ATTACHMENT 3

Transcript of the Public Hearing Held
for Proposed Rules in Batch 5

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THE STATE BAR OF CALIFORNIA

PUBLIC HEARING REGARDING
PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT
OF THE STATE BAR OF CALIFORNIA

TUESDAY, NOVEMBER 10, 2009

Reported by:
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ATTENDEE LIST

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P R O C E E D I N G S 10:42 a.m.

MR. SONDHEIM: Good morning. It's about 11:35 a.m. on November 10th and we're here for a public hearing of the State Bar of California to receive testimony on proposed amendments to the rules of professional conduct. My name is Harry Sondheim and I am the Chair of the State Bar's Commission for the Revision of 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 Supreme Court. The California Supreme Court, that is. Amendments to the Rules of Professional Conduct do not become binding unless and 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 posting at the State Bar Web site, public notices in the Daily Journal, the Daily Recorder, e-mail notifications to interested persons, and a press release to the media.

This proceeding is being audio recorded and 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. If you have any written materials that have not yet been submitted, please give them to Lauren McCurdy of the State Bar staff or you can give them to -- oh, Lauren is there in the back. She'll stand up for you so you know who she is. There you go.

If there's anyone who has not signed in, we also ask that you sign in with Lauren before being called to speak.

This public hearing has been authorized by the Board of Governors Committee on Regulation and Admissions which oversees the work of the commission. The commission is a subentity of the Board of Governors. Public hearing as well as the 60-day public comment period on the proposed rules which ends on November 13th have been authorized by the board.

Let me introduce the panelists. At my right is Paul Vapnek and at my left is Ellen Peck. And then we have staff here, Randall Difuntorum and our consultant Kevin Mohr.

Lauren?

MR. VAPNEK: Harry, one error. You said 11:45. It's 10:45.

MR. SONDHEIM: 10:45. Oh, I'm sorry. My apologies, it's 10:45.

Lauren, you want to call the speakers?

MS. McCURDY: Well, I guess we'll go by Gary Lieberstein who first signed in --

MR. LIEBERSTEIN: Thank you.

MS. McCURDY: -- addressing you on 3.8.

MR. LIEBERSTEIN: Good morning, Commissioner Sondheim, Mr. Chairman, and Commissioner Vapnek and Peck and other members of the commission. My name is Gary Lieberstein. I am presently the elected district attorney of Napa County and I am also the president of California District Attorneys Association. So I'm here in my capacity as president of CDAA representing 2500 prosecutors statewide.

By way of background, I've been a prosecutor in the Napa County District Attorney's office since 1985 and I've been the elected district attorney since 1998. In addition to my local and state duties, I'm also the California representative to the National District Attorneys Association board of directors.

I appreciate the opportunity to come and speak to you this morning with regard to Rule 3.8 which is certainly directed toward the responsibilities of a prosecutor. By way of background, I would tell you as a career prosecutor that I take my ethical obligations as a prosecutor at the highest levels, that I ascribe to the theory and I know most of my colleagues feel the same way. And I say, "most." As in any profession, there are always people who work the boundaries of our profession. And the State Bar Commission as a disciplinary organization wouldn't exist if there weren't some folks among as, as in another professions as well, who go over the line of boundaries of ethical and legal obligations.

But I just want to say first and foremost, as a prosecutor our mantra is hard and fast and that is to do the right thing for the right reasons. And we try to ascribe to that and unfortunately, you know, one bad seed -- such as a former prosecutor I believe from North Carolina, Mr. Nifong -- when a case like that happens, suddenly there is a major reaction and certainly at the national level and I suspect, in part, in California. And my experience with that is those are the exceptions much more so than the rules.

I would like us to start with what is currently in effect which at the outset we would say we believe that Rule 5.110, the current existing rule regarding duty of members in government service and particularly prosecutors is one which we think currently covers the area more than adequately. There are many state and federal regulations and cases that govern our duties and obligations. And I'll touch on a few of those.

But just for the record, I'll recite this fairly short -- (As Read:) a member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause. If after the institution of criminal charges the member in government service having responsibility for prosecuting the charges becomes aware that those charges are not supported by probable cause, the member shall

promptly so advise the court in which the criminal matter is pending.

And that is the length and breadth of the current rule. I would also indicate that our duties as a prosecutor involve not just holding the responsibles accountable but protecting the innocent. And that's something that I think has borne out over the years with the implement of DNA technology that is something that's now used equally to exonerate as well as to prosecute and convict. And I think there are many district attorneys, both in California and across the country, who have gone on record in the fact we've seen decades-old cases dismissed because of exonerating evidence. So that's -- Brady v. Maryland has been the standard for a long time but I think with the advent of science, such as DNA, we take that much further.

I also want to say at the outset that I find the comments of the commission actually pretty straightforward in terms of many of our obligations. What we have some issues with is the actual rule we find in some areas is in conflict to the comments and some areas adds standards that are not required by law and, in fact, are confusing. We understand the stated goal of the commission is to actually make responsibilities more clear for prosecutors and to better protect the innocent, and our concerns in some of these areas is that it actually confuses some of the responsibilities.

I would state in just looking at the comments, Comment No. 1, I don't think we could state it any better. I think that states the highest ethical duties of a prosecutor. And, again, I don't think we have any issue whatsoever with the definitions that are set out in Comment No. 1 on Page 31. Comment 2, of course prosecutors -- anybody in the prosecutor's office. We think Comment No. 3 is particularly important that you're stating that you don't intend to expand upon the obligations imposed upon prosecutors by applicable law. But, again, when we get into the actual rule, we think that this comment is in conflict with some parts of the rule.

No. 4 is also equally true. Clearly, preliminary hearing is a critical right for a defendant and, you know, waiver of preliminary hearing is one that's usually sought by a represented defendant. In the case of an unrepresented defendant, that would normally be a situation where we would be in a courtroom and a judge would have approved the defendant appearing in pro per. So, again, the basic sense of that comment is very straightforward.

We also appreciate Comment 5, that these rules are meant to be with respect to controlling case law and that you're not going to hold a prosecutor retroactive based on a change of law in the future.

And, again, I think we go through each of these comments and personally and on behalf of my colleagues, I don't think I have concerns about any of those comments with the exception of Comment 11. And we'll get into that in more detail. But we have a very strong concern and that will -- that's in Rule 3.8(g) in terms of how a prosecutor in one jurisdiction can

reasonably know that the evidence or information is material and should be disclosed to another jurisdiction. And we can talk about that.

And Comment 12 is pretty much right on case law. I mean, that's our Brady obligation. And we appreciate Comment 13 very much, that a prosecutor's independent judgment made in good faith isn't a violation. We think that that good faith language should be prevalent throughout Rule 3.8, that when a prosecutor is acting in good faith, just as the Supreme Court has allowed good faith exceptions for law enforcement, that that should be taken into consideration whether someone -- in this case, a prosecutor -- is subject to discipline.

So with those introductory comments, I would turn to the Rule 3.8 specifically. And I would also note and incorporate -- you have a letter I believe I already submitted by my learned colleague, Gregory Totten, the elected district attorney of Ventura County. Mr. Totten is also on our board of directors. I believe he's our second vice president. And I believe he very eloquently stated a number of concerns that he has and I'll try to highlight a few of

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those that we share.

And then you also have a letter recently submitted by Bob Lee who is the elected district attorney of Santa Cruz County and I believe he elaborates on some of the objections as well. And I think that our letters are pretty consistent in terms of our concerns. And I would anticipate a third letter coming on behalf of all of our -- all of my colleagues, most likely signed by myself and our executive director Scott Thorpe. And you should receive that in the next day or two and certainly by Friday, for sure.

So with regard to 3.8, the initial concern -- you state, "a prosecutor in a criminal case." And the current rule that I spoke of, 5.110, makes a very clear distinction between prefiling and postfiling. And we think that's very important. So just at the outset, it's not clear. Does a criminal case mean at the outset of law enforcement's investigation? Is that when it's sent to the district attorney's office? Does that mean it's been filed? That's unclear.

The word, "recommending," is one that we have a very strong concern about in 3.8(a) because we really don't understand the context. If a prosecutor files charges or declines to file charges, I have 21 prosecutors under my jurisdiction and my name is on

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every piece of paper that charges a crime, whether it's a misdemeanor or a felony. And the only way one of my prosecutors can sign their name under my name is because I've given them my legal authority as elected district attorney.

The term, recommending, simply does not have any meaning in our profession. Our concerns are if that is such to say that we have an internal discussion about whether or not a case should be filed and ultimately there's a disagreement that somebody in the office who recommends against filing then could potentially report his colleague to the State Bar because they recommended filing and there was a disagreement. And this is all

around the term, "probable cause."
And I would also indicate to you -- and I'm not suggesting you change the rule -- but probable cause is the standard that the police officer uses to make an arrest. It's probable cause to believe that a crime has been committed and that they believe they know the person or persons responsible. Our standard, of course, at trial is beyond a reasonable doubt. Most district attorneys, most prosecutors, when they review a case for filing -- and as a career prosecutor, I can tell you this is what I do -- is you project yourself into the courtroom and you look at whether or not this is a

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charge you can sustain in front of a jury beyond a reasonable doubt based on what you have in front of you.
Clearly, at the outset of a case there's going to be many things that are not investigated yet. In the case of a murder case, you may have evidence of probable cause and someone's in custody and you have to make a charging decision and much more information is going to come along the way and you're not prepared to prove beyond a reasonable doubt the day you file. But, you know, an example -- and you're not going to generally be disciplining a prosecutor who exercised their discretion doesn't file a case because they don't believe probable cause exists.
Those are the ones you read about in the newspaper and some of the highlighted cases such as my recent experience having to do with some coach of a local professional football team and the debate whether or not we should have filed. And I can tell you I had probable cause to file but I was way beyond that and my decision making as to whether or not that was a case that we could prove beyond a reasonable doubt belonged in a courtroom.
So probable cause certainly is a lower standard but it's also -- it's not an absolute. And we have judges every day that make probable cause rulings.

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When somebody is arrested and put in jail on a crime, there is a legal requirement for a judge within 24 hours to review an affidavit of probable cause that's signed by a police officer. And that officer -- the judge then makes an initial decision whether or not the baseline of probable cause has been shown for the person to remain in custody before the prosecutor's even filed.
Once the prosecutor files -- and in a felony case we have a preliminary hearing. And a preliminary hearing is to decide whether or not there's probable cause to go to trial. And, again, that's the lower standard of reason to believe a crime was committed and that we've got the person or persons responsible for it. So, again, these are decisions that are made at different levels.
Our concern is does a -- when a judge finds, for example, that probable cause doesn't exist in a preliminary hearing and we've filed the charge and the judge says, I'm sorry, Mr. Prosecutor, I just don't find enough to go to trial, is now the district attorney or the assistant district attorney subject to being reported to the bar because they filed a case that subsequently a judge found did not have probable cause? And probable cause can be based on a number of things.

25 You can have a case -- for example, what I'd
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1 say classic, I did child molest cases for a number of
2 years. And the only witness you often have in a child
3 molest case is the child. And you have an accused who
4 either makes no statement or generally makes a statement
5 and denies it happened. And we make credibility calls,
6 we make judgment calls on whether or not we believe that
7 evidence to be credible and to fit probable cause and,
8 ultimately, to fit beyond a reasonable doubt.
9 Our concern here, again, we file a case of
10 child molest and it goes to preliminary hearing and
11 let's say the child testifies and the judge doesn't find
12 the child believable or the child doesn't testify and
13 there's other evidence and the judge says no -- yes,
14 sir?
15 MR. MOHR: If I could just ask a question.
16 You're discussing the probable cause but that's in
17 Rule 5.110 right now, the current rule, and you just
18 said that you have no problem with Rule 5.110.
19 MR. SONDHEIM: In other words, if a judge
20 finds no probable cause, right now under the law you can
21 refile and you're not subject to 5.110.
22 Is there any difference in what is proposed
23 here?
24 MR. LIEBERSTEIN: Well, the two differences in
25 A are the "recommending" --
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1 MR. SONDHEIM: Right.
2 MR. LIEBERSTEIN: -- and we would, at the sake
3 of being redundant, recommend you remove that word
4 because it -- again, we have -- you know, we have very
5 extensive internal discussions on cases sometimes,
6 whether to file, and we just don't understand what that
7 means. Even if it's in a grand jury context in counties
8 that use grand jury, you know, we still have the
9 concern, you know, what if there's a discussion on
10 whether or not it should go to grand jury.
11 Yes?
12 MS. PECK: Harry, may I ask a question?
13 MR. SONDHEIM: Sure. Go right ahead.
14 MS. PECK: Here's my question on
15 "recommending." I understand totally your point of view
16 but if that word, recommending, were perhaps needed by
17 another type of prosecutor -- for example, a
18 U.S. Attorney -- would the word, recommending, in that
19 language cause you DAs problems because you never do
20 that? Would it create any liability to you even though
21 it may be a term that you never would use?
22 MR. LIEBERSTEIN: Well, the liability concern
23 is -- as I've stated, I believe -- which is who is
24 liable here in terms of the prosecutor. In other words,
25 you get a disgruntled prosecutor who, you know, is at
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1 odds because he or she felt differently about a
2 controversial case and they then report to the State Bar
3 that, you know, I didn't think there was probable cause
4 and my boss went ahead and filed this anyway. And then
5 let's say a judge finds no probable cause or a jury
6 acquits. And our concern is you come back and say,
7 well, you know, that -- there were three people in the
8 room that recommended that. You know, the person who
9 signed it and then, you know, the district attorney.

As far as a U.S. attorney, I don't know how that would apply for the State Bar because, of course, they're not -- they don't recommend to us whether we file charges. It's either federal or it's state or it's local. And I don't think the State Bar has jurisdiction over federal prosecutors.
MR. VAPNEK: If they're California lawyers, the State Bar --
MS. PECK: Yes.
MR. VAPNEK: -- does have jurisdiction.
MS. PECK: So the U.S. Attorney's office has been -- that has several offices in California has been very concerned and actually working with the commission on language that, similarly, doesn't -- is flexible enough to deal with their practices.
So I guess what I'm asking you is if you say

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that in your practice it's the -- it would be you the district attorney who brought charges, you would never ever recommend anything, so that word wouldn't really affect you. That is, if you brought charges without probable cause and you otherwise met this standard -- I'm not saying you but if a district attorney brought charges that were without probable cause or were with probable cause, the fact that there's a word, recommending, in there doesn't seem to -- doesn't seem to affect whether or not there's disciplinary culpability. It seems at least applicable to your offices to be perhaps redundant. But I want to -- that's what I'm trying to focus on.
Is it redundant or is it not?
MR. SONDHEIM: Isn't your problem, as I understand it, is that it isn't clear what recommended --
MR. LIEBERSTEIN: Exactly.
MR. SONDHEIM: -- recommending means. It can relate to internal affairs.
MR. LIEBERSTEIN: Exactly.
MR. SONDHEIM: And if we want to keep it in, I take it there would be no objection if it were limited to recommendations made to a grand jury in the course of a grand jury.

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MR. LIEBERSTEIN: I think that would certainly pinpoint it a lot more. You know, once again, I think what you want to focus on is you don't want some rogue prosecutor going in and bringing baseless charges to a grand jury. Now the flip side of that is, again, who determines whether it was baseless. Because in some situations, the grand jury is used as a combination for indictment and also for investigation. And so, you know, the grand jury doesn't indict them and is that prosecutor now liable to the State Bar because they recommended charges of grand jury that a grand jury found there wasn't probable cause.
MS. PECK: Very interesting.
MR. SONDHEIM: Isn't that problem the same, though, when you file a case? You're, in essence, recommending that X be brought into the criminal justice system. Is there any real difference, then, between that and recommending if it's limited to the grand jury?
MR. LIEBERSTEIN: Well, I guess -- I mean, in the context of filing charges, that's already covered by

commencing or continuing to prosecute.
MR. SONDHEIM: Right.
MR. LIEBERSTEIN: And I think it's sufficient to state that that word makes us very uncomfortable even in the grand jury setting for the reasons we just

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pointed out. Because it's -- it's not -- it's not an easily defined -- both "recommending" and "probable cause" are not easily defined. And, you know, there's a concern of liability. The prosecutor recommends charges to the grand jury. The grand jury doesn't indict. The target of the grand jury now comes back and not only sues the prosecutor to try to get outside of absolute immunity and uses Rule 3.8(a) to say, well, the State Bar says a prosecutor must refrain from recommending charges that he knows, and then the other words we have great concern about are "reasonably should know."
MR. SONDHEIM: We'll get to that in a minute.
But staying with the "recommending," don't you have the same problem when you file criminal charges against somebody directly into a courtroom for a preliminary hearing? You could still be sued the same way and the reference could be to the same current rule.
MR. LIEBERSTEIN: I think --
MR. SONDHEIM: I'm trying to understand why there would be a difference between the recommendation to a grand jury and the filing of criminal charges.
MR. LIEBERSTEIN: I mean, I understand your point. And while I think it's true that you could use the current rule for that, I think this tends to pinpoint it more.

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MR. SONDHEIM: Okay.
MS. PECK: And Harry, can I ask one more question along those lines?
MR. LIEBERSTEIN: I'm at your service.
MR. SONDHEIM: Yes.
MS. PECK: Yeah. Because this is very helpful to me, I must say. It's really helpful.
Did you -- did I hear also that you have an objection to the word, "continuing" --
MR. LIEBERSTEIN: No.
MS. PECK: -- to prosecute?
MR. LIEBERSTEIN: No.
MS. PECK: Oh, that's okay. All right. That's what I wanted to --
MR. LIEBERSTEIN: That's part of our ethical obligation not to -- if we learn evidence that shows that we got the wrong person, we shouldn't be in court.
MS. PECK: Excellent. Thank you.
MR. LIEBERSTEIN: And then the other part of 3.8(a) is the "reasonably should know." And I think, again, current rule says, "should know," and I just -- myself and colleagues have concerns about what does the word, reasonably, mean in that context. And there's -- you know, again there's -- it's a lot of sort of Monday morning quarterbacking and backguessing about what we

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should have known after the fact. And that's a very hard standard to try to apply.
In other words, should we have known that a particular witness wasn't credible based on the information we had in front of us when a subsequent

investigation shows that they made prior false complaints or something. There's no way you could know that at the time the charges came to you or, you know, were there additional police investigations that weren't turned over to the prosecution that later come to light.

I have nine investigators that work for me because when we get a case from the police department -- and, you know, I'm a medium county -- that case is never investigated to our full satisfaction. We want to make sure we know everything that we can as best we can and make sure that we're doing the right thing. And so if we just rely on the police investigation, that may or may not give us what we need.

If by further investigation we find out that along the lines of the earlier part of that that we shouldn't continue to prosecute a charge, are we now liable because someone goes, well, you reasonably should have known this two months ago. Or what about the prosecutor who gets handed a case in the larger offices and, you know, they've got a big case load and they

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don't have time to get to it for a month and by the time they get to it, because it's set for trial down the road, they find out things that someone goes, well, if you had picked it up a month ago, you should have known this. And then -- and they're thereby held accountable.

MR. SONDHEIM: But the words, should know, are currently in the rule.

MR. LIEBERSTEIN: They are.

MR. SONDHEIM: So you think "reasonably," in essence, increases the chance of disciplinary liability for a prosecutor rather than providing a narrower standard for a prosecutor.

MR. MOHR: Harry, may I read the definition of "reasonably should know" from the model rules which the commission this last weekend recommended be adopted?

And (As Read:) "reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

That's all it means.

MR. VAPNEK: That doesn't help.

MR. LIEBERSTEIN: Yeah. And I guess I should say, you know, if we're talking about 5.110 and in the course of this discussion, I mean, I do have concerns about what "should know" means for the very reasons I

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say. You know, you're basically trying to prove a negative.

MR. SONDHEIM: But you've been operating and district attorneys throughout the state for years under that standard and maybe you can provide us if you think it's been improperly applied. But I'm personally not aware of anything like that. And when one has the word, reasonably, I'm just wondering if that doesn't give you greater protection than if it just says, should know.

MR. LIEBERSTEIN: Well, I mean, I understand your point and again, as I say, I guess we -- that causes us concern.

MR. SONDHEIM: All right.

MR. LIEBERSTEIN: And clearly -- I mean, if it's obvious that a witness was lying or in the Nifong situation somebody could say, well, if he didn't know,

he certainly should have known, that's one a lot of people might agree on. But we're just concerned that there's -- again, when you talk about the debate that prosecutors, defense attorneys, and judges have every day about what constitutes probable cause, this has some concerns. But, you know, I think it's noted in our letters as well and I don't want to belabor the point further unless you think I should.

MR. SONDHEIM: Would you get more comfort, as

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has been suggested by the Santa Cruz district attorney, if there were some provision comparable to Comment 13 that says a prosecutor's independent judgment made in good faith that probable cause exists will not violate the rule?

MR. LIEBERSTEIN: Yes.

MR. SONDHEIM: Would that take care of the "reasonably should know" problem?

MR. LIEBERSTEIN: I think that would be very helpful. I'm not saying there wouldn't still be concerns, but I think that that was why I started with the comments. Because, you know, you look at intent but obviously when you look at the rule by itself in a law book or in practice, not everybody sees the intent behind it. And that good faith exception is very important. Because clearly if a prosecutor is acting in bad faith, there should be consequences if it's obvious and if they're misusing their office. I think that's a basic tenet that we live by every day.

Then we move forward then to 3.8(b). We do have some concerns there and I think Mr. Totten addressed that very well. And that is that that appears to add requirements on us that the law doesn't require. In other words, on its face it seems to -- it seems to put a duty on the prosecution that we don't have any

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control over. In other words, since it doesn't talk about pre or postfiling, it seems to put a duty on the prosecution that we somehow have an obligation to ensure that the police are making sure that they have advised of the right to counsel.

And that's what Miranda's about. I mean, the police have that obligation. And once charges are filed, that's the jurisdiction of the court. I mean, the court has that direct obligation to advise somebody and, in fact, before we can even take a plea in even the simplest of misdemeanor cases or even infractions, the accused has to be advised of their right to counsel.

So we're -- you know, quite frankly, we believe -- as Mr. Totten states -- that that simply is unnecessary. I mean, it's -- it shifts a burden to prosecutors that we could be disciplined for something that in many cases we don't have control over. I mean, prefiling we rarely if ever have direct contact with the accused. You know, law enforcement does but we -- you know, I've seen it on TV and I can't -- in 25 years, I've never been in a jail cell sitting across from a defendant offering him Man 2 or whatever you see on television.

MS. PECK: Whatever Jack McCoy does?

MR. LIEBERSTEIN: Yeah, it just doesn't --

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MS. PECK: Things are different in New York.

MR. LIEBERSTEIN: They must be. They must be. But in real life that just doesn't happen. And we're just not sure what the point of B is. I understand you want to protect the innocent and protect the defendant. And we believe that the law already covers that area and you're adding a layer on prosecutors that the law simply doesn't add.
MR. VAPNEK: May I ask a --
MR. LIEBERSTEIN: Certainly.
MR. VAPNEK: -- question, Mr. Lieberstein?
MR. LIEBERSTEIN: Yes, sir.
MR. VAPNEK: The proposal of the commission for 3.8(b) is identical to the provision in the current model rules. And I believe most if not all states have adopted 3.8(b).
Have you heard of any problems in any other state that has adopted 3.8(b) that gives you pause that the commission should consider?
MR. LIEBERSTEIN: I don't have the answer to that, sir. I -- you know, I would be saying to run up the NDAA pole. But my understanding is that many of the model ABA rules have not been adopted by a majority of the states. I don't know if 3.8(b) is one in particular, but I'm not -- I'm not here to tell you that

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we're in -- that we think the ABA model rules are all right on point. I mean, you know, I don't have those in front of me to go line by line.
MR. VAPNEK: No, I understand.
MR. LIEBERSTEIN: And I'm just looking at what California's trying to do. But we do feel that that's in conflict with Comment B, that none of these rules are meant to expand the obligations imposed on prosecutors by existing law and yet this very area would appear to do that.
And it does cause us serious concern that, you know, we're essentially being put in a position that we have no ability to satisfy that simply because -- you know, I will tell you in my own practice over the years when I'm in the courtroom and we're taking a plea, it is obviously to make sure that the judge is properly advising the defendant. That's the jurisdiction of the judge at that point, but it's also my responsibility to make sure I have a plea that's going to hold up on appeal. But that's a very limited situation. And this just puts us in places we simply in the real world can't be.
We're not there next to the defendant when the police make initial contact or, you know, read them their Miranda rights or anything like that. And they

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set their first appearance in court. It's not the prosecutor's not only place but I don't even think there's a protocol for the prosecutor to advise the defendant of his rights. That's the court's jurisdiction.
Yes, sir?
MR. MOHR: I'm looking at a Wyoming rule that begins -- this is at Page 218 of the materials that were posted to the Web site. And it qualifies Paragraph B by beginning with the words, (As Read:) prior to interviewing an accused or prior to counseling a law enforcement officer with respect to interviewing an

accused.
So when you're actually involved in it then you have to take steps to assure, you know, that the accused has been advised of their rights, you know, not interfering with their rights. In other words, Paragraph B as written right now would follow that introductory clause.
Would that provide you with comfort?
MR. LIEBERSTEIN: Well, I think you would have to say when -- you would have to reference when a prosecutor is directly involved with the interview of an accused. And as I said, that is an extremely limited situation in real life.

MR. MOHR: But this addresses that because it says, prior to interviewing an accused.
MR. LIEBERSTEIN: Well, certainly --
MR. MOHR: It's just saying that before you interview an accused, this is what you must do. It doesn't mean that you have to -- it's only going to apply when you are interviewing an accused, is how I would read it.
MR. LIEBERSTEIN: I think our concern and the reason we say it's unnecessary is because that is such a limited situation in real life. I mean, I can't personally in 25 years ever think of a time when I was directly interviewing an accused. There are certainly cases where the prosecutor is monitoring the interview in another room, perhaps, or on a remote level, but it's the police officer that's in interviewing the accused.
And one of the reasons for that is that -- is the very baseline that we don't want to make ourselves a witness to a case. If we're the prosecution and we're directly interviewing a defendant, now we're a witness and we've got a built-in conflict. So, I mean, you're building a rule for a very limited exception that just seems -- when the -- when the desire is to make it clearer what the responsibilities are and to clear up ambiguities, we think this just creates great ambiguity.

Because I think as soon as you put in that language, someone's going to look and go, well, wait a second, prosecutors don't interview accused, so why is there a rule. I guess that's -- that's our concern. What is the need for this rule when simply this situation doesn't happen.
MR. MOHR: Okay. What if a prosecutor did interview an accused and didn't take the steps that are outlined in Paragraph B? What would be the result? Would the prosecutor be subject to discipline? Should the prosecutor be subject to discipline under those cases?
MR. LIEBERSTEIN: If a prosecutor was one-on-one interviewing a defendant, I mean, I think that would be -- in a number of situations, that would -- to me would be unethical in itself. I mean, it certainly wouldn't be part of any model prosecution courses. I mean, I think we would -- you know, we would be urging against that in any training I know of.
There may be times when the prosecutor is in the room with the law enforcement officer, and there certainly may be jurisdictions where the prosecutor may interject a question. But the law enforcement officer

is the one conducting the interview. Now if you're saying when a prosecutor is involved in an interview

with a law enforcement officer the prosecutor should make all reasonable efforts to make sure the law enforcement officer advises the accused of his right to counsel, I think that would probably be conforming with existing law.

If you think you need a rule that says that, I haven't consulted my colleagues on this but my gut sense tells me that that would not be objectionable. But the way this is stated -- and I'm not sure you need that. But the way this is stated, we think this is very confusing and unnecessary.

MR. MOHR: But it does happen that on occasion a prosecutor would be in the interview room with the police officer; is that correct?

MR. LIEBERSTEIN: I can't tell you that never happens. I mean, we have a full range of size of jurisdictions. I would tell you that would be a great exception and that would certainly be something that I would -- in training fellow prosecutors, I would advise against. Because, like I said, once again it makes the prosecutor a witness.

And if I assign a prosecutor, for example, a murder case -- and my practice is to assign them on day one when we know that there's a potential case -- they're going to be in some way observing an interview

with law enforcement. Most likely, it's through a closed-circuit TV or something but it -- you know, it gives the law enforcement officer a chance to step out and say, is there anything else I should cover. But they're not going to be in having that interview and my prosecutor's going to know -- you know, if they don't hear a Miranda warning, they're going to make sure -- they're going to call the officer out and make sure he gives it.

Because we -- in my jurisdiction we videotape all interviews. But that's not required by any rules and there's some jurisdictions that don't. But I can tell you the last thing I want is a videotaped interview where an officer is sitting with someone in custody and there's no Miranda warning. Now remember, if they're not in custody, they don't have to have a Miranda warning either. I mean, there are situations where -- that are noncustodial where Miranda rights aren't required.

So it's not every situation that somebody has an immediate right to counsel. And again, you know, what's the definition of "accused"? I mean, that's -- that's problematic too. Somebody can be a suspect and they're not necessarily an accused. You know, you hear terms -- the police will say they're a person of

interest. There is something called a Beheler warning which is short of Miranda where someone doesn't have a right to counsel, they're not in custody, and an officer is essentially telling them, you know, you understand you're not in custody, you're free to leave at any time, you know, the door is open, you know, and you don't have to talk to me if you don't want to but, you know, we'd like to ask you some questions.

In those situations -- and there's a lot of case authority on that -- an actual advisement of right to counsel is not required. And case law, as I say, is very clear on that. It's when it becomes a custodial situation that that's required.

So, again, the way this is written would somehow seem to imply that in every situation, somebody who is accused of a crime -- whatever that means -- has to be advised of their right to counsel. And that simply goes beyond applicable law.

MR. SONDHEIM: Let's say that this were changed, B, in some way to impose the obligation that you have or at least that you think you should have, as I understand, in the courtroom to make sure a judge has properly taken all the waivers. If he hasn't, you will try and interject. Not all judges are perfect in that regard although they usually have a script. Sometimes

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they overlook something. You would step in because otherwise the case goes up on appeal and gets reversed.

Now let's assume now that you are listening in on a discussion between a police officer and an accused or suspect or whatever the word may be that we would eventually come up with. And you realize that the Miranda warnings haven't been given which makes it clear to you the confession isn't going to be any good in court.

Wouldn't you feel comfortable with -- would you feel comfortable with an obligation at that point to at least make sure the officer complies with Miranda?

MR. LIEBERSTEIN: Yeah, I think I would have to --

MR. SONDHEIM: If you're just listening in. You're not in the room.

MR. LIEBERSTEIN: I would have to see how that rule was drafted. Again, it would have to be a limited -- in a limited situation where the prosecutor is involved in some way in the interview and it would have to designate that the person is in custody, as defined by applicable law, so that there's no ambiguity about whether --

MR. SONDHEIM: Who's an accused.

MR. LIEBERSTEIN: -- custodial or not. We're

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talking about a custodial interview. And, you know, if there were something in there that the prosecutor should make reasonable efforts to -- in that situation to assure that, you know, the person -- that the suspect in custody or accused in custody has been given his -- advised of his right to counsel -- again, properly written -- if stated current law, it's something I think I would recommend to my colleagues that we -- you know, we took a close look at.

MR. SONDHEIM: Well, current law doesn't require you to tell the officer to give the Miranda rights.

MR. LIEBERSTEIN: Well, and I don't --

MR. SONDHEIM: Because you lose the confession, so to speak, if that happens.

MR. LIEBERSTEIN: Yeah. And I don't think we would want to see a State Bar rule that told -- that put an obligation on a prosecutor that applicable law didn't. But I think, you know, your -- it's more of a

recommendation. You know, a reasonable effort kind of thing.

But it -- you know, again, you've got to understand -- and I know you came, apparently, from a very large jurisdiction, Mr. Sondheim. But, you know, there are very small jurisdictions too and there are

very different police practices from a small jurisdiction to a large jurisdiction. And, you know, I suspect in some large jurisdictions, prosecutors may be less welcomed by certain police agencies than other agencies. As you know, it's -- I hasten to use the word political because it's not traditional politics but it's relationships, and there are some areas where relationships aren't as good as they should be.

MR. SONDHEIM: They're not as cordial as they might be.

MR. LIEBERSTEIN: And I think, you know, if you hang on to the -- you know, the flavor of this discussion, we're going to come back to that down the road when we talk about extrajudicial statements. Because, once again, they're -- we don't control the police and by law they don't control us. You know, I like -- I think we should work on a good relationship but that's my model. But there are obviously counties where, you know, the chief prosecutor and certain heads of law enforcement don't even talk to each other, which is unfortunate. But if they're not talking to each other, it's kind of hard to make recommendations that will go anywhere. So that's our concerns with B.

C, I think there's -- I think Mr. Totten pointed out some concerns there, in turn. We understand

the reason for this but our concerns are in some cases you may not get in a situation where -- let's say in misdemeanor court in my county, someone has a drunk driving -- so you're talking about waiving preliminary hearings. So we're probably focused on felony although it just says, "such as the right to a preliminary hearing." But certainly somebody waiving their rights and entering a guilty plea would be considered an important pretrial right.

And we constantly deal with defendants on a first appearance in misdemeanor court where they're charged with a drunk driving and the district attorney is in the courtroom and the judge wants the district attorney to talk to the accused. Usually, there's an attorney there but many times in drunk drivings, they don't have a lawyer. And they want to know what's going to happen to them if they plead guilty. And the court often encourages that discussion. And usually it's a pretty straightforward, you know, .20 blood alcohol, here's what -- you know, here's what a first offense is.

And so I don't know what kind of input you've gotten from the judicial branch, and maybe that comes later when it goes to the Supreme Court. But in some of these areas, I think that it would be helpful to have some input from the bench. Because, you know, there may

be some areas where the bench is feeling like some of these rules may be stepping on their jurisdiction, and prosecutors who are afraid of being -- facing potential bar discipline are going to be put in situations where

they're going to be overstepping a judge and the judge is maybe feeling like they don't want to see that happen. Or it's not necessary.

And so, you know, we have a concern in this, particularly in the less serious cases. In felonies, I don't think that's a problem because in a felony you're -- someone's not going to proceed on their own in pro per unless the judge has gone through their Faretta rights and allowed that. But it happens all the time in misdemeanor court. A lot of people just don't want to put out the costs for a lawyer particularly when they're just there to resolve the case. You know, when a judge has a calendar with fifty or a hundred misdemeanor cases, I don't think they're going to go through and -- each case and go through a finding that the person can represent themselves.

MR. SONDHEIM: I realized before you indicated that you really didn't have any problem with the comments except for one, but I note that Mr. Totten has suggested that in Comment 2 it ought to be clarified to be consistent with the rule. And Mr. Totten suggests

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that if the comment have an additional sentence -- if there is to be a comment, which he questions, and he suggests that Paragraph C does not apply, however, to an accused appearing pro se with the approval of a tribunal.

I take it you'd have no problem, if we were to decide to keep this provision, to add that to Comment 2?

MR. LIEBERSTEIN: I would never take issue with such a legal scholar as Gregory Totten. He -- I mean, he is extremely knowledgeable in this area so -- and that's why I say I'm trying to, as best I can, summarize the concerns and there may be one of the letters that expresses in more eloquent language than I'm giving you directly and I'd ask you to incorporate and put this together as best you can with all that.

3.8(d) we think is a very important section to be in there. And I don't think any of the letters take exception with the language in 3(d). In fact, I think Mr. Totten specifically says that's -- that's extremely helpful and, you know, Comment 3 also backs that up. So we're fine with that. I don't think -- I don't think there's -- although it's a very limited situation that we would even encounter 3.8(e), I haven't heard any significant concerns of my colleagues on 3.8(e).

3.8(f) is the one I was referring to earlier

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in terms of the extrajudicial statements. And again, first and foremost, I think it's Rule No. 1 for prosecutors that we don't believe our cases should be litigated in the media. Equally, we don't believe that the defense should litigate cases in the media and unfortunately the sanctions are much heavier on us for violating that rule than they seem to be on defense attorneys.

And we believe that there is a separate provision for defense counsel that uses the language, "under your supervision." And therefore, you know, if it's a public defender's office that has a public defender investigator then that rule would apply to the public defender to prosecute that defense attorney. But if that was an independent investigator, the argument

would be, well, I have no control over my independent investigator. And I think we believe to the extent that the investigators or employees are working for the prosecutor's office, we think that's consistent with other rules for prosecutors.

Our concern is when you put it -- an obligation on the prosecutor that could subject them to discipline up to disbarral -- up to being disbarred and you hold them accountable for statements made by independent police departments, that's very troubling.

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And I can tell you that, you know, ideally I would wish that law enforcement agencies wouldn't be, you know, having big press conferences and making glowing statements about how they got the right guy and -- you know, and it's a slam dunk case and whatever other worst case scenarios they might have heard of.

But the fact of the matter is we can't control that. And, you know, we could have a standard boilerplate letter that we send out to every police agency and, you know, point out the rule and tell them that we could be held responsible if they basically go public and pollute a jury pool, and the ones that we have good relationships with will say, we understand that, Gary, and we respect that, and the ones that we don't will go, and why should be I concerned about this, you know, you're going to tell me how to do my job or what I'm supposed to tell the media.

And so to put that in a State Bar rule we feel is very, very troubling. In a perfect world, yes, I agree that, you know, a case should be tried in the courtroom and the courtroom only. But, as I say, I think putting that obligation on prosecutors and those under their supervision is absolutely appropriate but to extend that to law enforcement personnel or other persons who are outside of our jurisdiction, we just

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think you're setting us up in a place that we can't succeed.

MR. SONDHEIM: Let me ask you this. One way of approaching this issue is simply to limit what defense attorneys have to do and what prosecutors have to do to 3.6 which is the trial publicity and 5.3 which relates to responsibilities regarding non-lawyer assistance. And that's, you might say, the way that things are more or less balanced.

The point that Mr. Totten makes, as I understand it, is there's an imbalance now being created by F. And his suggestion is that if we want to impose the responsibility that F imposes on special -- on prosecutors, we ought to impose the same responsibility on defense attorneys to even the scales, so to speak.

Would you see a problem with that?

MR. LIEBERSTEIN: Well, again, I support evening the scale and that's why I refer and I think he does as well to the statement about direct supervisor authority. But I think if you took it to the same length as the prosecutors and you set up, you know, the defense attorney is responsible for anything anybody says about the case -- let's see. I don't know how to put this.

Because a defense attorney's world is much

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tighter. I mean, they basically have their defense team which is the defense attorneys and any investigators they employ or hire and, beyond that, maybe some experts. They don't have to -- they don't deal with law enforcement, you know. They're job is to react to the law enforcement and obviously, you know, examine the officers in a courtroom and everything.

So I'm not sure how you make those worlds parallel. Because I think that exposing the prosecutor liability for what a police officer says I think is just a -- is something that can't be -- can't be equaled to the defense. So I think the point Mr. Totten makes and I think that I would make is if you limit that to those persons in which we have direct supervisory authority over then I think you're on equal plane with the defense.

In the real world, unfortunately, there are defense attorneys who violate that with regularity and, unfortunately, I think often go undisciplined for the same conduct that I think a prosecutor should be drawn and quartered for. But that's another world. But I think to even the scales that we both have the same responsibility in the manner of direct supervisor authority would be appropriate. I think, again, to extend -- to extend that rule to people outside our

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control I just -- I think it's unfair.

MR. SONDHEIM: Well, 3.8 expands it to investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecution. And Mr. Totten's last sentence with regard to 3.8(f) says, the rule should be modified to impose comparable responsibilities on defense attorneys.

So I take it, at least as he views it, if we were to in some manner impose a similar obligation on defense attorneys then he would feel the scales are evenly balanced.

MR. LIEBERSTEIN: Well, I think that may be an area where --

MR. SONDHEIM: You might differ with him.

MR. LIEBERSTEIN: -- my colleagues and I may disagree a little bit with Mr. Totten, notwithstanding my glowing prior statement. I mean, I -- you know, I think it's cleaner because we -- you know, we believe in fundamental fairness. But, again, I just think it's a -- that's one of our biggest issues here, I think, among other colleagues of mine that, you know, we just have had too many bad experiences with, you know, law enforcement that don't know how to -- I mean, we're on the record -- but, you know, don't know how to use better discretion on what they should or shouldn't say.

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And we can point out until we're blue in the face that that's not helping our case and at what point have we satisfied our obligation and at what point have we not done enough. And I think that's the concern. I wish you had direct jurisdiction over them too.

And then the G section, I know the biggest single concern that we have in that area is when you're imposing that obligation on a prosecutor in one jurisdiction on a case that happened in another jurisdiction. Because there's just -- I mean, I had a conversation last night with my colleague from San Diego

County, Bonnie Dumanis, who I just followed as president, and she said, wait a second, so if I found out something in my jurisdiction about a case you had in Napa, I'm supposed to know if that's material or credible evidence that would lead toward exoneration?

And this comes back to Brady. I mean, Brady doesn't say, well, we take our Brady obligations very seriously. It is very clear in Brady in terms of material evidence and evidence that would directly lead -- I think the standard is were that evidence known prior to trial or known to the jury that it would have likely led to a different result. And so not every item that could potentially be exonerating is subject to Brady and subject to disclosure. I think a number of

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offices, mine included, takes the view that "if in doubt, turn it over," because we'd rather err on that side than the other side.

But I think there's just no way that I can know the nuances or anything that may be material or critical on a case in L.A. County. I mean, clearly -- you know, if somebody walked through my jurisdiction and said, oh, by the way -- tells the police, by the way, not only did I commit this murder but I committed three murders in L.A., I think I would be on the phone with the L.A. prosecutor and say, we've got a guy that just confessed to three murders in your county. And if that prosecutor looked him up and said, oh, we've got a guy in custody on that, well, yeah, that would -- obviously should trigger a major investigation.

But that's an extreme example and I -- again, I think there's folks that make it more eloquent than I'm making it here in the letters. And also the concern about when it says turn the information over to the court. As we point out, the court loses jurisdiction at the time of sentencing and ultimately after a hundred and twenty days after the sentence runs under 1170(d), they have no jurisdiction to recall it. I mean, there isn't. So I think if it has to be -- in the case where it's in our jurisdiction, it should be that information

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needs to be made known to the last counsel of record for the accused or for the defendant if they can be located. Because they're the ones that then would be potentially bringing a habeas proceeding which is how -- you know, which is how you remedy these things is through an extraordinary writ.

But, you know, if I have -- if I have Brady information on a case that was disposed of two years ago -- and I'll -- you know, I won't go into details but I'll give you an example. We had that come up in our county where it was a collateral matter. We don't think it had any effect at all on the verdict but it involved the lead investigator in the case who happened to be my chief investigator but was formerly the lead police investigator before he worked for me. And it was a totally collateral issue where there was some dishonesty not amounting to a crime but we just felt it was something ultimately that should be known. And it was not. And that was even a close question whether it was Brady at all.

If that was the case in another jurisdiction, I wouldn't even know that officer was involved in

another jurisdiction's case and how in the world would I report it to them. But in that case, the case was on appeal so we reported -- we reported the information to

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the appellate attorney for the defendant.

MR. MOHR: I'm not sure I see the problem with "knows." Knows is there to limit the application of the rule to prosecutors in a different jurisdiction. It's saying, you have to know. There's no duty to investigate beyond that. It's just based on whatever facts may be before you and that you can draw inferences under the definition of know but, you know, there's no obligation to do any investigation. It's only if the conviction had been obtained in the prosecutor's jurisdiction itself under (g)(2). So, if anything, I think the concern would be if G, the introductory statement, said if the prosecutor knew or should have known, that would be something of real cause for concern. But this is the actual -- this is requiring actual knowledge. So I'm not sure I understand what the complaints are.

MR. LIEBERSTEIN: You know, I guess it's -- I guess it's just the fear of the unknown. In other words, this may be so limited that, you know, you're going to see this once in a lifetime that -- like I said, probably an example I gave you. And even in that example, that may not be material and credible because, you know, there are some people who confess to things they didn't do and maybe that person was trying to, you

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know, get some favor -- you know, some type of consideration locally. So I guess that's where people look at that going, how in the world would I know and if I knew, how would I know it was new evidence or credible or material.

MR. MOHR: Because originally when this was first proposed -- this is the language from the model rule. Originally when it was first proposed was by representatives of the New York State Bar. And the -- I think it was the litigation section or the criminal section of the American Bar Association.

And they had just said, "when a prosecutor knows of material evidence." And what they added was, "new, credible." And the new and credible is put in to protect you so that you don't apply some kind of twenty-twenty hindsight to what the prosecutor had to do with. I mean, the prosecutor had to know that this was credible at the time.

So it was put in there to protect a prosecutor who in good faith may have come across this and, you know, exercised his or her independent judgment and maybe didn't take action and then when a subsequent investigation shows that this was credible, well, they -- you know, they didn't know that. So they're okay. So this has been through the mill and has been

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revised based on comments that have been submitted. I understand the concern with the unknown but the way it's drafted is really to protect prosecutors against somebody going in and trying to apply twenty-twenty, you know, Monday morning quarterbacking or whatever.

MR. LIEBERSTEIN: Well, I guess the concern, sir, and I know -- you know, we note and I would adopt

that -- you know, we concur with the minority's concerns on this area. And I -- a number of these rules -- and I guess when I say there's concerns about how they may be misapplied, ultimately the person who's going to determine whether the rules are violated or not is going to be a state bar court.

The concern is in some of these areas are we giving more fuel to defense attorneys or other folks who have political differences with a prosecutor or with a particular prosecution brought to bring what would otherwise be baseless charges to the State Bar which ultimately, in following the rules at the end of a State Bar hearing and a long process, the prosecutor's exonerated. But, you know, the cost of that process -- and I don't mean just the financial cost, I mean, is -- is -- is a serious concern in terms of how these may be misused.

And I don't know if I'm stating that correctly

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but it's -- we have seen situations before where a defense attorney will report a prosecutor and there's absolutely no basis for it but, you know, they're stretching something and now the prosecutor has to, you know, face State Bar charges and has to deal with that with -- and we just think some of these areas may increase that possibility.

MR. VAPNEK: It happens in civil cases even under our current rule. So it's just a fact of life.

MR. LIEBERSTEIN: We're just concerned it may become a larger fact. In other words, you look at existing 5.110 and you can say, well, people can make all kinds of accusations under that. But it's fairly tight and it's relatively vague. And then you've got all these, okay, well, they violate 3(a), they violate 3(d), they violate 3(f) and -- I mean, time will tell but I can assure you there will be accusations made and some, you know, for not appropriate reasons. And it's going to cause some serious grief and, you know, it may tend to cause some problems with prosecutorial discretion which, as you know, civilly there's absolute liability -- I mean absolute ...

MS. PECK: Immunity.

MR. VAPNEK: Immunity.

MR. LIEBERSTEIN: Absolute immunity -- there's

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a misstatement -- you know, when a prosecutor is using his prosecutorial duties and acting in good faith. You know, obviously if a prosecutor goes, oh yeah, you're right, I had to get reelected and the poor guy got in the way, I mean, that's -- you know, that's the extreme example, you know. So we're just concerned that you have absolute immunity on one hand and then you've got -- you know, you've got this new pool of rules that are subject to question and accusations that don't currently exist. And we're not sure of the need for all these.

MR. SONDHEIM: Isn't your problem with G that the "knows of new, credible and material evidence" -- that phrase just says you've got to know the evidence. It doesn't say that you have no know that it creates a reasonable likelihood at that time. Because the reasonable likelihood could be determined later on.

So that if you have some evidence -- and I

take it this is your concern -- if you have some evidence today, you know of the evidence, and later on it turns out that it creates a reasonable likelihood that the convicted defendant did not commit the crime, there will be hindsight used in weighing what you knew about the credible and material evidence.
MR. LIEBERSTEIN: That's -- that's certainly a

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legitimate concern.
MR. SONDHEIM: Isn't that the problem that the knows is just limited to the first, in a sense, part of that. It's not clear that it relates to the reasonable likelihood aspect.
MR. LIEBERSTEIN: Again, I guess -- you know, you want to look to what the intent of the rule is and then, you know, is it meant to be broad, is it meant to be very limited, and is the intent -- I mean, I think your ultimate intent is if -- you know, if you know of evidence which on its face appears to be very, very strong that the wrong person was convicted and is serving time, we want you to tell someone about it. I mean, I think that's really the bottom line.
But the question interpretation-wise is, how often is this going to come up in another jurisdiction where -- you know, where I'm going to know that. And if I -- if it comes back that the DA had some police report somewhere that, you know, they should have turned over, we're just concerned about accusations that we would have no legitimate way of preparing for.
And, as I say, in our own jurisdiction I think that's -- that's -- that should happen as a matter of course. I mean, again, we should be -- that's one of our baselines is if we learn of new credible material

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information that leads us to believe we put the wrong person away, that's -- that's, I think, the very essence of our criminal justice system of fairness.
MR. SONDHEIM: Let me ask you another question with regard to your concern about courtrooms and jurisdiction.
You'd indicated maybe it should be given to the last counsel of record. But that counsel also may have the same problem, not in terms of jurisdiction but he or she is finished with the case.
Should we then, via this rule, provide that you give the information to the last counsel of record? And what does that counsel do with it? Because he or she was paid, the case is over. Are we then expecting that person to now investigate?
MR. LIEBERSTEIN: Well -- and I think that that's the dilemma. But when you say the prosecutor turn over to the court, I mean, we're not in a position to institute a habeas proceeding for the defendant. Now if you say --
MR. SONDHEIM: Not true. My office has done that at times when we've discovered some evidence. Just -- you know, the difference perhaps between a small county and a larger county.
MR. LIEBERSTEIN: It may be. And maybe

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there's got to be some way of clarifying -- again, whatever form this ends up in -- if the case is -- if the case is currently on appeal then it -- then notice

be given to the appellate counsel. In our case, we notified the appellate counsel that we had a potential Brady and then we brought it back. Because it was on appeal, we gave it to the attorney general and they established jurisdiction was back in a local court on habeas. And so there was a habeas locally.

If the matter's not -- no longer on appeal then perhaps notice should be to the last known counsel and reasonable efforts made to give notice to the defendant. And maybe that's -- you know, the reasonable effort is a letter from the prosecutor to the defendant, wherever they may be -- and that's going to be tough sometimes too and I may slapped down for making that recommendation because, you know, how do I find out where the defendant is in 170,000 inmates.

But, again, if I have new credible material information creating a legal, reasonable likelihood the defendant didn't commit the crime then I think I should go a little further to try to figure out where that guy is. I mean, I think I can --

MR. SONDHEIM: He may not even be in the system. He may already have been released.

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MR. LIEBERSTEIN: Well, then we've made our best effort. I mean, if he's released, you know, there's only so much you can do to locate somebody and -- if they're released and off parole. But, you know, I think if you say reasonable effort, I don't think someone would fault the DA for going through prison locator and running a rap sheet and if the guy's on parole, you know, notifying the parole officer. And if he's off parole, that may be as far as you can go.

MR. SONDHEIM: But we don't at this time have the concept of reasonable efforts. We just say in our current version of the rule to give it to the defendant. And you're suggesting -- and I think I personally would agree -- that it would just be reasonable efforts to give it to the defendant.

MR. LIEBERSTEIN: Because I don't know how you can go beyond -- I mean, there's only so much you can do. And, again, somebody can debate that and say, well, you didn't do enough. But I think, you know -- and if you tie in, again, good faith reasonable -- something like good faith reasonable effort, you know, I think we all know the difference between -- you know, I looked in the local phone book and I couldn't find a listing, so I filed the information versus, you know, trying to go through running a rap sheet and a DMV and seeing if

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they're still around.

You know, in more cases than not this type of thing is going to be on a -- and particularly in the area -- in the time of three strikes and life sentences, it's probably going to be in a pretty serious case. And I don't know if you also want to qualify that to differentiate between felony and misdemeanor. Because, you know, again I think it's very unlikely we're going to come across information years later that the wrong -- that someone else drove a car in a drunk driving. But I think, you know, if you're talking about the efforts of the prosecution and fairness and everything, I think we probably should be looking in a felony context.

I just -- you know, just in closing because I

think we've kind of beaten through this, I -- on behalf of my colleagues, we do really appreciate the opportunity and, you know, the letters that we've submitted and I think we'll get, you know, another letter and, you know, I'll try to take some of your questions back. Although with this hearing and comment closing on Friday it may be kind of hard to, you know, jump back. But I would say if you -- you know, if you redo some of the language or something and you're willing to have our input, by all means, please --
MR. SONDHEIM: We would like your input and we

appreciate your input today because I think it has clarified for all of us some issues that perhaps we have not considered before.
MR. VAPNEK: And even if you can't get it in by Friday, we'd still welcome it.
MR. LIEBERSTEIN: Thank you so much. And feel free -- my e-mail is direct to me and I'll be happy to leave my cell number with someone and -- you know, through my office. But if you have another hearing and you need me back, I'll come back. And thank you for your patience to hear this lawyer drone on a little while.
MR. SONDHEIM: Actually, just so you know, after we finish what we call batches of rules, we put them all together in a final report which is sent out. So all the rules are there and at that point there is another opportunity to comment on the final completed product.
MR. LIEBERSTEIN: Excellent. I appreciate that. And I'll put on my other hat, I hope you have a chance to come up and visit Napa Valley sometime. It's a nice respite from the city.
MR. SONDHEIM: Great.
MS. PECK: Thank you.
MR. LIEBERSTEIN: Thank you so much.

MR. SONDHEIM: Thanks for coming.
Okay. I think, using what I call the 11th Commandment in our commission, it's now -- what? Almost 12:00 o'clock and we're going to take a little break.
MR. VAPNEK: Give the court reporter a break.
MR. SONDHEIM: And give the court reporter a break also. And we'll be going off the record for about -- why don't we say fifteen minutes.
(Recess taken from 11:56 a.m. until 12:14 p.m.)
--oOo--
MR. SONDHEIM: All right. We're back on the record again.
Lauren, you want to ...
MS. McCURDY: Yes, we're going to call Ms. Schur from the Disability Rights California speaking on 1.14.
MS. SCHUR: Good morning. Thank you. My name is Dara Schur and I am the Director of Litigation for Disability Rights California. Our former name which some of you may have known us by was Protection and Advocacy, Inc. And I'll say a little bit more about who we are in just a minute.
I wanted to thank the commission members for the opportunity to be heard and state that unfortunately

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we didn't learn of the rule until late-ish and so our comments -- we will be submitting written comments but I don't have them for you here this morning. We will get them to you by the end of Friday. And we have been in discussion with a number of other disability rights groups throughout the state, and I'm hoping that the comments that we submit to you will be joint comments. That was one of the reasons why they're somewhat delayed is that we're working with a number of our colleagues to submit some joint comments.

I think it may be helpful if I say a little bit about who Disability Rights California is. We are a statewide advocacy organization and we were started thirty years ago by the federal government when it enacted a law protecting people with disabilities and setting up advocacy agencies in every state called protection advocacy agencies to advocate for the rights of people with disabilities.

And when it was -- the first one of those laws, protection advocacy for people with developmental disabilities, came out of some significant abuses of people in facilities and state hospitals for people with developmental disabilities. There was some horrifying circumstances. And so Congress passed the law to enable -- to ensure that there was a voice for people

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with significant cognitive disabilities in state hospitals.

Over the years, Congress has found it important to expand the rule of protection advocacy agencies and we now represent at the behest of the federal government people with every kind of disability throughout California in facilities, in state institutions, and in the community. And we see thousands of thousands of clients with developmental disabilities statewide annually on an extremely broad range of issues. Now many of those are people with sensory or mobility impairments, but a very large number of them are people who have cognitive disabilities of one kind or another or psychiatric illnesses or psychiatric histories.

We, in addition to our seven federal grants at the moment, also receive IALTA funding through our legal services provider and we have two state contracts. One of those are obviously clients rights advocates represent statewide people with developmental disabilities who are served by the state regional center system that includes, among other things, clients with mental retardation, clients with autism, clients with a fairly wide range of developmental disabilities. And we also have a contract with the state, our office of

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patients' rights, to provide advocacy inside the state's five psychiatric hospitals.

And I'm providing that background so you can see that we have a great depth of experience in working with clients with disabilities, and we speak to you out of that experience. I have to say that I -- while I really appreciate that the commission must have struggled with what I know are the very challenging issues in Rule 1.14, we stand here to oppose the rule and support the minority position. And I will say that

I'm very grateful that the commission modified the model rule as far as it did because I think the modifications that the commission has proposed are an improvement over the model rule.

But we continue to have many of the same concerns expressed by the minority that this will infringe on the autonomy of people with disabilities, that it will create major barriers in attorney-client trust relationships, and will unnecessarily in many cases result in the breach of client confidences and the destruction of trust in the lawyers who are supposed to speak for the people with disabilities.

We know how hard that can be sometimes but we think that it is imperative that clients with disabilities, including cognitive and psychiatric

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disabilities, have the same rights to attorney confidence and trust that other individuals do even when that makes it challenging, in many cases, to determine what their choices are or to allow them to make choices that may not seem like the best choice for the attorney. And we operate fundamentally under an expressed interest, not a best interest standard. We believe that the role of a lawyer is to spend time, take whatever steps necessary to ascertain the goals of the client, and to carry those out even if we as lawyers do not always agree with the choices that our clients are making or don't think, in our opinion, those are the best choices for our clients.

And I think all of us can agree that that's the standard for lawyers in general but there is a great deal of concern, particularly with people with disabilities, that that standard isn't good for people or enables them to engage in activities that might not be the choices we think are best for them in the long run. And we very strongly believe that lawyers ought to be bound by expressed interest. And that is not always easy to ascertain. And I can tell you we struggle with some very difficult situations in state hospitals when people believe their medication isn't good and they don't want to have it, when they are in a facility and

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they want to move to the community. And putting appropriate placements in the community are difficult for them in a very wide range of circumstances.

So let me start by saying among the reasons we think that the rule is problematic, even though well-intended, is that it -- its ambiguity in the hands of people who do not have experience representing people with disabilities, who are not trained to understand incompetency or various kinds of cognitive disabilities, who may not know various methods that exist to work with people to help ascertain what they need and to help carry out their wishes, will result in many circumstances in actions being taken that may be adverse to what the client would like.

Let me start with Section A. And I think while we certainly agree with the intent of A which is that lawyers who represent people with disabilities, even who have diminished capacities in some manner, should aspire to maintain a normal client-lawyer relationship, what's unclear is what we mean by, "as far as reasonably possible." If what that means is subject

only to the specific exception below, that may be one thing. But I don't know how -- where -- what that means.

It seems to us that we carry out a normal

client-lawyer relationship with all our clients and what we do that is different than what we do with some of our clients who may not have cognitive or psychiatric disabilities is we offer them reasonable accommodations. We spend significantly more time with them. We spend -- we use communication facilitators. We learn to understand and translate and to think about the level at which they're operating, and often that does take a lot of time and it is often challenging. But we think it is our obligation as lawyers and under the ADA.

And we also think that the problem with this rule as we go forward is that it isn't very nuanced, even though I think there was an attempt to make it nuanced. People can be cognitively impaired in some ways and not others, and I think the rule recognizes that. But, for example, we represent often people with developmental disabilities who have mental retardation. They're often very capable of saying, I want to live here or there, I want this person to help me or not that person to help me, I want to be able to engage in this activity, whereas they don't have any ability to maybe understand a lawsuit or understand their role in a lawsuit. But they can give us very clear direction about the outcome that they want.

Now I think there are -- most of us would say

they have some kind of diminished capacity and that that diminished capacity might, in fact, interfere with their ability to understand the legal relationship. But from our perspective as their lawyers, we believe we have the ability to say what is it you want, have them tell us what they want, and then see our job as implementing that for them. And I think that to assume that someone's diminished capacity automatically interferes with their decision making power around the decision, even if they can't understand some of the ways in which you get there, is problematic.

MS. PECK: Ms. Schur, may I ask you a question --

MS. SCHUR: Sure.

MS. PECK: -- about that? Are you -- are you speaking to A or to B at this point in time?

MS. SCHUR: I guess I moved to B. I'm sorry.

MS. PECK: No, no. That's all right. I thought you had and you're expressing yourself very well.

I guess my question is, if a client is able to express their wishes, as you have described it, why would you think that they come within Rule Subpart B? That's what I'm not understanding about this aspect. And I want to make sure I'm not missing what you're

saying.

MS. SCHUR: Well, I --

MS. PECK: That is, if a person with developmental disabilities is able to and capable of expressing themselves regarding the kinds of things they want in a legal proceeding -- they may not be able to

understand the bigger legal issues and, gosh knows, I probably don't either -- but if they were able to communicate to you the results that they wanted to obtain, why would they come within B at all?

MS. SCHUR: Well, our concern is that the language isn't clear on that even though there's an attempt to make it clear. And let me give you some examples.

"Make adequately considered decisions in connection with a representation." I can tell you that some of our clients may not understand what a lawsuit is. They can't make the decision about maybe whether to file a lawsuit or not file a lawsuit, but they can be very clear about what it is they want in their life. So I don't know when it says, adequately considered decisions in connection with a representation, does that mean just the end goal as they've expressed it or does it mean all of the decisions along the way.

And another example --

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MS. PECK: Well, let me stop you right there. Because I guess what I'm not understanding about what you just said is you've said that they are able to tell you what results that they want.

MS. SCHUR: Right.

MS. PECK: And apparently that is enough for you to file a lawsuit.

So what part of that process you just described was not adequately considered decisions in connection with a representation that you would feel like you can't represent them? That's -- because apparently that part is working for you.

MS. SCHUR: It does work for us. Our concern is that lawyers who don't have the kind of experience working with people with disabilities that we do will not understand that. They will be working with someone who has a hard time articulating more than a basic goal, and they will determine based on this rule that that person did not adequately consider this decision, that that decision isn't in their perception the best choice for the client, is not in the interest of the client from the attorney's perspective because they don't have as much cognitive ability as a client who doesn't have some kind of illness. I mean, I can tell you -- or disability.

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MS. PECK: So the problem isn't necessarily with the standard, it's that a lawyer may not be educated enough in working with people with disabilities or cognitive impairments or developmental disabilities in order to properly apply the standard? I'm trying to figure out which it is.

MS. SCHUR: I think it's both. I think the fact that most -- many lawyers out there don't have that training, don't understand it, will be quick to jump in many circumstances where we would not to the conclusion that someone falls within this rule and that the rule therefore enables them to do things that right now they can't do.

MR. VAPNEK: But I think -- and I understand your position but I'm concerned about the risk to a lawyer who has a client with significantly diminished capacity. But in the small (ii), the rule says, "the

client is at risk of substantial physical, financial or other harm unless action is taken."

So what you have is a lawyer confronted with a situation with a client with diminished capacity who may not have the training that your people have in working with developmentally disabled people. But there's -- the client is substantially at risk. And while, as you suggest, the client can express a goal, there is that

risk and it's entirely conceivable, to my way of thinking, that the client cannot comprehend fully the risk that the client is faced with.

And this -- from, you know, anecdotal -- happens a lot with people taking advantage of older people whose mental capacity is diminished and so on. And if that's the case, should a lawyer be subject to discipline -- and, after all, this is a disciplinary rule as well as a rule for general guidance -- should a lawyer be at risk for discipline if he or she thinks that there is a substantial risk and proceeds as best he or she can to protect that client from what the rule says, substantial physical, financial or other harm? And how are we going to guide lawyers? Should we have no rule at all and just let it go or can we mandate that they all take training by your organization --

MS. SCHUR: Well --

MR. VAPNEK: -- or some similar organization?

MS. SCHUR: We certainly would not oppose a requirement that people be trained. There are certainly a lot of other MCLE requirements out there, and this is an issue that most lawyers confront at some point in their practice. And understanding their obligations under the Americans with Disabilities Act and how to provide accommodations and work with clients with

capacity would certainly be a good thing.

But we think the current rule is the right one. We think that the lawyer is the place where the client has to go and know that it's confidential and that there are some many other agencies and other circumstances that can act to protect a client. And sometimes lawyers want to protect clients from things that clients -- clients get to take risks and clients with disabilities are no different than anyone else.

I might choose to trust a relative and that might be not a wise choice but I get to do that. And just because I have a disability doesn't mean I don't get to make an unwise choice. I might be in a facility where someone wants to give me drugs. The doctor might think it's in my best interest to give me drugs. I don't think it's in my best interest. The drugs don't make me feel good.

The lawyer has to carry out the client's wishes, not the lawyer's perception of where the harm is. And it may be that this is just way too broad. I mean, there might be a rule that identifies, you know, specific immediate physical harm. But this rule -- other harm, financial or other harm -- I mean, clients with disabilities get to make bad choices too. And this -- and they don't get to be second guessed by other

people. And much of our practice is representing -- I shouldn't say much. But there is a portion of our

practice that is representing clients with disabilities who want to do something that their family doesn't agree with because the family thinks it's not the wise choice or not the safe choice.

And that's the role of the lawyer, we believe, is to help the client take that choice. And if you -- and I just don't know where the boundaries to this are in terms of the lawyer determining what the dangers are and the lawyer determining what's best for the client.

MS. PECK: Can we start with an extreme so I can --

MS. SCHUR: Sure.

MS. PECK: -- understand, really, where you're coming from. Because the situation that you have described where you have a client that is able to articulate what their goals are may not be within the scope of B. And I can see why you have argued that it is, but it may not be. But -- so let's -- let's go to another extreme just so I understand how you deal with the issue.

Suppose that you have a client that is unable to articulate what their goals are in the representation, as many people are appointed by courts

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and others to represent developmentally disabled people or people with other disabilities who are simply not able to articulate what their goals are. Then -- and that person has some financial resources and someone -- in your opinion, you have reached the absolute opinion that the client is at risk of substantial financial harm unless some action is taken.

How do you deal with that kind of a representation currently with no rule in California?

MS. SCHUR: Well, let me start by saying if someone is completely incapable of expressing an opinion -- in other words, they cannot communicate at all, they're in a coma, or there's no way to ascertain --

MS. PECK: Well, let's not make them in a coma. Let's take a person who -- let's take something -- a person who's able to walk but is unable to talk because perhaps they have Alzheimer's. There are people with Alzheimer's that are able to walk and eat and move around but they are unable to communicate clearly. Or even -- I don't even want to say that they have to communicate clearly, because sometimes people in that --

MR. VAPNEK: Coherently.

MS. PECK: Well, no. There -- people in that

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situation can make their views known. But I'm saying this person cannot make their views known. But they're not in a coma.

MS. SCHUR: Well, let me just say I think that part of the challenge is figuring out what that is. Because some people -- first of all, cognitive ability is not constant. So even if you have someone with Alzheimer's, at the early stages of Alzheimer's they may very well be capable of making their views known.

MS. PECK: No, I'm talking about someone who's beyond that. They're in Stage 3, if you will, and -- and they are being financially abused. I want to move back away from the physical abuse because I think that's

a different category.
MS. SCHUR: If there is someone who is incapable of communicating in any way their desires, you probably don't have the ability to form an attorney-client relationship.
MS. PECK: So how could you help them?
MS. SCHUR: I think you can't help them in your capacity as representing them because you have no ability to form an --
MS. PECK: So you --
MS. SCHUR: -- attorney-client --
MS. PECK: -- simply --

MS. SCHUR: -- relationship with them.
MS. PECK: Suppose you were appointed by a court to represent them to find out what their best interests are, whether that's express or some objective -- more objective standard.
What would you do for them?
MS. SCHUR: Well, I think if you're -- that's a challenging issue because if you're appointed by a court and the court has some concerns about competency, the court may be making -- you know, taking steps to determine what the -- whether they're competent and may order some kind of competency review. I think that is a very challenging situation. I think that in our experience -- and why this is a concern to me -- that the large majority of people we see with cognitive disabilities and psychiatric disabilities are not quite at that stage.
MS. PECK: I know. I'm trying to move -- I'm trying to move from the extreme where under the current law, a lawyer would -- who was appointed or somehow otherwise represents this person who is not able to express their interests -- would not be able to bring a conservatorship proceeding against them or seek a conservatorship proceeding because of the confidentiality. And so then I'm trying to figure out

how a lawyer under your thinking would help that person to protect their financial interests and whether or not this rule would be helpful to such a person.
MS. SCHUR: I think the reality is it's the court at that point who has to determine what is -- does this person need a guardian ad litem. Does this person need someone to speak for them because they can't speak for themselves. I think the lawyer has to determine can this person communicate clearly enough with me in some capacity, whatever that may be -- through a facilitator in some instances -- what it is they want so that I can carry out their wishes.
And if not then it's up to the court to appoint a guardian who can assess the situation and speak for the person. Or a conservator, as the case may be. But I think your role as a lawyer is to act on the express wishes of your client and to respect the confidences of your client. And if your client cannot in any way communicate to you what they want then I don't -- I think --
MS. PECK: You think you should reject the representation, then?
MS. SCHUR: I think you may be able to say --
MS. PECK: So babies and people who can't

speak would not ever be able to have access to the
courts --
MS. SCHUR: No.
MS. PECK: -- for protection?
MS. SCHUR: The courts have many mechanisms available to represent them in those circumstances. That's what guardian ad litems are and that's what guardians are for. And another family member may come in and appoint them or a court may make that determination. But I think it's your --
MS. PECK: So then there's no ability for a lawyer to represent the best interests of a person in that circumstance. It would be turned over to a guardian ad litem or someone else who would know better what's best for the client.
Is that correct? That's what you're saying? Am I getting it right?
MS. SCHUR: I would say in the rare instance in which a client cannot speak for themselves -- an adult client -- it is very difficult. If you cannot ascertain at all what their wishes are, it is -- in the absence of a party appointed to represent that person's interests, I don't -- and I think this is a problem that many of us face is that we get approached -- we are working with someone and we want to help them. But I don't think that's our role.
MR. SONDHEIM: In the situation just posed to you, who goes to court to get the guardian?
MS. SCHUR: It would be a family member usually.
MR. SONDHEIM: No family members for this particular individual.
MS. SCHUR: Then it's often an agency. And that's their job. And my job if that client came to me --
MR. SONDHEIM: But do you report that to an agency so the agency can look into it?
MS. SCHUR: I think that's what the current rule prohibits. And that's our concern.
MR. SONDHEIM: Why does the current rule prohibit you from going to an agency?
MS. SCHUR: If you are approached -- if you have a client relationship with someone and they become -- and let's say you represent them in an early stage and they become later unable to communicate with you, I don't believe you can breach the client confidentiality rule to go outside --
MR. SONDHEIM: Okay. So you can't go to an agency, there are no relatives, and the client is just left to swing.
Is that the situation?
MS. SCHUR: I do think that's the role of other parts of our community. And it's not --
MR. VAPNEK: Don't you find that a real problem that if I'm confronted with a person who is helpless -- a family member approaches me or a friend -- typically, it's a friend -- an older person who is -- who is either -- who is likely to be harmed financially by someone who has wormed himself or herself into a relationship with this person and I find that the person

at risk can't fully communicate with me so that I can't fully understand what that person's wishes are, that I'm subject to discipline if I call adult protective services and say, this person is at risk and somebody is going to steal his or her money or house or what have you, that -- I find -- I find it difficult to understand how you can say that -- just let that person go.

MS. SCHUR: Well, let me take your example. You've been approached by a family member or a friend. In either of those situations, you may very well choose to represent the family member or the friend in getting -- in seeking out a conservatorship or a guardian to protect the interest of their loved ones. And I think that that's what many of us do. It's how many lawyers first get approached. I don't see any problem with people who are concerned about their loved

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ones being fully represented and seeking to have someone appointed to take care of their loved one. That makes a lot of sense to me.

MR. SONDHEIM: But what if you --

MS. SCHUR: But we're talking about the -- I'm sorry, go ahead.

MR. SONDHEIM: No.

MS. SCHUR: I think that is a different situation than when you're approached by the individual or whether you -- in that instance, I don't believe you can represent the individual. You represent the family members who may also have a legitimate and appropriate desire to take care of their family member. And at that point, the court can determine in fact is this person so incompetent that they need to have someone take care of them to protect them.

And I think that's in reality what happens most of the time when people end up in a conservatorship proceeding. But I think our role as lawyers for the person who's facing a conservatorship is not to act on behalf of their family members. It's to act on behalf of the individual who is at risk. And we have to take our lead from that individual and protect their confidences and make sure that they have someone who speaks only for them and from their perspective. And if

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we can't -- if we determine that that individual cannot do that then I'm not sure we can form an attorney-client relationship with them.

And we're faced with this, you know, all the time. We get calls daily from family members and we tell them we can't represent them because we can only represent the person with the disability.

MS. PECK: I want to see if I understand. I want to move from -- I think I understand your position with respect to the person who cannot communicate his or her desires to you and how you'd approach that.

Let's take for a moment the person who is able to express -- whether or not they can understand the grander scheme of the judicial system which, again, sometimes I don't understand myself. So I wouldn't fault a person for not understanding that.

But suppose that you have a person who has some cognitive damage and they may not be able to understand the larger legal system but they can express to you through words and some other maybe nonverbal

speech --
MS. SCHUR: Uh-huh.
MS. PECK: -- exactly what their desires are --
MS. SCHUR: Uh-huh.

MS. PECK: -- and they can express their concerns. You represent them in a civil proceeding to obtain money damages, and their cognitive impairment continues to deteriorate slightly over time but they're still able to express themselves.
Your client hooks up with someone who's going to help take care of them and in your own mind, that person is taking advantage of them. But that person, your client, really loves Person X -- I mean, adores Person X -- and wants to entrust all of the money that they get to Person X. You believe that Person X is going to defraud them.
If I understand what you're saying, you would follow -- your client when you talk to them understands -- may not understand what you're saying to them about defrauding them and then you drill down in terms of communication and communicate as much as possible what might happen. In your view, the person -- your client -- does not understand what those consequences are but nevertheless expresses a desire to have X get all the money.
Am I right that under your theory of representation, the express interests of the client, that you would not interfere in any way or -- or believe that if the other parts of the rule are met that you

should contact anybody else, any other agency?
MS. SCHUR: I would say this is among the more challenging situations that we face. I --
MS. PECK: This is what we've been wrestling with.
MS. SCHUR: Right. I understand that.
MS. PECK: And how would you handle that? Let me ask you that.
MS. SCHUR: I think under the current rule, we would not be able to do anything.
MS. PECK: There is no current rule.
MS. SCHUR: The current rule is confidentiality.
MS. PECK: Right, exactly.
MS. SCHUR: The current rule is expressed interest.
MS. PECK: So you would do nothing?
MS. SCHUR: We would do -- we would -- I would say -- not say we'd do nothing. We would obviously spend a great deal of time trying to counsel the client and work with the client.
MS. PECK: Right, exactly.
MS. SCHUR: Obviously, that is the primary thing we would do --
MS. PECK: Absolutely.

MS. SCHUR: -- in that circumstance.
MS. PECK: Absolutely.
MS. SCHUR: I mean, absolutely we would do that.
MS. PECK: But that fails and the client's --

MR. SONDHEIM: Right. You run for hours and it doesn't change.
MS. PECK: Or days or months.
MS. SCHUR: I think that that's -- unfortunately, that is part of carrying out the express wishes of a client even with a client who has diminished capacity.
MS. PECK: And you think that that is the correct policy?
MS. SCHUR: I do.
MS. PECK: Okay. That's --
MS. SCHUR: For the lawyer. For the lawyer. Not for other parts of the community but for the lawyer. I do believe that.
MS. PECK: Well, do you think it's the correct policy for the client? I don't care about the lawyer. I care about the client.
MS. SCHUR: I do.
MR. VAPNEK: What about protection of the client?

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MS. SCHUR: I believe --
MR. VAPNEK: You know the client's going to be defrauded and going to be left without any ability to take care of himself or herself financially and you're going to just let that happen? Don't you think the public -- not just lawyers -- the public will think that we're crazy if we say that that's perfectly permissible?
MS. SCHUR: I would say that clients with disabilities get to take risks too, and I would say we don't always know for sure whether our clients are making the best choices or not. And there might be some circumstances in which I would deeply regret that or give some thought as to whether there was something in the criminal exception to the rule that I might be able to pursue.
But I don't believe as a general rule that -- I -- what I'm concerned about and what my colleagues are concerned about, from our experience, is that bar members will be confronted with situations that are far less onerous than that and jump to the conclusion that the person is not competent and go outside of the scope of the attorney-client privilege.
MS. PECK: Just so you know, we've actually been talking with a lot of them and -- and everyone understands that short of this issue -- short of this

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issue there are lots of remedies and, otherwise, confidentiality and loyalty work. What we can't deal with are the last -- are these two hypotheticals. And there's just a difference -- a difference of opinion on policy. So it's very helpful for you to articulate that policy.
MR. MOHR: Just -- I just wanted to add, because the phrase that got me in the early deliberations over this rule and we had our representatives from the trust -- the executive committee of the trust and estates section who came to our meetings --
MR. VAPNEK: Regularly.
MR. MOHR: -- and they were pleading with us for a limited rule so that in the situation that Ellen just described, they would not have to do what -- now I

don't think any of them ever admitted having done it themselves. But they said at least they read about it in a book or they had heard about it from friends, "drop the anonymous dime." That's the phrase I remember. That they would call adult services, not tell them who they were but said, this is a problem, to get the organization that could do something involved.

Now that's all we're trying to do with this rule. If you look at the last paragraph of B after the

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enumerated subparagraphs it says, "the lawyer may, but is not required to, notify a individual or organization that has the ability to take action to protect the client." That's all. We didn't go the way of the ABA to throw aside loyalty and get a conservator appointed and rush into open court and say this is a problem, my client's not listening to me. No. We just want them to be able to get the client into the system where people who are trained to act on the client's behalf can assist the client.

And if that means that the lawyer to a certain extent has to exercise his or her independent judgment in the interests of the client, that's the policy that we thought and the only policy that we thought we were trying to achieve by the rule ...

(Reporter interruption.)

(Discussion held off the record.)

MR. SONDHEIM: We're back on the record.

MR. MOHR: That's the policy that the commission chose to pursue to at least facilitate the lawyer's ability to get the client into the system where the client can be protected.

MS. PECK: And I take it that that policy is the policy that you're arguing against?

MS. SCHUR: Let me say two things. We are

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very appreciative that you narrowed it from the model rule in an attempt to make it encompass only a very narrow circumstance, and we are -- we struggle on a regular basis with that circumstance. And I would say, however, that we do believe that lawyers for clients have a unique role, and that role is to speak for their clients and not necessarily to take action that contradicts their client's wishes even if we do not believe it is in the best interests of the client.

Now some of this could be that there are ways in which your proposed direction could be narrowed further to leave less room for lawyers to make determinations that are potentially different than what their clients would wish. But let me just take the example that you just gave.

Once a lawyer has done that and alerted a protective agency or a family member and they seek to conserve that client, I think you've got an incredible conflict of interest on your hands at that point because your client does not want to be conserved, you've now created a situation and someone else is seeking to conserve your client or act in a way that is contrary to your client's expressed interest, and I think that that interferes with your ability to further represent the client.

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And I think that that is a very challenging

place to be. And you may decide as a lawyer you're going to make that call and then step back from representing the client, but I do think it does create a situation where it is not as simple as making the call to adult protective services. I think that it creates an ongoing situation that then becomes more complex in terms of divided loyalties.

MR. VAPNEK: Well, then how do we guide lawyers? Because that's part of our job. How do we recommend to the board of governors and the Supreme Court a rule that will encompass what you're suggesting and guide lawyers who want to do the right thing? Most of them do.

MS. SCHUR: They do. And we understand that. I would say that for the most part I think the current rule does what it's supposed to do. There may be a rule for a very narrow rule in a case of physical harm. But even then, I can tell you that in our experience, there are many other agencies out there and people involved. And even very isolated people often have a government agency, a social service worker -- someone who will step in at the point of which there is serious physical harm and then your role is to speak for the client and not to take care of the client.

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I think these are some of the more challenging issues that we struggle with and they play out in very dramatic ways. I mean, we do occasionally face clients who are suicidal and, you know, the challenge is do we, you know, breach a confidence or do we -- and interfere. And I can tell you that in most circumstances we've been certainly able to, you know, figure out alternatives to breaching the client relationship. But -- and I don't know in some circumstances if it's a question of saving a life whether you might not make a choice that was different. But short of that, I think clients do have a right to make bad choices and that this rule sets us up in a role that is different from the role of an advocate.

MR. SONDHEIM: You've indicated that perhaps there might be a more limited rule than what we have. And let me just suggest to you that you give some thought to giving us some sort of alternative in the letter that you're going to be sending to us so that at least we can deal with some of the language. Because you have indicated there is a client -- let's say a subject of suicide. You might, perhaps, allow something to happen.

For example, if you have a client who has been your client for many years and all of a sudden the

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client comes in and starts talking to you that he or she is an alien and it's clear to you that they've just gone off into space, so to speak, and the client says to you, you know, I am now immune from any illness or disease and I'm going to stop all the medications I've been taking, which includes the medication, let's say, that is lifesaving if a client continues to take it but will ensure the client's death if not taken.

So, you know, maybe you can come up with something that at least affords lawyers some ability to do things in situations where you're unable to get through to the client and yet perhaps you might agree as

a matter of policy in terms of how the public looks upon lawyers and perhaps in terms of the client's own interest it might be appropriate to have a rule.

MS. SCHUR: We can certainly look for language and we certainly -- I can -- and we can look to have it be, you know, very narrow. I don't know -- I can't tell you that we'll be able to come up with some because I can tell you that among my colleagues, most of them believe very strongly that this is not our role as lawyers and advocates for people is to protect them and that we do have clients with significant cognitive disabilities who don't want to take their medications and we believe they have a right not to do it. And it's

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the same as an individual who refuses medical treatment for many other reasons. There are other institutions that step in there, but we don't believe that's our role in representing a client.

Now I can tell you one area which we are looking at closely because I think there is some disagreement among my colleagues or at least some thinking that we're trying to sort out in our letter to you about the use of guardian ad litems. And I can tell you that many of us believe that someone may be competent to agree that you should represent them but also agree that there may be someone who should act on their behalf in the context of a litigation.

And so we do not believe that the appointment of a guardian ad litem in a particular piece of litigation where consistent with the client's express wishes necessarily creates a problem and we're not sure that the statutes as drafted make that clear. But I think that that may be a very different situation than a conservatorship or a general guardian, and I think one of the reasons we're concerned with the nuances is that people are competent for very different reasons. I mean, to carry out very different tasks. Excuse me.

And the conservator -- the statutes regarding conservators take that into account in saying you may be

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competent to vote but not to manage your money or you may be competent for one purpose or not another purpose and require the courts to make very specific findings about where you have the ability to act in various arenas. And that's one of the reasons why we think this rule isn't quite specific enough. Because while it does say, to make decisions related to the representation, I'm not sure that's clear enough to provide guidance to people who don't have experience working with people with disabilities.

MS. PECK: Just so you know, we excluded from this rule someone who is the subject of a conservatorship proceeding and we did not -- I don't think we intended that a person -- a person who is able to express that they would accept the appointment of a guardian ad litem is within this rule. The situation that we have been working with are the ones that I spoke to, the person is objecting to any kind of conservatorship, guardian ad litem, or other kind of protective care and either is moving towards suicide or financial risk.

I think I understand what policy you are recommending. And because I am more familiar with

issues involving mainly children about the principles of best interests of the child, it would be really helpful

if there are any tomes or seminal work on the expressed interests of the client in people with developmental disabilities or cognitive disabilities.

If you could point us to something like that, that would be very helpful so that we understand how the attorney-client relationship works in that kind of a situation. I'm not talking about social tomes or behavioral tomes or psychological tomes. I'm talking about some work that involves the attorney-client relationship and how it works with the expressed interests of the client. That would be really helpful for understanding the policy that you're advocating.

MS. SCHUR: I certainly will look for some articles.

MS. PECK: And it's not a mandate but --

MS. SCHUR: Oh, no.

MS. PECK: -- it would be so helpful for us to understand the rational basis from which you come.

MS. SCHUR: Thank you. And I -- and I -- I don't want to take too much more of your time. I know my colleague wants to speak.

But I do want to say there were some things that we did very much like in here and one of them was in Comment 2, the obligation to "require the lawyer to use a manner and means of communication adapted to the

client's ability to comprehend and deliberate." We do think that that is excellent language and also consistent, I think, with the Americans with Disabilities Act.

And I think I'm going to stop there and thank you for your time and we understand the issues you were struggling with. Thank you for listening to us.

MR. SONDHEIM: Thank you for coming.

MS. PECK: Thank you.

MS. McCURDY: The next speaker is Melissa Morris, Law Foundation of Silicon Valley, on Rule 1.14.

MS. MORRIS: Good, I guess, afternoon now. Thank you for giving me the opportunity to talk. I won't take up too much of your time, in part because I think a lot of what I have to say would be a repetition of what Ms. Schur just discussed with you.

My name is Melissa Morris. I'm an attorney with the Law Foundation of Silicon Valley. And if you're not familiar with our program, we are a free legal services program that serves clients in primarily Santa Clara County but also a little bit in San Mateo County as well. We have five different programs which I will try to name without forgetting: The Public Interest Law Firm, The Fair Housing Law Project, Mental

Health Advocacy Project, Health Legal Services, and Legal Advocates for Children and Youth.

You can kind of guess from that list that we actually represent a broad range of client populations in a very broad range of situations. I actually currently work for Public Interest Law Firm and Fair Housing Law Project.

(Reporter interruption.)

MS. MORRIS: Sorry, thank you. I will slow down.

And much of our representation focuses on representing people with disabilities and seniors, particularly in litigation and also policy advocacy. Mental Health Advocacy Project is the state-mandated mental health patients rights advocate for Santa Clara County. And so they represent clients in mental health institutions who are being held involuntarily. They also represent mental health consumers in Santa Clara County generally.

And so our opposition to the rule is very similar to Disability Rights California because we too, for the most part -- not in all of our programs, because we do have one program that represents children -- but generally speaking, we do espouse an expressed interest policy and we do feel that protecting the rights of

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clients to keep their communications with their attorneys confidential is extremely important, especially for people with disabilities.

People with disabilities generally face discrimination in society, especially people with mental health disabilities, in employment and housing and public services. That's what our work is about. And so for people with disabilities who are seeking legal representation, many times the promise of confidentiality is essential to the trust they establish with their attorney.

Now I'm thinking particularly of people in the mental health system of care but if you look at seniors and people with other types of disabilities, the same can be said in a lot of situations which is that attorneys are the only people that our clients encounter who have a duty to keep their secrets. Doctors are mandated reporters. Social workers are mandated reporters. Family members don't have any duty to keep things secret that their family members tell them. And so where a client is looking for confidentiality, the attorney is really the only place they can turn for that.

It's a difficult situation, this scenario in which a client is being abused and they don't authorize

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the attorneys to report the abuse. I know I've struggled with this, in particular in financial abuse situations. It's heartwrenching when something bad is happening to your client and you're powerless to do anything to stop it. But at the same time, just because somebody does not want to report that they are being abused does not mean that they lack capacity or that they can't make decisions for themselves. We see this in the elder abuse context and also in domestic violence situations.

I think, you know, as a human being you always want to report the abuser, but people may have reasons for not wanting to do that. So, you know, as an example you have the client that we discussed who has somebody that they really care -- that they really care about who is taking advantage of them. Maybe they have a legal settlement coming in and cash coming in and they say, my new best friend is going to handle the money for me. And you know that new best friend is a bad person and is

going to steal their money.
You can advise your client. You can even ask your client, you know, can I report to APS. And I've done that. I've told clients that I have a concern and that I want to make a report on their behalf. But I won't do it without their permission. Because you have

to recognize that that client, even though you think they're making a bad decision, might be doing it because they really care about their new best friend. They don't want their new best friend to go to jail.
And so that is something that has to be balanced. And again, as attorneys, our role is to listen to our clients, to keep their confidences, and to act in their interests as they communicate them to us.
MR. SONDHEIM: Doesn't the rule allow you to balance that? You don't have to do anything if you don't want to. When your client tells you, "I don't want this," you're not required and you're not subject to discipline under this rule.
MS. MORRIS: So, again, I'd like to sort of go back to the concern that attorneys, in reading the rule, may be emboldened to make reports in situations where the client may not lack capacity but where the attorney feels that, for example, because the client is willing to continue to be the victim of abuse that they're making bad decisions and the attorney should report. And we don't see that as being the role of the attorney.
Clients have the right to make their own bad decisions. Our role as attorneys is to counsel them and to give them -- to give them that information and maybe even to ask them for permission to take action on their

behalf but to sort of make -- make the report to APS, to a concerned family member, or to whomever else. Just because you disagree with the client, I don't think it's something that ought to be permitted. And I think the concern may not necessarily be with exact language of the rule but with the practical consequences that it might lead to.
MS. PECK: Excuse me. So if a developmentally disabled person who might otherwise be in a state or local institution had the financial means to be outside of that and that person was, within the meaning of the rule, incapable of making adequately considered decisions -- not because the lawyer wasn't educated but because that person was unable to make adequately considered decisions -- all of their money was lost and that person had to be institutionalized for care at the public cost, the fact that the client expressed a desire to still entrust the money to best friend is not the wrong policy on a societal --
MS. MORRIS: It's an extremely difficult question. And I certainly don't want to diminish, sort of, the --
MS. PECK: We're looking for what the right policy is.
MS. MORRIS: Right.

MS. PECK: Is the right policy to allow lawyers to look at the bigger picture and look at what the lawyer may consider the best interests of the client rather than the expressed interests of the client --

MS. MORRIS: Right, right.
MS. PECK: -- I understand the distinction -- where that may make a difference between that person being on -- being cared for by the public rather than being able to have some self financial determination --
MS. MORRIS: Right.
MS. PECK: -- is that a better result with this theory? That's what I'm asking. Because that's the hard decision we've been wrestling with and I just want to know what your views are on that.
MS. MORRIS: Yeah. I mean, is it a better result for the client to be destitute and institutionalized as opposed to having money and living independently? No, it's not a better result. But at the same time, I think that we as attorneys are limited in what we should be able to do. Now in that situation -- and I hate to even suggest sort of passing off responsibilities to anyone else -- but in that situation, you have a client who's institutionalized. That client is surrounded by people who are mandated reporters.

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MS. PECK: But they weren't mandated reporters before that. There's no one --
MS. MORRIS: Oh, so it's somebody who loses their ability to live independently.
MR. SONDHEIM: Correct.
MS. PECK: Well, let's say it's a street person who comes in -- a street person who's living on the street, is not currently under any state -- under any state or local financing whatsoever and they come into a 25,000-dollar lawsuit that helps them. Because of a personal injury lawsuit, let's say. These kinds of things are issues that have been presented to us --
MS. MORRIS: Right.
MS. PECK: -- on many occasions. And, hypothetically, the person gets a new BFF who is going to manage that $25,000. Now the $25,000 would enable the person to move from the street to some kind of financial self determination. There is no other institution involved. There's just you, the lawyer, handling the personal injury case with this money coming in. And the likely consequence of the BFF is that all of that $25,000 will be lost and that the person will either be on the street or more likely will end up being institutionalized either courtesy of law enforcement or someone else.

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So that's the issue we've been struggling with. It's not a personal -- I mean, some of the issues of physical harm can be dealt with. In the current Rule 3.100 which allows that, some of them can. But the financial issue is something that's very troubling.
So what is the right policy choice? Is it to continue the express interests of the client even though it will lead to financial disaster or is it to take a different viewpoint, something like this rule? That's what our dilemma is.
MS. MORRIS: I think what really it comes down to here is sort of a question of letting the client make bad decisions about their money, and we have a situation where it is truly disastrous for the person to lose all their money. But at the same time, attorneys who get

settlements for their clients often disagree with how their clients choose to spend the money. They may spend it on drugs. They might spend it on gambling. They might spend it on a flat screen TV. They might spend it on any number of things that I might not think would be wise. And just because a client has a disability doesn't mean that I get to intervene in deciding how they spend their money.

I can certainly counsel them although --

MS. PECK: But with all due respect, isn't there a difference -- and please don't misunderstand me. I do appreciate very deeply the tremendous work and the philosophy behind the expressed desires of the client.

A client who may have other financial resources and may have cognitive abilities and is not developmentally disabled or have some other disability may be able to go out and take care of themselves again after they spend that $25,000 and go bankrupt. The person who is developmentally disabled or who has other disabilities such that they are not able to live on their own may not have those abilities.

And so isn't that -- aren't the disabilities in and of themselves things that go -- that a lawyer must take into account in protecting the interests of the client? I mean, that is, doesn't the fact of disability -- depending on the level -- make a difference when you're -- when you're looking at this issue? Because that person may never have that opportunity to find care again that makes them independent.

MS. MORRIS: It's a tough situation. And the scenario you've outlined, you know, is sort of one where the most tragic outcome could occur. But -- and I think that it is important for the attorney, if they know their client has a disability, to take it into account.

It's just sort of a question of, well, what's the proper way for doing that. Is it that I pay attention to the way that I counsel my client, the options I consider in advising them and trying to understand where they're coming from, or is it something else? Is it to say because they have a disability, somehow that triggers a different power than I had before, the power to go and report?

And I think the first of those options is the better in terms of how we, as attorneys, look at our client's disabilities in these very difficult situations. And I -- I do think that there probably are -- that there probably is the potential for when you as an attorney don't report abuse that something bad could happen. And I don't want to diminish that or diminish that concern. It's certainly something that, you know, I think about on a personal level.

But at the same time, it has to do with what our role as the legal profession is in representing our clients and ensuring that clients with disabilities are accorded the most autonomy possible and that that autonomy is not compromised. And I think sort of -- returning to sort of understanding what it means to have a client with a disability, I'd like to repeat the encouragement for more attorney training.

If we have a rule about this particular issue, I think it's important for attorneys not only to understand different kinds of disabilities and how to provide reasonable accommodations in their practice -- which are required by law in addition to being required ethically, I believe -- but also what would the consequences be, for example, if we had a rule that allowed reporting such as the one that's proposed or a modified version.

Attorneys need to understand what are the consequences of doing that. What does it mean to file a report with adult protective services. What does it mean to contact somebody's family member and have that family member go out and seek a conservatorship. What are the possible consequences for the client beyond the scope of their representation. Because what's advantageous for the particular representation in a particular situation could have really serious adverse impacts for the client further down the road.

For example, if you did something as an attorney to enable a conservatorship during the course of the representation, that might be great for the representation. It might allow you, for example, to save the client's house to continue in some representation that's really beneficial for the client.

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But depending on the type of conservatorship that's imposed, it might mean later for the client that they're not able to make choices about their medical care, that they're not able to make choices about where they live, or they're not able to make choices about their finances. And so it's important for attorneys to understand what are the potential consequences of the actions that are allowed by such a rule.

I think that's probably the extent of my comments unless there are any more questions.

MR. SONDHEIM: Are there any more questions?

MS. PECK: I just want to say to both of you how very much I appreciate your advocacy, and if I'm ever disabled -- and I probably will be -- I hope that there's someone who will take care of me as well as you have advocated those positions today.

MR. DIFUNTORUM: Can I ask one question?

MR. VAPNEK: Sure, Randy.

MR. DIFUNTORUM: This rule originally came to the bar and was referred to the commission -- it began as a legislative proposal from the trust and estates section. And to me, there's a self-regulation aspect to this for the legal profession.

Unlike many other states, in California we have rules of professional conduct that emanate from the

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bar and the judiciary that regulate the conduct of lawyers but we also in California have legislative provisions that do the same thing. And some folks on the majority of the commission believe that if the legal profession doesn't regulate this issue then the legislature by default will do so. In fact, that's where this initiative was heading, to begin with.

From your perspective, if you had to choose between working through the bar to get some sort of reform implemented or working with the legislature, would you tell us to beg off and just allow you to work

with the legislature to deal with this issue?
MR. MOHR: Hobson's choice.
MS. SCHUR: Yes. I can tell you that we are happy to work with either one of you. We certainly do a lot of work in the legislature. And I am grateful for the wisdom of this commission, and I think whatever they come out of it with will shape whatever does end up happening at the legislature, if it does.
Do you want to add something to that?
The one thing I think I would like to say is that, you know, for me what this comes down to is when I see a new client, particularly one who's troubled and had a lot of very adverse run-ins or interfaces with various institutions or family members, and they come to

me and I can say to them, whatever you tell me is in confidence and whatever we do, I'm only going to do what you want me to do, and if this rule were in place, I feel like I would have to say to that client, everything you tell me is in confidence unless I decide down the road that I know better than you and I think you're at risk. And I think that that is a fundamental difference in how I build a relationship with my clients.
So I just -- that's, in closing, everything I want to say. So thank you.
MR. SONDHEIM: We thank both of you and, needless to say, there are those on the commission who share your concerns, as do we, but we just come out on different ends. And that's why you have a minority position.
MR. VAPNEK: And I think we here in California have taken a completely different route from virtually every other state, and what you're advocating for California is quite different from what virtually every other state has done. And, you know, should we be going our own way as we have or should we -- the word isn't tow the line but should we accommodate our views to what others have suggested is the wrong-headed view.
And I didn't -- you know, why should we as a group listen to your advocacy as opposed to what roughly

49 other jurisdictions or 50 other jurisdictions have done and -- accompanied by commentary from eminent law professors who tell us we don't know what we're doing when we maintain the absolute -- the absolute requirement of 6068(e)(1) and let our clients be taken advantage of because of that view. And, you know, how do we reconcile that?
We would be grateful if you had a solution for us. We've been struggling lo these many years. As a matter of fact, earlier I was thinking that after Kevin suggested the dropping the dime that this issue came up I would guess about 30 years ago when we first started working on the rules -- those of us who have been on the commission for that long -- and there was a discussion down in Monterey with family represent -- with lawyers who do family representation who had a client tell them about abuse of a child.
And the question was, how would they handle that issue, told in confidence, and what would they do because they're well aware that there's a child at risk. And virtually all of the people who talked to us then -- this was at least 30 years or roughly 30 years ago --

said what Kevin said. That one way or another, they would find a way to advise child protective services of the problem to see to it that it was remedied.

Now that's not the way the commission has proceeded with, you know, a bump and a wink about what can be done to solve an almost insoluble problem. But if you have a proposal -- we haven't been able to come up with one, obviously. If you have a proposal, we would welcome it.

MR. SONDHEIM: All right. Let me ask if there's anybody else in the room who would like to speak.

MS. SCHUR: Thank you for your time.

MR. SONDHEIM: We thank you.

MS. PECK: Thank you.

MR. MOHR: Thanks very much.

MS. MORRIS: And I definitely appreciate how much thought and effort has been put into this. Thank you.

MR. SONDHEIM: Seeing that there's no one else in the room who desires to speak, we'll adjourn the public hearing. And I'd like to thank all the speakers and other attendees who have joined us today.

And it now being about a little bit past 1:30, we will close the public hearing.

(Whereupon, the proceedings were adjourned at 1:30 p.m.)

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CERTIFICATE OF REPORTER

I, PATRICK J. DELANEY, a Certified Shorthand Reporter, hereby certify that the foregoing proceedings were taken in shorthand by me, at the time and place therein stated, and that the said proceedings were thereafter reduced to typewriting, by computer, under my direction and supervision.

I further certify that I am not counsel or attorney for either or any of the parties to the said proceedings, nor in any way interested in the event of this cause, and that I am not related to any of the parties hereto.

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