suggested that you provide us
23 with language to clarify whatever concerns you have. If
24 you have further discussions with Mr. Minaster, you
25 might suggest that to him as kind of a fall-back

1 position in the event the commission is not persuaded to
2 go back to the current party situation.

3 MR. GREENE: Certainly I will share that
4 invitation with him, Mr. Chairman, and send him an
5 e-mail when I get back to my office. Those are the two
6 major -- three major points I wanted to make. If there
7 are any questions, I stand ready to answer them.

8 Thank you.

9 COMMISSION MEMBER SONDHEIM: Let me suggest
10 that we take maybe a 15-minute break right now and see
11 if anybody else shows up and wants to talk.

12 (recess taken.)

13 COMMISSION MEMBER SONDHEIM: We're going to
14 resume now, and Steve Lewis wants to add a little bit to
15 what he's previously stated.

16 MR. LEWIS: Thank you very much. I just feel
17 like I didn't articulately make one point that I would
18 like, and that is regarding the juxtaposition between
19 Rule 1.8.1, Comment [15] and Rule 4.2, Comment [8].

20 I did talk about this to some extent, but when
21 we look at the fact that when a client already has
22 independent counsel with respect to a transaction and I
23 suggested that there be language in Paragraph [15]
24 talking about the lawyer having an obligation to
25 communicate with the client's counsel for that matter or

1 at least to get permission from that counsel to speak
2 directly with a lawyer.

3 I look at Comment [8] to Rule 4.2 and Rule 4.2
4 would suggest to me that the lawyer actually would be
5 obligated in that manner because the only situation in
6 which the lawyer can speak directly with a person who is
7 represented generally is when the lawyer is a party to a
8 transaction, and one is not generally a party, and 1.8.1
9 deals essentially with transactions.

10 So I think that the comment to 1.8.1, Paragraph
11 [15], needs to cross-reference Rule 4.2 and the
12 commission needs to deal with that in one way or
13 another. I think the right way is by requiring a lawyer
14 who knows the client is represented by counsel for
15 purposes of the transaction to require the lawyer to
16 communicate directly with the client's counsel or to get
17 permission from counsel to commune directly with the
18 lawyer.

19 Thank you.

20 COMMISSION MEMBER SONDHEIM: Thank you. It is
21 now approximately 12:18 and all the persons who are
22 present to testify have been given an opportunity to
23 speak, and we'll be going off the record for a 15-minute
24 break to see if anyone else arrives.

25 (Recess taken.)

1 COMMISSION MEMBER SONDEHEIM: We've been waiting
2 approximately 15 minutes to see if anybody else is
3 interested in making any comments. Unless there is
4 anybody in the room here who would like to speak, I'm
5 going to adjourn our public hearing. Seeing no one who
6 desires to speak, we will adjourn the public hearing.
7 We've looked outside to see if there was anybody on
8 their way and there appears to be no one.

9 I want to thank every everybody who is still
10 here for coming, and it is now about 12:35 and I wish
11 all of you a good afternoon.

12 (Proceedings concluded.)
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

---000---

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, PHYLLIS MANK, certify that I was the
Official Court Reporter and that I reported in shorthand
writing the foregoing proceedings to the best of my
ability; that I thereafter caused my shorthand writing
to be reduced to typewriting, and the pages numbered 1
through 74, inclusive, constitute a complete, true and
correct record.

In witness whereof, I have subscribed this
certificate at Sacramento, California, on this 18th day
of June, 2008.

PHYLLIS MANK, CSR No. 5093