ATTACHMENT 3

Transcript of the Public Hearings Conducted
on May 21, 2010 in San Francisco and
June 10, 2010 in Los Angeles

THE STATE BAR OF CALIFORNIA

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

FRIDAY, MAY 21, 2010

Reported by:
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The following document is the official transcript for the public hearing that was held on Friday, May 21, 2010 at the State Bar of California, San Francisco Office which is located at 180 Howard Street, San Francisco, Ca 94105. This public hearing was held on behalf of the Commission for the Revision of the Rules of Professional Conduct regarding the proposed Rules of Professional Conduct.

TABLE OF CONTENTS

ATTENDEE LIST

The State Bar of California
180 Howard Street
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Commission for the Revision of the Rules of Professional Conduct:

Paul Vapnec, Chair
Kevin Morh, Consultant (via telephone)
Jerome Sapiro
Randall Difuntorum

Staff:
Lauren McCurdy
Mimi Lee

Speakers:

Peter S. Stern,
Executive Committee, Trusts & Estates Section Liaison

Tiela Chalmers,
Executive Director, Volunteer Legal Services Program, State Bar Standing Committee on Delivery of Legal Services

Steven K. Austin,
Contra Costa Superior Court Judge, California Commission on Access to Justice

Linda Kim,
Associate Director, Public Interest Clearinghouse

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P R O C E E D I N G S 10:45 a.m.

MR. VAPNEK: Good morning. It's 10:45. I'm sorry we're a little late. We've been waiting for the chair of the Rules and Revision Commission, who is flying up this morning from Los Angeles. We haven't heard from him, so we've decided to proceed with the hearing in his absence. It will be recorded, so he will be able to review the material at a later time.

I'm Paul Vapnek. I'm a co-vice chair of the commission, and until Mr. Sondheim arrives, I will conduct the hearing on behalf of the Commission. 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.

The Rules of Professional Conduct are professional responsibility standards, the violation of which will subject an attorney to discipline. Pursuant to statute, Business and Professions Code Section 6077, the State Bar of California is charged with the responsibility of developing and adopting amendments to the Rules for approval by the California Supreme Court. 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 a posting at the State Bar Website, public notices in the Daily Journal, the Recorder, the California Bar Journal, the San Francisco Chronicle, email 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, who is sitting at the table. If there is anyone here 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 Regulations and Admissions, which oversees the work of the Commission. The Commission is a sub-entity of the Board of Governors. This public hearing, as well as the 90-day public comment period on the proposed rules, which ends on June 15, 2010, has been authorized by the Board of Governors.

And now I will introduce my co-panelists this morning. Jerome Sapiro has been a member of the Rules and Revision Commission, as have I, since it was started --

MR. SAPIRO: Since before it was formed.

MR. VAPNEK: -- as a special subcommittee of COPRAC in 1983, and we're still at it. Although, this project, we hope, is going to end by September, when we fully expect the Board of Governors to submit the work that we've been doing for the past nine years to the Supreme Court for adoption of the new rules.

I'm Paul Vapnek, as I've mentioned earlier, co-vice chair of the Commission, and both Jerry and I practice law here in San Francisco.

MR. MOHR: Paul, it's -- Kevin is on the phone. Could you just say that, so the reporter gets my name. It's Kevin Mohr, M-O-H-R, and I'm the reporter for the Commission.

MR. VAPNEK: Thank you, Kevin. I'm sorry. You've been so quiet I had forgotten you were on the line with us.

MR. MOHR: Okay. I'll probably remain being quiet.

MR. VAPNEK: Thank you.

Now, Lauren, would you call the first speaker.

MS. MCCURDY: Okay. It will be Peter Stern, from the State Bar Trusts & Estates Section, speaking on rules 1.14 and 1.6.

MR. STERN: Good morning. It's a pleasure to be here again. I've sat in this room many times as a semi participant, since I'm not a member of the Commission but speaking on behalf of the Trust and Estate Section, and it's a pleasure to see some of my old colleagues, as it were, in the development of these rules.

While we haven't been at it as long as the Commission and the State Bar since 1983, certainly since the mid '90s, the Trust and Estate Section has been vocal and determined to bring about or to help bring about some change in the structure of our Rules of Professional Conduct that would allow attorneys to come to the assistance of their gravely disabled clients when they see that the client is about to make a serious mistake because of not being able to see the entire picture when the client is acting in the grips of some form of impaired capacity.

The ABA model Rules of Professional Conduct many years ago set out its proposed Rule, 1.14, which would have allowed and does allow attorneys in other states to seek some assistance for their clients when

they believe the client is gravely impaired and cannot act in his or her own interest.

We have been very pleased to see the way Rule 1.14 and now Rule 1.6, which intermeshes with it, have been developed by the Rules Revision Commission, and we strongly encourage their endorsement by the State Bar Board of Governors and by the Supreme Court. We hope soon to see that these rules will be part of the Rules of Professional Conduct that California attorneys can turn to for guidance as they seek help and face the dilemma.

As we said in our Ethics Guide, the guide that the section published back in 1997 and has reissued in 2008, often, we the attorneys, are the last bastion. The client comes to us often with a person who we would regard as a perpetrator of elder abuse and asks us to make changes in an estate plan, to sign over documents, to give things to a person who is fairly new in the life of this individual, and we try to intervene and we try to dialogue with the client.

Often we're successful. We are able, following the spirit of these rules, to engage with the client and to respect all of those client's confidences and get done what has to get done, but occasionally we can't. Up till now, we cannot take an action. Under Rule 1.14,

as it is related to 1.6, we can now disclose the minimum, the minimum bit of information, that will be necessary to some other party to try to help this client, to defend the client's interest.

Rule 1.14 calls upon us to take an action in defense of the client's interest. This is defined and described in Rule 1.6 in the exception under B -- I believe it's B-5 -- to take an action in the client's interest. So we urge the Commission to continue to push this Rule forward. We urge the Bar to adopt it and to send it to the Supreme Court.

I will submit a brief modification of the statement that we have sent up before to include a technical requirement that the State Bar requires to put on every statement that is an official position of the State Bar. Thank you very much.

MR. VAPNEK: Thank you.

MR. SAPIRO: Peter, can I ask you a question? Thank you again for being here.

MR. STERN: You're welcome, and, Jerry, it's always a pleasure to talk with you about these things.

MR. SAPIRO: Thank you.

In the proposed Rule, we use in a couple of different places, paragraph A and comment two, for example, the phrase "diminished capacity" or "whose

capacity is diminished." In your presentation, you've used the phrase "gravely disabled client." My first question to you is, do you perceive that there's a difference between the two phrases and if so, is it deterrent.

MR. STERN: No, because my comments are oral comments trying to describe a situation where we have a client who can't make a decision. Grave disability could be someone who has advanced Lou Gehrig's disease, ALS, who is gravely disabled but perfectly competent to sign contracts, do a will, do a trust, and indeed the whole point of this goes to the disabilities, as they are defined with the help of our cooperation and developing this, by the insertion of the references to our Probate Code Sections relating to the protection of a client with diminished capacity in sections 8.11 and 8.12.

They were not talking about a physical disability. We're talking about a cognitive, functional problem, so that's what I meant when I talked about substantial impairment.

MR. SAPIRO: Thank you for clarifying.

MR. STERN: You're welcome.

MR. VAPNEK: Peter, thank you. Again, I also want to express personally and on behalf of the

Commission the appreciation we have for your participation in this process and of the Trusts and Estates Section. That help has been substantial in working through this. For one, as you probably know, while I've been in practice for a long time, I'm a patent lawyer, as I like to say in my real life, and so don't get Trusts and Estates' questions very often. But I do have a substantial practice in giving advice to lawyers.

And I can tell you just within the last couple of weeks, I had a lawyer call me with a situation that fits exactly within the problems covered by 1.14. And so I was able because of all of the discussions we have had, to guide this lawyer on what can and can't be done in light of the current law and of the proposed Rule. So it's a real -- a real dilemma for lawyers on what they can and cannot do, and I for one believe the Commission has been on the right track. I again express the appreciation of the Commission for the work that your Section and you have done in helping us.

MR. STERN: Well, thank you very much. I certainly want to mention my colleague, Margaret Lodise, who will, I believe, participate in your June dealings. She and I have, as you know, been kind of a tag team on this on behalf of Trusts and Estates. Thank you.

MR. SAPIRO: Thank you, Peter.

MS. MCCURDY: Okay. Next up is Tiela Chalmers from the Bar Association of San Francisco, Volunteer Legal Services Program and also the Standing Committee on Delivery of Legal Services.

MS. CHALMERS: Thank you. Hello, everybody. I'm Tiela Chalmers, and I really appreciate the chance to be heard on Rule 6.1 today. So I'm speaking with two hats, but not out of two sides of my mouth, both as the executive director of Volunteer Legal Services Program, which is the largest pro bono legal services provider in San Francisco and as the vice chair of the Standing Committee on the delivery of legal services here at the State Bar, which committee, as you probably know, really is the State Bar's sort of voice on legal services and pro bono issues.

We would really like and I would like in both those capacities to urge you and similarly the Board of Governors to adopt some version of 6.1. We understand there's been a lot of discussion about the language, and we're happy to engage in that discussion. Our committee, SCDLS, hasn't had an opportunity to sit and rehash the Board of Governors' concerns about the language, and we're more than happy to do that.

We're actually meeting on Monday, and we'll be

sending in some written comments. I can say personally I really -- my priority is to have a Rule, and I can certainly live with more narrow language, a more narrow definition of pro bono. I could live with putting the word "strive" in. I could live with the ABA Rule as it is. I just think it's really important to have a Rule.

I know that the State Bar has a resolution, and I think it's a useful thing and a great resolution, but students in law school don't study State Bar resolutions. To be perfectly honest with you, lawyers tend to not track resolutions either. The State Bar issues a number of resolutions. They may make the paper or they don't, but it's not part of what either lawyers or students consult.

And when we at VLSP go out to recruit lawyers, part of what we talk about are ethical issues concerning pro bono. It is such a great tool to be able to go and say, you know, "Our Supreme Court has issued in its Rules of Professional Conduct a provision urging lawyers to do this. It's from the highest level of the Administration of Justice in this state believed to be an important thing."

That's a really powerful tool for us from a recruitment standpoint. Of course, we are already able to say that the Chief Justice particularly urges people

to do pro bono, because our chief has an amazing record on that subject and has really been very supportive. But the Rules are really the jumping off point for people's reference, and this would be very helpful.

I also want to say that I go to a lot of national conferences on pro bono, and California is viewed as being a leader in pro bono. We have a fabulous community of lawyers, many of whom donate large amounts of time. We have, as I said, the chief providing great leadership. I think it would be embarrassing, frankly, to have us have rejected a Rule urging people to do pro bono.

44 or 45 states in the country have such a Rule. It would, I think, be seen as a statement about where we stand on pro bono, and I would hate for that to happen, and I don't think it would accurately reflect the Board of Governors' position on the subject. I have heard it said that there's some concern that having this Rule would lead to mandatory pro bono. I actually think the opposite is true.

I think in the absence of any Rule, those people who advocate for mandatory pro bono -- and I am not one of them -- will actually have more of a platform from which to speak. I think what we need to do is come out with what we think the right way to handle pro bono

is. Personally, I think that right way is to have it be voluntary, but to have the legal community make clear that it's our value. And finally, I want to say that I know that the rules generally -- Mr. Vapnek, as you've said in the beginning -- the Rules generally tell us what we can be disciplined for.

But I actually think the rules have a slightly broader purpose than that. They tell us what we should strive to be as we're lawyers. What does it mean to be a lawyer? That is really the fundamental question that we ask ourselves and that the rules give us guidance for. To have a Rule that urges you to do something fits perfectly well within that, and that's part of what it means to be a lawyer.

So I really would appreciate your urging the Board of Governors to reconsider its decision and to pass this Rule. I'm happy to answer any questions.

MR. VAPNEK: Thank you.

Jerry?

MR. SAPIRO: Were you satisfied with the version of the Rule that the Commission proposed to the Board?

MS. CHALMERS: I was. I was. You know, could it have been stronger? Yes, I thought it could have. But I was happy with it that way, and I'd be happy to

leave it that way.

MR. SAPIRO: Have you any suggestions as to how it might be improved to become acceptable to both the Board and organizations such as yours?

MS. CHALMERS: My guess is -- again, speaking just with my VLSP hat on now, my guess is that going with the ABA language may feel like the safest, partly because it's the ABA language. And so, it's already been adopted in many states, and that would still be fine with us. As I say, I think "strive to" in the beginning of the Rule is also just fine.

MR. MOHR: Paul, could I ask a question?

MR. VAPNEK: Yes, Kevin.

MR. MOHR: Hi, Tiela. This is Kevin Mohr. I guess what I wanted to say, in some regards I think you're speaking to the choir right now. You're preaching to the choir, because the Commission voted 12/0 to approve the Rule that was submitted to the Board of Governors. I don't know if you're aware of that, but we did make the change with the reference to Access to Justice, particularly with respect to Access to Justice.

MS. CHALMERS: Yes.

MR. MOHR: I think what's most important is that representatives of the Access to Justice community, the pro bono community be present the next time the

Board of Governors meets. They need to hear from you. They need to hear specifically, you know, why you want the Rule. Everything that you just said is exactly what we stated at the Board of Governors' meeting.

MS. CHALMERS: Right.

MR. MOHR: But many people, to a certain extent, apparently had made up their minds beforehand that they didn't want a pro bono Rule. I agree with you that it's more important to have approval that is coming from the Supreme Court, that the resolution tends to get lost in the shuffle. We urged that on the Board of Governors, yet they rejected our proposed Rule by a vote of 7 to 1, and they rejected the American Bar Association Rule by a vote of 5 to 3.

MS. CHALMERS: Right.

MR. MOHR: If anything, I think our Rule is more similar to the Board of Governors' resolution and more in line with what you wanted than the ABA Rule itself. I mean, as far as us, we will continue to urge it. Yes, we can go back and we can do that. But unless they hear loud and clear from the Access to Justice community, what we may say may not have that much of an effect on the decision that had previously been made.

MS. CHALMERS: Yes. Thank you very much for saying that. I do appreciate that. In this moment, I'm

speaking to the choir, and I felt that the Commission was really very responsive when we -- I was here speaking and others, and we sort of, you know, came up with some comprised language, and I really appreciated that.

So absolutely I will be at the Board of Governors' meeting, and I'm willing to bet that many others from the community will be. In addition, I think there will likely be a flurry of written comment during this comment period.

MR. VAPNEK: I would like to second that proposal by Kevin. In speaking informally before the meeting, I mentioned that very thing. We on the Commission certainly believe that the Rule is appropriate. For reasons best known to RAC, they disagree. But I think the full Board of Governors has to be made aware of what their constituency believes. While at least a third of them will be ending their terms, nevertheless they should hear from the community.

The more people they here from, the more likely it is that they will change their mind. So I think it's important that the voices of the Board of Governors' constituency be heard by the Board urging them to change their mind about proposed Rule 6.1.

MS. CHALMERS: Thank you very much.

MR. VAPNEK: Thank you.

MS. MCCURDY: Okay. Next we have the Honorable Steven Austin from Contra Costa Superior Court. Steven is speaking on behalf of the California Commission on Access to Justice.

MR. VAPNEK: Judge Austin, welcome.

JUDGE AUSTIN: Thank you. Thanks for the opportunity to testify today. My name is Steve Austin, and I'm a judge in Contra Costa County. I appear on behalf of the California Commission on Access to Justice, and I am the immediate past chair of the Commission. Justice Ronald Robie, who is the current chair of the Commission regrets that he cannot be here today, but he will be submitting written comments on behalf of the Commission.

On Wednesday of this week, the Access Commission voted unanimously to urge the State Bar to recommend a pro bono Rule as part of the Rule revision process. The Commission strongly supported Rule 6.1 in written comments submitted earlier in the process, and the Commission maintains its strong support for the Rule. There were several reasons for the Commission's unwavering support for this Rule, and I will go into those reasons later on in my testimony.

At this point, I want to indicate that this is

an issue of utmost concern to the Commission, and we will make ourselves completely available to work with any and all parties to make sure that this Rule is ultimately adopted and recommended to the Supreme Court. It is of utmost concern.

I can tell you, our meeting on Wednesday -- I was just on the telephone, but there was also video conferencing going on. It was one of the most raucous issues that I've had in my many years that I've been involved with the Access Commission. There was some disbelief. There was a great deal of emotion expressed.

It was difficult for Justice Robie. I'm glad I wasn't the chair, because he was having a hard time controlling, I think, the proceedings, because everyone wanted to speak. In all my time on the Commission I haven't heard any issue that's come up that had such reaction. I'll put it that way. So it's a very, very important thing to all the people that are involved in the Commission and generally in Access to Justice issues in our state.

We understand that the Rules and Revision Commission put a great deal of thought into its analysis of ABA Model Rule 6.1, and we appreciate that effort and the improvements that you recommended to the Rule. We particularly appreciated the change that you recommended

to strengthen the emphasis on activities that promoted Access to Justice that was just mentioned in connection with the previous testimony. We also understand that the vote of the committee to not recommend Rule 6.1 in no way reflects a lack of support for pro bono among Board committee members. However, it did indicate a need to clarify some fundamental issues so that any outstanding issues can be resolved and the rule can be reconsidered.

We believe that it is imperative that our revised Rules of Professional Conduct include a Rule addressing the important role of pro bono, and we urge the Rules and Revision Commission and the Board of Governors to do everything in your power to make sure that happens. There are differences of opinion about some provisions within the Rule, and those differences can and should be addressed in the coming weeks so that a final Rule can be approved by the Board and recommended on to the Supreme Court.

My message today is that the actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's model rule, it can be the Rule as modified by this Rules and Revision Commission, or it can be some combination. The critical point is that we believe a pro bono Rule must

be recommended to the Supreme Court for the following reasons. As Tiela indicated, at least 45 other states have included a similar provision in their ethics rules. According to the report of this Rules and Revision Commission, nearly every jurisdiction has adopted some version of model Rule 6.1.

It is important to have a pro bono Rule in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave it out of the rules.

The Bar's ethic's manual, 250, does include the Board resolution, but it is on, in the current version, page 387 out of a 387-page publication. It's easy to find, I guess, if you know where it is. You just turn to the back.

MR. SAPIRO: Wait until you see the length of it when we adopt the rules that are being proposed.

JUDGE AUSTIN: Other proposed rules are similar in nature. Several do not involve disciplinary consequences, but they permit or encourage certain behavior. The vast majority of the work done pursuant to Rule 6.1 in other states is legal services for the poor, despite the language allowing other kinds of pro

bono activity. Comments to the proposed California Rule would emphasize that promoting Access to Justice is encouraged, even for the nonlegal services pro bono work. And even if some work would be called "pro bono" that we would not consider true "pro bono," that is not a reason to have no ethics rule on the subject.

Because the Rules are ultimately approved by the Supreme Court, it my seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA model Rules but leave out the Rule on one of the topics the Chief Justice most strongly supports.

This topic is very important to me because I have dealings with the Chief Justice, being from the judiciary. The last time as the chair of the Commission, I met with the Chief to talk about Access issues, along with a select group. It was open for all type of discussion, and you can imagine all the different areas that we deal with.

The central focus of our discussion, led by the Chief, was pro bono and the ways that we can assist in increasing pro bono activity in the state, how the judiciary can assist. Out of that, we've come up with a tool kit for the judiciary to go out and encourage lawyers to provide pro bono services, and it's one of his central and most important issues.

Others will testify and submit comment on the fact that there is a great need for legal services that is not now being filled, despite existing pro bono resolutions. I could speak to that from my own personal experience as a trial court judge. I'm now out in Pittsburg in Contra Costa County. I know when I first came on the bench, I was shocked at the number of people who are self-represented.

As an attorney, you don't see it every day. You're in court with other lawyers in a much more controlled sort of setting in most cases. I was just flabbergasted by the number of people that are coming through our courts doing important things that I never saw before as a practicing attorney. Now I see it as a judge. They come in facing issues without lawyers, like, "Can I keep my kids? Will I keep my home? Will I a have to file bankruptcy because of the collection agencies that are seeking default judgments against me? And I don't even know what the word means."

It happens all day, every day in our courts. The judges see it all the time, and that's why they're so supportive of one of the central tenants of getting some services to these people, and that's pro bono. Anything that can be done to encourage it is really, really needed in our state.

The Access Commission believes that pro bono is a fundamental component of our delivery system, and we have worked hard to establish the new pilot representation project that is being launched next year. Pro bono is a key part of those pilot projects that are getting national attention. To not adopt the pro bono Rule at this point would be a giant step backward in our efforts to improve Access to Justice.

Thank you again for allowing me to testify on behalf of the Access to Justice Commission. I'd be glad to respond to any questions that you have. And I realize again that I am kind of speaking to the choir here, but if you have any questions or if there's anything we can do to be of assistance.

MR. VAPNEK: Thank you, Judge Austin.

Jerry?

MR. SAPIRO: Judge, I'd like to ask you the same question that I put to Tiela, and you may not be authorized to speak on behalf of the Commission. But either in your personal capacity or on behalf of the Commission, have you any suggestions as to wording changes that we might suggest that might compromise the position that the Commission took versus what the Board did?

JUDGE AUSTIN: Yes. I think with both hats on

I could say that -- I mean, the way that it was recommended is great. I think it's perfectly acceptable and to everyone on the Commission. We really did like the language that you added in having to do with addressing Access to Justice concerns, and I would encourage that to be left in in any final version.

I think adding in in the introductory area, back in, some of the language having to do with "aspire" or "strive," that type of language that was taken out in the recommendation, I think that would make it, perhaps, more palatable to people that may have objections to it. I think clearly the Commission would have no problem with doing that.

MR. MOHR: Could I make a comment?

MR. VAPNEK: Kevin, yes. I was just going to call on you.

MR. MOHR: Thank you.

Your Honor, I just wanted to point something out that, the language that we used that we substituted in the model Rule is actually from the Board of Governors' resolution that the Board of Governors didn't like. I know that sounds kind of strange, but, you know, we thought it was a stronger statement and we now realize that that was an error on our part, that we should have left in the "strive." Because the "strive"

sends a signal that this is purely aspirational, and that is what we will probably do. I can't speak for the Commission. I'm just the reporter, but I'm going to recommend that that be done, and I think based on the comments that were received from you and Tiela and from the members of the Board of Governors, that would be the appropriate way to go.

JUDGE AUSTIN: Not to say I don't like the way it is worded now. I think it's very clear in the way that it is, and I appreciate the way that it was worded. But I could see that as a potential compromise.

MR. VAPNEK: I might add that when next you happen to speak to the Chief, you might mention how strongly the Commission feels about 6.1, and that even if the Board of Governors continues to reject the 6.1, the Chief and the rest of the Supreme Court have the power to adopt it, no matter what the Board of Governors does.

JUDGE AUSTIN: I'm certain that discussion is going to come up at some point in time. His feelings are so strong. Actually, we were just talking before the testimony about the article he wrote with Justice Broderick that's in the State Bar publication this month. I just received it a few days ago, and it speaks volumes about the needs for services and the importance

of pro bono services.

MR. VAPNEK: I might mention, early on in my legal career, I was a clerk for a Federal judge, and there was very little organized pro bono. There was enforced pro bono, because Federal judges -- in those days when criminal defendants were brought in for initial arraignment, the judge would often lean over the bench and point to one of the lawyers waiting to argue a motion, or whatnot, and appoint that lawyer on the spot to defend.

I saw that happen more than once to patent lawyers waiting for cases, before the judge I was clerking for, who obviously had never practiced a minute of criminal law, picked to represent a criminal defendant, at least for the arraignment. We've come a long way from that means of defense, and certainly the Federal public defender now handles all of those cases.

JUDGE AUSTIN: Yes, I'm happy as a judge. I couldn't imagine having to do that to people, but I've heard similar stories, though.

MR. SAPIRO: That happened in the Superior Court, Judge Austin.

MR. VAPNEK: I saw that judge actually do it.

MR. SAPIRO: I was in trial once in San Francisco in a criminal case, and the practice in those

days was that each of the judges would receive ex parte or small claim matters assigned to them, and they would hear those between 8:30 and 9:30 every morning. And one morning I walked in, getting ready for my trial to resume, and there was a domestic relations case going on with a woman who was not represented. And the judge turned to me and said, "Mr. Sapiro, will you step outside and advise this lady about what her rights are?" It worked in state court, too.

JUDGE AUSTIN: I wish I could do that now sometimes, but I haven't.

MR. VAPNEK: You probably have the power, Your Honor.

JUDGE AUSTIN: I know. Sometimes I wonder what power I have, but it would be nice to be able to do that. I think the lawyers would clear out pretty quickly. Thank you.

MR. VAPNEK: Thank you.

MR. SAPIRO: Thank you, Your Honor.

JUDGE AUSTIN: Thanks.

MS. MCCURDY: Next, we have Linda Kim from the Public Interest Clearinghouse.

MS. KIM: Good morning, and thank you so much for this opportunity to testify today. I also want to thank this Commission for your very thoughtful work on

Rule 6.1. My name is Linda Kim. I'm the Associate Director of the Public Interest Clearinghouse. PIC works closely with all sectors of the California legal community, including law firms, law schools and students and legal services nonprofits, all 100 of them, to increase Access to Justice by increasing the pro bono resources available to assist low income and other disadvantaged Californians.

The Public Interest Clearinghouse strongly supports the inclusion of an aspirational rule on pro bono in the Rules of Professional Conduct. PIC believes that even an aspirational Rule not intended to be the basis for discipline would be valuable, because it would provide formal recognition in California that all lawyers have a professional responsibility to do pro bono work.

PIC works closely on pro bono issues statewide, and we see the desperate need for any and all tools that would be available to further Access to Justice. It is unthinkable that a leadership state like California would not have an aspirational Rule, and we urge the State Bar Board of Governors to adopt Rule 6.1. Thank you so much.

MR. VAPNEK: Thank you Ms. Kim.

Jerry, do you have anything to add?

MR. SAPIRO: No questions. Thank you.

MR. VAPNEK: Kevin?

MR. MOHR: Nothing.

MR. VAPNEK: Thank you.

Thank you very much.

MS. MCCURDY: I believe that is all we have.

MR. VAPNEK: No others?

MS. MCCURDY: No others.

MR. VAPNEK: Okay. I guess we can take a recess.

MR. DIFUNTORUM: We can go off the record for fifteen minutes.

MR. VAPNEK: Go off the record for fifteen minutes, and then if there are any additional speakers we'll take them after the recess.

Again, thank you to everyone who has appeared and presented testimony today.

We're going off the record now.

(Recess taken.)

MR. VAPNEK: It's 11:41. We're going back on the record. There being no further speakers at this hearing, we're adjourned. Thank you.

(Whereupon, the proceedings were adjourned at 11:41 a.m.)

CERTIFICATE OF REPORTER

I, Dawn E. Howard, hereby certify that said proceedings were taken in shorthand by me, a Certified Shorthand Reporter of the State of California, and were thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true, and correct record of said proceedings which took place;

That I am a disinterested person in the said action.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 28th day of May, 2010.

_____

DAWN E. HOWARD
CSR No. 13201

Rules Revision Commission Public Hearing May 21, 2010

Trusts and Estates Section Comment on Rules 1.6 and 1.14

The Trusts and Estates Section of the State Bar of California strongly encourages the adoption of Rules 1.6 and 1.14. The Section has worked to develop a rule like Rule 1.14 since 1996, and members of the Trusts and Estates Section have contributed to the work of the Rules Revision Commission on Rule 1.14 for the past five years.

California's proposed Rule 1.14 goes far toward protecting the core concept of confidentiality while permitting an attorney to take the minimal step necessary to notify someone or an entity when the attorney's client is substantially impaired, cannot act in his or her own behalf, and is at risk of being harmed physically or financially. The Ethics Guide published by the Section in 1997 and revised in 2008, emphasized the commitment of California's trusts and estates lawyers to balance "the duties of confidentiality and loyalty that are the cornerstones of the California legal system" with being able to take "those steps necessary to protect their mentally impaired clients from fraud and undue influence." (Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel, 2nd ed., page 155.)

The modification of B&PC Sec. 6068(e)(2) to allow notification of confidential information where necessary to prevent a criminal act involving death or substantial bodily, and Rule 3-100, created to implement the new code section, mandate that the notification an attorney can give is no more than is necessary to prevent the criminal act. Proposed Rule 1.6 underscores that the disclosure contemplated in Proposed Rule 1.14 similarly is limited to minimum disclosure of information necessary to get assistance for the substantially impaired client. Proposed Rule 1.6, (b)(5). The rule is in this regard consistent with the existing COPRAC standard set out in Formal Opinion 1989-112, which does not permit an attorney to initiate conservatorship proceedings over his or her own client.

Members of the Section have noted that in their working with impaired clients and their families, this proposed rule would have saved clients from personal harm and financial exploitation. In some instances, attorneys have acted notwithstanding the law and the rules of professional conduct, and on occasion to their detriment, to protect the interests of a client who was at risk. Section members have been confronted with the dilemma of having clients who were too demented to realize their situation and thus were unable to understand the risks they were confronting. Their comments at the time Proposed Rule 1.14 was first submitted for public comment in the fall of 2009 were overwhelmingly in favor of adoption. Proposed Rule 1.14 goes far toward providing a structure for the attorney to follow in knowing what precautions to take, both in order to minimize disclosure to what is necessary and to verify that the disclosure is the only means available to protect an impaired client.

Proposed Rule 1.14 is overdue. While much of the opposition to it is based on the reasonable desire to preserve the value of absolute confidentiality, that opposition does not provide any measures that would offer protection to an impaired client who is at risk. There is no erosion of the attorney-client relationship where the attorney acts to protect the client and to preserve the client's interests.

Peter S. Stern, on behalf of the Trusts and Estates Section of the State Bar of California
May 17, 2010

This position is only that of the TRUSTS AND ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS AND ESTATES SECTION is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

STATE BAR COURT

OF THE STATE OF CALIFORNIA

PUBLIC HEARING ON

CALIFORNIA RULES OF PROFESSIONAL CONDUCT

THURSDAY, JUNE 10, 2010

10:30 A.M.

APPEARANCES:

For the Commission: HARRY SONDHEIM, CHAIR
ELLEN PECK, ESQ.
ROBERT KEHR, ESQ.
KEVIN MOHR, ESQ.
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MR. SONDHEIM: Good morning, it's about 10:35 a.m. on Thursday, June 10th, 2010, and we are here for a Public Hearing of the State Bar of California, to receive testimony on proposed amendments to the Rules of Professional Conduct.

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 California Supreme Court.

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 a posting at the State Bar website, public notices in the Daily Journal, the California Bar Journal, 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. The microphone is right across from me, so please use that microphone. And if there are any intervening speakers, we ask that you re-state your name, so that your comments can be properly attributed.

If you have any written materials that have not yet -- not yet been submitted, please give them to Mimi -- Mimi Lee of the State Bar staff, who's sitting right there. And if there is anyone here who has not signed in, we also ask that you sign in with Mimi 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 sub-entity of the Board of Governors, and this public hearing, as well as the 90-day public comment period on the proposed rules which ends on June 15, 2010, has been authorized by the Board.

Now let me introduce who we have sitting here. To my far left is Raul Martinez. He is a member of the Commission. Next to him is Kevin Mohr, who is our consultant. To my immediate right is Bob Kehr, who is also a member of the Commission. To his right is Ellen Peck, a member of the Commission. And to her right is Randy Difuntorum, who's a member of the State Bar staff, and as I indicated before, next to him is Mimi Lee.

Now, the way we're going to do this is, we're

doing to call each speaker in the order that they were signed up, assuming they are here when we call them, and if not, we'll got back to them later on. And each speaker will have 15 minutes maximum to speak. And we're going to go a little bit out of order, because one speaker needs to leave early, so we will start with him. Mimi, you want to --

MS. LEE: William Hoffman.

(Pause.)

MR. SONDHEIM: Good morning.

MR. HOFFMAN: Good morning. My name is William A. Hoffman. I'm here on behalf of the State Bar of California, Law Practice Management and Technology Section of -- which we usually just call, "LPMT." And thank you for letting me come and give some observations from our section.

The LPMT's focus is on, as it says, the practice of law, the management of one's practice. And as such, we have a particular interest in ethics and professional conduct. We do many MCLE presentations and publications related to the ethics of the practice of law.

And we recognize that law is both a profession and a business, as I think the Rules of Professional Conduct do. But particularly those rules with regard to how to properly handle financial transactions and the money of clients. And that's part of business, as well as the many rules that have to do with observing the ethical norms of a professional.

What I'd like to do today is to make some general comments on the rules and an offer of assistance.

Now let me first say how grateful we are for all the work that you have done. And I'm sure that I cannot express the enormous number of hours and thought you put into these rules. I've done my best to read them and many of the discussion drafts, and I can see the product of great thought and consideration.

And just from working on any committee, I know that each line is usually carefully thought out, often debated, and this is an enormous task for you to have done for us, the attorneys of California. So, on our behalf, I'd like to thank you for your efforts.

I would also ask you to, at this point, sit back, take a broad look at these rules, as we have, since they are now completed.

MR. SONDHEIM: Not quite completed.

MR. HOFFMAN: What?

MR. SONDHEIM: I was saying, not quite completed.

MR. HOFFMAN: They are not.

MR. SONDHEIM: We still have this hearing, and the public comment is open until June 15th, and then we're going to consider everything that has been presented to us during this public comment period.

MR. HOFFMAN: Yes. And we will be presenting our

written comments --

MR. SONDHEIM: Okay.

MR. HOFFMAN: -- submitting them by Tuesday.

MR. SONDHEIM: Okay.

MR. HOFFMAN: What I meant was, this is a sense of -- since these are time for the last comments, to look at the rules as a whole, and to see how they work as one machine, if you will. And that will be some of our comments to be submitted in writing.

This in many ways is a sea change for California attorneys. We're going from a code of a little more 18,000 words and 30 pages, to about 68,000 words and 98 pages.

And although most of the basic rules, conduct, behavior, ethics, are similar to the present code, there are of course wrinkles and nuances that all will have to learn.

And we would like to offer our expertise and experience in law practice management and the ethical practice of law, and adhering to professional conduct norms, to assist the Commission and the Board to introduce and help lawyers deal with this.

I think, and our executive committee talked about this a fair bit, that this will be a relatively big pill to swallow. It's not that it is an unwanted one, or not that it doesn't clarify a number of issues, it's just a large document.

Now, one of the benefits of what you have written is, from my reading of it, including some of the discussion drafts, but what is the benefit is, the more detailed comments help fill out those gray areas, those nuances.

Because I think rules such as these, are not meant really to catch the guilty, but to guide the innocent. To tell lawyers how we can do a better job, not necessarily to play gotcha. I mean, for a lot of those kind of things, we have a penal code, because a lot of the violations of the Rules of Professional Conduct are otherwise criminal acts in many ways.

But as guidelines, for how to do it right, how to be more considerate of interest of clients of the public. I think you've provided enormous help in all those comments.

Now, that being said, our question is, how are you going to get the 200,000-plus lawyers of California to be interested or motivated or eager to absorb these rules, to learn them, to spend a fair bit of time learning the new procedure?

And I'd like to talk to you about that today. Our committee of the executive committee, and our section, would like to play -- assist in playing a role in helping you promote the rules and teach them to our fellow lawyers. To be part of the vehicle by which this -- what I say is a great educational task, is done.

And so, I also want to ask you what your thoughts are on how we can be of assistance in developing perhaps a project or an approach, to help further the goals of these rules.

Because, as you know, after eight years and this enormous amount of work, in one sense, the hard work begins again, because we have to have 200,000 lawyers now learn, absorb and -- learn how we practice, as we do in Law Practice Management, how that affects their daily life. How we can help them do a better job.

So I wonder, from the committee, if there are any thoughts about how our section might be of help, and also to present that as a -- as an idea for further contemplation.

MR. SONDHEIM: Speaking for myself, let me just say, it appears to me that it may be premature to start planning.

Because we still have to go through, ultimately, the Board of Governors, and then it goes to the Supreme Court, and we have to see what the Supreme Court will say with regard to what is proposed. And judging by past experience, there will be some period of time in between, let's say, the adoption of whatever the Supreme Court adopts, and the implementation of the rules.

And during that period of time, I think the effort can then be made to try and get lawyers to become familiar

with the rules.

MR. HOFFMAN: Well, we would like to assist in any we can in doing that. And although I know there is that long process before -- even before the Supreme Court decides on these rules, we are trying to look ahead to the new landscape.

And it's going to be a long road, and we want to be part of the vehicle to help people go down that road. And so that's, in large part, what I also wanted to say to you today.

But again, I think that in -- as an overall look, it's -- it's very valuable to at least, once we feel the Board has decided this as a set of rules, or what you're presenting, to think back, to reflect on them as a whole.

Because I think that is a valuable exercise, and that's what we will be doing, we'll be giving you some comments on them. Because I can see that each rule, by itself, has a lot of merit. How do they all work as a whole? How do they work in terms of how we will get fellow attorneys to absorb them. So, thank you very much.

MR. SONDHEIM: I just to say, the sooner you get your comments in, the more time we have to study them. Because our next meeting is shortly after the comment period ends. So, although June 15th is the cut-off date, if you get it in earlier, either today, tomorrow, if that's

possible, it will be helpful.

MR. HOFFMAN: We'll do our best. As you must know, I'm working through a committee also, so we shall see.

MR. SONDHEIM: You have our sympathy.

MR. HOFFMAN: Okay. So, thank you very much. I appreciate it.

MR. SONDHEIM: You're welcome.

MS. PECK: Thank you.

MR. SONDHEIM: All right. Mimi, why don't we go in order and see if the next gentleman is here.

MS. LEE: Okay. Neal Dudovitz.

MR. DUDOVITZ: I don't know if it's possible, but I'm part of a group of people, and I -- I think it's probably better to have somebody else introduce -- introduce it for us. Is it possible to substitute Mr. Rothschild first?

MR. SONDHEIM: Sure.

MR. DUDOVITZ: Okay.

MR. SONDHEIM: That's fine.

MR. DUDOVITZ: Thank you.

(Pause.)

MR. ROTHSCHILD: Good morning. My name is Toby Rothschild. I'm general counsel with the Legal Aid Foundation of Los Angeles, speaking today on behalf of the Legal Aid Foundation, and also the State Access to Justice

Commission, and the Access to Justice Committee of the Los Angeles County Bar.

I would point out there are four other people here specifically to talk about Rule 6.1, which is one of the ones I will be addressing, and it may make the most sense to have those in some kind of serial order, rather than interrupting between them. So, I'll leave that to your discretion.

The process of revising the rules has, you know, certainly been a long and arduous one. But I want to begin by going through what I think are some of the proposals that are included in this package, that are truly helpful to Access to Justice.

That's the issue that I've watching as the Commission has proceeded through its work, and I wanted to highlight a number of the rules that I think the Commission has done an excellent job in addressing, and in proving Access to Justice.

So let me start through them fairly quickly in order. Rule 1.2(c) and comment six and seven, dealing with limited scope representation, supports in the rules the clear policy of both the State Bar and the Supreme Court, to encourage limited scope representation.

Rule 1.5(a)(4), which permits payment of costs and fees, as opposed to advancing of costs and fees for pro bono

clients and indigent clients, is a major help, and an improvement actually over the ABA version.

And particularly, subsection (b) of 1.8.5, dealing with gifts to clients, is a great help because one of the issues that comes up -- that I get questions from legal aid lawyers regularly is, my client's got a hearing tomorrow morning. Can I give him $10 so that he can take a cab to the hearing, and then maybe have some breakfast on the way. And since that's a personal or business expense of the client, I have to say, "the rule says you can't."

Now, do I tell them to go ahead and do it? Yeah. But, technically, it violates the rules. And I think it's nice to have a provision that says, "yes, it's okay," as long as there's no quid pro quo for it, that you can give your client money if that's going to help them.

Rule 1.14 dealing with clients with diminished capacity. It's a very important for our clients. Again, a significant improvement over the ABA version of it.

And I think, while the Access community is not a hundred percent united, because there are people within the disability community who feel it goes too far, I think the general consensus is that it's a major improvement over the current situation.

Rule 4.2 on communication with represented persons. Much better than the ABA version, clarifying the

ability to speak to public officials, which is often extremely important for public-interest attorneys, who are attempting to resolve the issues that affect their clients on a daily basis.

Comment 10 specifically is very helpful, also, in the limited scope representation comment -- context, in terms of what issues -- and how you can talk to a client who's represented for some things and not for others.

4.3, dealing with unrepresented people. Most poor people are unrepresented, even those that have some help from a self-help center or other kinds of assistance, are unrepresented for the most part. And it's very helpful in setting out limits on lawyer's conduct in dealing with such unrepresented people.

Comment six, also I really appreciate again, the improvement over the ABA version, in clarifying the situation to allow covert civil investigation, including discrimination testing.

Rule 5.4(a)(4) and subdivision (e) and comments seven, eight and nine, the support for certified lawyer referral services, and the prohibition of other kinds of lawyer referral services is extremely helpful in preventing fraud and abuse. And the fee provision of comment eight clarifies that issue for our organizations, and we appreciate that.

Rule 6.3 has always -- dealing with being on the board of a legal services program, has always been the law in California, but having it spelled out clearly in the rules is very helpful.

A battle with my board of directors in Long Beach over access to client information is what first got me involved and interested in ethics back in the early '70s. And so I really appreciate having that clearly spelled out in the rule.

6.4, dealing with law reform. Again, important for the public interest law community, generally.

6.5, I don't need to say anything more about that -- the limited legal services program is clearly a key issue for us.

And the last one I would cite is 7.5 and comment one thereto, which is a very important issue for legal aid programs throughout the state. That's the one that deals with the name of the law firm, and not using names that are confusingly similar with non-profit legal services providers.

It's excellent, I think, to move that from the Board-adopted standards into the rule itself. It will make it much more obvious and much better noted. We're also hopeful that it will help with interpretation of similar laws, such as recently enacted Business and Professions Code

Section 6159.5 and following, regarding the misuse of the "Legal Aid" name.

Now on to the one glaring omission and disappointment in the rules, at they currently sit, and that's Rule 6.1. Almost every state has Rule 6.1. I think that of the few that don't -- there's only one that doesn't have something like it, and the others -- some of the others have rules that are stronger than 6.1.

Students, when they study the rules in their law school classes, and lawyers when the look at the rules, tend to look at the rules. I don't know of any law school class that trains students to look at the last page of the -- of the gray book, which is where the State Bar's Board of Governor's resolution supporting pro bono is. I'm glad it's even there, it didn't used to be -- but it's not what people tend to look at.

Having 6.1 in the rules will be a major assistance in encouraging pro bono work, by both the firms and solo and small firm practitioners. Having it there gives us the ability to go to the lawyers and say, "see, it says right here, you ought to do that." We have lots of incentives we give, but that will be a major one.

For California not to have Rule 6.1, we believe would be a serious flaw in the work of the past eight, nine -- however many years it's been of this Commission.

Two suggestions regarding the wording of 6.1. First, if it will assist with its adoption, we would be okay with adding back the ABA language of "aspire to," in the second sentence of the preamble. We think it's not necessary, but if it will assist the Board in being comfortable with the rule, we would be glad to have it there.

The second relates to comment four -- and I don't know that this one has been pointed out in other comments yet, but it will be. The final sentence of the ABA comment four was deleted by the Commission. In the -- this is the sentence that talks about donation of fees. In the explanation, reference was made to the deletion of ABA 5.4(a)(4) as the justification. This is very problematic for us.

First of all, 5.4(a)(4) refers to sharing of court-awarded legal fees. The rules, in their totality, distinguish between sharing of fees and splitting of fees.

In stating that:

> "Giving all or part of the fee award to a non-profit legal services firm, which is authorized to practice law under the Frye case, is a violation of 5.4,"

the concepts are being confused. It's not a fee

sharing, it's -- if anything, a fee splitting.

Secondly, no rule prohibits contributions to non-profit organizations. If there's no agreement to share, split or otherwise divide the fee, to prevent pro bono law firms from contributing voluntarily to the legal services organization which referred the case, keeps the firm from supporting the infrastructure necessary to guarantee the continued availability of the screening and support that legal aid programs provide to the private bar to make pro bono successful.

We suggest that the last sentence of ABA comment four be reinserted into the comment, in the California version.

Thank you very much for the opportunity to comment, and for your years of devotion and hard work on the project. The lawyers and the clients of California owe you a great deal. Thank you.

MR. SONDHEIM: I hope your disappointment isn't necessarily with the Commission which, as you know, had recommended the adoption of 6.1.

MR. ROTHSCHILD: I understand that. And I'm hopeful that --

MR. SONDHEIM: And just a -- and --

MR. ROTHSCHILD: -- that if the Commission reasserts its concerns and maybe with the adjustment of

adding "aspires to" back in, it will persuade the Board that it really is voluntary, and they should go ahead and move it forward.

MR. SONDHEIM: -- all right. You might also consider, because others have done it in other areas, contacting particular members of the Board of Governors to express your concern that there's a large community out there that want 6.1 --

MR. ROTHSCHILD: Yes.

MR. SONDHEIM: -- and there may be some -- and this is my own personal view, differences of opinion exactly as to what to do with 6.1. But I think you're all unanimous that we ought to have 6.1 in some form.

And I think, from my own perspective, that it's important that that message be conveyed to the Board of Governors, without necessarily trying to nitpick particular language.

MR. ROTHSCHILD: Right. We'll leave the nitpicking to working with you and -- and convey the overall message to the Board. Thank you.

MR. SONDHEIM: Thank you. Let me then take others who want to talk on 6.1, maybe in the order that they are listed. And we'll take them all as a group.

MS. LEE: Mitch Kamin --

MR. SONDHEIM: I think the first one was Neal --

MS. LEE: -- yes, Neal Dudovitz.

MR. DUDOVITZ: Well, I thought I was last, but -- yeah, yeah.

(Pause.)

MR. KAMIN: Good morning. I'm not Neal Dudovitz.

MR. SONDHEIM: Would you state your name for the record.

MR. KAMIN: Absolutely, thank you. I'm Mitch Kamin. I'm the president and CEO of Bet Tzedek Legal Services. Also a Board member and past president of the Legal Aid Association of California.

I appreciate the chance to testify today on behalf of Bet Tzedek, which serves 12,000 low income and elderly Angelenos every year with a wide range of civil legal services needs.

We also have a significant pro bono program, in partnership with law firms and corporate law departments, which, last year brought in more than $16,000,000-worth of donated services.

In addition, we run the Bet Tzedek Justice Network, which is a partnership with a 150 law firms and corporate law departments currently serving Holocaust survivors and low-income seniors in 31 cities across North America.

The Legal Aid Association is a group representing

approximately 100 IOLTA-funded legal services non-profits, including Bet Tzedek Neighborhood Legal Services and Public Counsel, among others.

I want to echo the comments of Toby Rothschild, and definitely assert the value of 6.1 for our ability to recruit pro bono support. I also want to note from the perspective of California, the importance of 6.1 extends far beyond our individual programs.

California has long been a leader in Access issues. We have the Access Commission of the State Bar, AB 590 last year and, of course, a Chief Justice who greatly support access issues in general and pro bono in particular.

But at the same time, California suffers from a significant justice gap, whereupon the most recent study by the Legal Services Corporation, approximately two-thirds of eligible low income Californians could not receive legal services that they would otherwise be entitled to.

The adoption of 6.1 will maintain California's status as an access leader, while at the same time helping organizations, including those in rural parts of our state, to close the justice gap by recruiting more pro bono help.

Now, as I mentioned, there hasn't been a study of the access gap for a number of years, but member programs from LAC uniformly report both a decrease in funding, which results in a decrease in services available, as well as an

increase in calls for assistance.

And at Bet Tzedek in particular, I will share that we last year reduced our operating budget by 15 percent while calls for help increased by 40 percent, to give you a sense of the order of magnitude.

And we believe that access to pro bono is particularly important in these economic times, and that not approving 6.1 could send exactly the wrong message at the wrong time, at the time when our organizations and clients need pro bono the most.

Adoption of 6.1 will also help smaller and rural programs in particular, who lack the resources to recruit pro bono. It makes the message much clearer, and of course has the credibility of being a disciplinary rule of the State Bar.

I want to end by noting that I and LAC and Bet Tzedek do not believe that 6.1 is a step toward mandatory pro bono, and that we would in fact oppose a mandatory pro bono requirement.

We're fortunate to have firms and companies with a great dedication to pro bono, including O'Melveny and Myers and many others. And making pro bono mandatory we think would be contradictory and counter-productive.

But having 6.1 as a rule of Professional Conduct will send a very positive message, and reinforce our efforts

to involve more and more California attorneys in making California a leader in access to justice for all. Thank you very much.

MR. SONDHEIM: Thank you. Who would like to speak next?

MR. DUDOVITZ: Okay, thank you. I'm Neal Dudovitz. I'm the executive director of Neighborhood Legal Services of Los Angeles County, which is one of California's largest legal services programs. We focus a lot of our attention on the northern and eastern portions of Los Angeles County. And we assist through our various programs, almost 70,000 people a year.

One of the -- I certainly endorse the comments of my colleagues, Toby and Mitch. I think we're certainly -- no surprise to you, the legal services community is strongly in favor, in general, of Rule 6.1., and I would say, from my perspective, I think it's a necessity for us.

And the reason I came down here today was to emphasize to you that the breadth of -- of why 6.1 is necessary. Because we do a lot of work in places like Pomona, Lancaster-Palmdale area, El Monte, the San Fernando Valley -- these are areas where a large amount of the lawyers are -- work with small firms and individual practices.

This rule is really important for our ability to

recruit and work with private lawyers on a pro bono basis in those kind of context.

And our -- our office has actually just initiated a new pro bono initiative, focused on various elements of the Bar, but -- but really with an emphasis on trying to find increased avenues for lawyers in those kinds of practices, to be able to effectively participate pro bono.

What Toby said is, " can you hold up the book and show them the rule?" What role does that play? It plays an enormous role when you be in a -- conversations with people about the importance of pro bono.

So I would urge you, and I appreciated the comments that there's another place these comments have to be -- have to be focused, because the Commission has been very -- has been very supportive, and I appreciate that.

I think that we want to make clear -- I would like to make clear of the depth and breadth of the support for the -- for the rule.

And so again, I would say the work that -- that said, you're going to hear from public counsel, and they're -- the large effort they do with the -- and O'Melveny, of the large effort they do with the major firms is a critical element of pro bono.

But it -- this rule is also important for the individual practitioners -- and I don't know what the

numbers are, but I -- but I know a substantial portion of our Bar is that -- that's who the Bar is. And so I think you need to focus this very -- the focus of this is very broad.

MR. SONDHEIM: Let me just make one observation, which is my personal observation. You've indicated that with the rule, you are able to obtain more attorneys who will do pro bono work.

It seems to me, it would be helpful to the Commission, the Board of Governors and the Supreme Court, to make it clear why what we currently have needs to be supplemented by 6.1.

I think that if your organization or other organizations can, in effect, demonstrate the usefulness of having it, over and above what we currently have, that it may be of some assistance to you in getting 6.1 --

MR. DUDOVITZ: Correct.

MR. SONDHEIM: -- that's my personal observation.

MR. DUDOVITZ: Well, appreciate that, and I think that is a good observation, and something we can -- we can try to address. I think there are other examples. I think Mitch gave some examples about the current circumstances, where are numbers of clients are increasing and our funding is decreasing simultaneously.

You know, what I always explain to people is,

we're a pretty -- from our perspective, a large program. We have 45 or 50 lawyers. There's something over a million people eligible for our services in our target area, and we can't -- we -- as much as we can help 70,000 people, that's a drop in the bucket. We can't do it without the support of the Bar.

I would also really add something that is important. The -- that's why it's great to have this in the ethics rule. The commitment of the -- of lawyers in general, to see that part of their -- they have an obligation that's part of -- part of what makes us an important part of our community, is that we -- we do all collectively care and it is an important commitment.

So, I think that -- but I think we can do a better job. And we -- I think collectively, we can -- we can figure out some better ways to make it -- make your point to people like the Board of Governors.

MR. SONDHEIM: Kevin.

MR. MOHR: I was hoping not to have to speak. I've lost my voice from coughing all week. But --

MR. SONDHEIM: From giving a hard time to students.

MR. MOHR: -- well that, too. But one thing I think it's important for you do, as you're talking about you need to address another audience, and that's going to be the

Board of Governors.

And the Board of Governors has representatives from the California Young Lawyers Association, and they came down against this rule very strongly. I think you need to look at their comments and be prepared to address their comments before the Board of Governors. I think that's going to be very important.

MR. SONDHEIM: Thank you. Bob.

MR. HOFFMAN: Yeah, I have another comment. It seems to me that the -- the idea that having this in a rule, furthers the -- your goal of having something to point at, in trying to recruit pro bono contributions to your programs.

But it seems to me there's another aspect of it. Which is, is there anything in the rule, either that in the prior draft rule before the Board kicked it out, or anything that could be in a revised version of the draft rule, that would help guide lawyers as to what they are permitted or not permitted to do. That would simplify your recruitment efforts.

What I have in mind is that one of the goals of the rules is to provide guidance. If lawyers are not confused, then clients are protected. If clients are protected, lawyers are protected, and the lawyers don't get in trouble.

This is sort of an outlier, because there isn't any client yet. And guidance isn't to protect the client, because there isn't a client. The guidance, if there is any, would be to simplify your pro bono recruitment goals, which are -- which is a policy of the State Bar.

So if there is a way of connecting the guidance role of the rules -- I mean if in attempting to recruit pro bono contributions, you find that people are confused -- lawyers are confused and think they're not permitted to do something that they are permitted to do, and that the content of the rule would, as a result, provide guidance and simplify your task.

I would be interested in knowing what that is, and I think the Board might be interested also.

MR. SONDHEIM: All right. Who would like to speak?

MR. VERA: If I could -- if I could comment.

Good morning. My name is Hernan Vera. I'm the president of Public Counsel. We're the nation's largest public interest law firm that specializes primarily in increasing and supporting pro bono.

I wholeheartedly support and echo the comments of my colleagues here. Make no mistake, this would give us a very important tool at a time when we need it. With this recession now, it is becoming harder and harder to recruit

folks. We'll put that in writing for -- for the Board as well.

It's becoming tougher. We're continuing to appeal to the business case of pro bono. We're explaining to firms of all sizes, how pro bono benefits them. But it's becoming -- with billing practices, with client pressures, all of us here are having a harder time at getting the more senior folks, the partners involved. That's a change. That's a change.

So we believe that 6.1 will give us a rule -- give us a tool to go to the firms and say, "yes, it's aspirational but, look at this, look at this. Step forward. We need you, too." Not just the associates, but the partners to get more involved. That's the first thing in response to your question about how specifically would it affect us? It would allow us to have a greater tool for the partnerships and the more senior members of the Bar. That's the first thing.

The second is, in addition to the business case that we always make -- and I should add that, in my role, I go every week to law schools and firms to try to recruit -- to try to recruit attorneys and law students. We use over 3,500 in any typical year to provide more than $83,000,000 of free legal services.

So, we make the business case. But I think that

attorneys want to be appealed to in terms of something greater. They want to be appealed to in terms of the profession being different. And this is something we always talk about. That our profession, unlike most, is different.

It appeals to law students especially. A sense of pride that they're entering a profession that's different and special. How can we greater point to that? By having a rule that says, it's not just aspirational, in terms of a pro bono resolution, but it's actually in the ethics rules.

Now I have looked at summaries of the -- the objections from the CYLA, I haven't looked at them in incredible detail, but I think one of their points is, it's duplicative. It's already in the Business and Professions Code section.

Well, that's not the same, as Toby talked about. It's not the same as instruction that law students get in law school, looking at an ethics rule. And it's not the same for us, that stand up in front of a law firm, white-shoe law firm or a small firm, medium-size firm, and say, "this is part of our profession. It's recognized around the country, and it's not just an ABA rule, but it's a California rule as well." That's going to give us another great tool.

The last point I'd like to make is that Public Counsel's part of a coalition of firms and organizations,

mostly out of New York -- have been working for over five years to support what's called the "Pro Bono Declaration of the Americas" (sic.). It's a declaration that, asks attorneys in Latin America to agree to do 20 hours of pro bono.

It has now been adopted by dozens and dozens of bar associations in over 12 different countries. We were there at the launching in Mexico City. And part of the debate I think that's -- that folks are having now, is one that they're having there as well.

Lots of supreme courts and other courts have made resolutions about pro bono. It's not the same thing as a bar association or a court saying, "now we have -- we are signing a pledge," non-binding, but a pledge that each of our attorneys is going to commit themselves to 20 hours.

That's making a real difference in Latin America, and we're working in implementation in Argentina and Mexico, Brazil, Peru. We're sending our attorneys there to help create the pro bono infrastructure that we have here. They're 20-30 years behind, but I think they're taking the first steps in terms of sconcing those concepts in their rules itself.

So, we urge -- we urge that rule in -- with -- the adoption of that rule, and we'll be pleased to send written comments to that effect. Thank you.

MR. LASH: Good afternoon. My name is David Lash, and I'm an attorney at O'Melveny and Myers, and I run the national pro bono program for the firm.

And I would like to specifically address the Chairman's question about, what kind of an impact this is likely to have. Because I think I have -- if you'll indulge me for a couple of minutes, some parallel examples of how this kind of a statement can, in and of itself, dramatically improve pro bono performance.

At our firm, for instance, just to pick a firm at random, we have a very long history of service to the community through pro bono involvement.

Our -- one of the -- the son of the founder of our firm, Jack O'Melveny was the founding board chair of the Legal Aid Foundation, where Toby comes from.

In 1962, we were -- two of our lawyers were among a small group of about 40 lawyers that were invited to the White House by President Kennedy, to put together a program to represent and defend the civil rights workers in the South.

From that meeting grew the lawyers committee for civil rights under law, on which our partners have sat continuously since that meeting in 1962 at the White House, including people like Bill Coleman and Warren Christopher.

A number of years ago, on a pro bono basis, we

represented the Justice's of the Washington Supreme Court in defending against a challenge to the IOLTA programs across the country. And we took that case pro bono up to the Supreme Court, where we won. Which as we all know, for generations to come, has preserved millions and millions of dollars for -- that go directly to serving poor people and saving lives, literally.

We were -- we were among one of the first firms to charter a formal pro bono committee. We were one of the first firms to have a formal policy that gives full billable credit to every hour by every attorney recorded on a pro bono case. We were also one of the first firms in California to hire an attorney to -- who's dedicated to running a pro bono program.

And like many firms, like many of our colleagues, here in Los Angeles and across the country, we have very specific policies written -- written down that encourage pro bono involvement. And we're -- but, we are always looking to nurture that commitment.

A few years ago, Mr. Christopher wrote a value statement for the firm. And one of the core values as he articulated it, was "commitment to the community through pro bono service to the poor." That's a statement that's written, that every lawyer has in his or her office, that's given to every lawyer upon their -- when they join the firm.

And coupled with our history, which we also are very careful to inform all of our lawyers about repeatedly, because it's such an important part of our culture. But we do not rely on that history. We do not rely on that value statement.

Every time we have done something like that, our pro bono performance has increased. Every time we have re-embraced and nurtured our commitment, our pro bono performance has increased.

By reiterating our commitment to new attorneys and to existing attorneys, hopefully in new and creative ways, we have continually succeeded in increasing participation in our pro bono program. When the firm hired me to help ramp up the pro bono program, after a couple years, our hours doubled.

A few years later, when they asked me to sort down my commercial practice and devote more and more time to the pro bono leadership of the firm, again our hours doubled.

A few years ago, we adopted a formal pro bono initiative, which we advertised all over the firm. We really didn't do anything new in adopting that initiative. It was sort of a rededication to long-standing principals in the firm, but we presented it in a new way. We adopted a new infrastructure to help support the program. We got buy-in from the highest levels of the firm. And again, our

performance increased.

What we have learned, is that each time we find a new and powerful way to again embrace our commitment, our performance grows. We have found a direct correlation.

It's similar -- and I think we can find a parallel with our own Chief Justice. Chief Justice George has been a hero in the pro bono community, because he has used his very powerful bully-pulpit to encourage our community to continue to be involved in pro bono.

He, as you all know, a number of years ago, he sent a letter to every single letter lawyer in the State of California. And the impact of that was palpable. More and more people participated.

He then engaged the legal community in San Francisco, and they drafted a new pro bono pledge. And there was a press conference on the steps of the courthouse. And he was there, he was there promoting it. Again, palpable increase in participation.

He did the same thing here in Los Angeles when a number of us got together and formed the Los Angeles Pro Bono Council. And he was here for the kick-off event. We had more than 65 firms come and participate, and agree to participate.

He also was instrumental in getting the state legislature to fund the Equal Access Fund, which again,

created more and more opportunities and it increased pro bono participation throughout the State of California.

Many of these things were repetitive. But they are still vital and they are still necessary, and they still had a great impact. So that's the lesson that we've learned.

When leadership steps up and makes a strong and unequivocal statement about a core value, we have historically responded, as a law firm and as a legal community throughout the state.

And if I can be so presumptuous as to suggest that adopting Rule 6.1 will do exactly the same thing. As a rule of professional responsibility, it will have an extraordinary impact. Specifically because it's not disciplinary and it sets aspirational goals.

It will be this State's strongest statement ever, that as a profession, we have the ability to touch the lives of the less fortunate as no one else can. We can save people from being homeless. We can make sure they have access to healthcare. We can preserve basic necessities of life as can no other profession. And it starts with leadership.

So, on behalf of my firm, O'Melveny and Myers, we would urge the State Bar to adopt this rule, as a strong statement in support of pro bono participation, and our

profession's ability to provide the most unique and powerful assistance to the poor in the State of California.

And we think that by adopting this rule, it will be a statement stronger than any that has ever been made before, and we'll have the same kind of palpable increase in participation that so many other steps have had. And in the future, we're going to have to find more things to do, to continue to embrace that commitment and nurture our responsibility as a profession.

And just one last thought. I want to reiterate Toby's -- Mr. Rothschild's thought, about being careful. I know we may come back another day and nitpick the language, but we, and many other law firms, have donated hundreds and hundreds of thousands of dollars in recovered attorney fees in pro bono cases to these organizations here. And anything that we can do to avoid any hint that such donations would be impermissible or discouraged, is something we ought to be very cognizant of.

And finally, I just to recognize the concerns of the small law firms. We certainly understand that, in this economic time, it's very tough to make these kinds of commitments. But these organizations have come up with fantastic ways for small law firms and individual lawyers to participate in very time-limited but very impactful ways.

We have, ourselves, co-counseled pro bono cases

with small law firms, so that the burden that they have to carry is much less. We think there's a lot of ways to address those concerns.

So thank you. It's an honor to be here with all of these people from the community and an honor to address you. Thank you.

MR. SONDHEIM: Just an observation on the experience of your law firm. Being that when you use new ways to encourage pro bono work with your lawyers, you found an increase in the number of lawyers that participate. And so you had some experience with new ideas, so to speak.

And I think your point is, that 6.1 can be used the same way, and would hopefully increase the number of lawyers who would do pro bono work.

And you might want to make that point in writing, so that it's there not only in the record today, but also in the written materials that go to the Board and to the Supreme Court. And you may even want to send it to whomever you deem appropriate on the Board, to make that point.

And, at least as I understand it, that's one of the reasons why you think 6.1 is useful over and above what currently exists.

MR. LASH: Yes, exactly. That's exactly it. And I don't think that that's the only reason to adopt it. I certainly concur with everything these fine gentlemen have

said. But I absolutely agree, our experience is that those kinds of actions, taken by leadership in any form, have a profound impact and a direct correlation to increase participation.

MR. SONDHEIM: Anything else from any of you gentlemen?

MR. DUDOVITZ: Thank for indulging this verity.

MR. SONDHEIM: Sure.

MR. DUDOVITZ: We appreciate it.

MR. VERA: Thank you.

MR. KAMIN: Thank you.

MR. LASH: We have one other person listed for 6.1, and that's Anita Velasco. Is she here? No?

MR. DUDOVITZ: She works in my office and I think was registering me -- I thought.

MR. SONDHEIM: Okay. All right. Then we'll go down in the order that people signed up. And I think the next one would be Gary Lane.

MS. LEE: Gary Lane.

MR. LANE: It's going to be lonely over here after this. It's still good morning. My name is Gary Lane. I'm the president of Consumer Protection Legal Services in Santa Ana. And we specialize in helping consumers with a variety of financial issues, but the vast majority of them are suffering from mortgage problems. And we have an enormous

problem in our country, but a very much more strongly disappointing problem in California, Arizona, Nevada.

Let's deal with California. I see each week close to a hundred families who are losing their homes. And I've been told both by clients who sought our firm out, and by attorneys representing banks, that our law firm has sued more banks than any other law firm in Orange County. And I'm really not proud of that.

I spent the majority of my career as a law professor and a law school dean. I've taught legal ethics and I've always counseled my students that if it's at all possible, you should try and settle matters, rather than show up in court.

But what we're faced with here is California attorneys for the last year, in large part because of SB 94, and the State Bar's not taking any action in opposition to 94, but agreeing with its affecting attorneys as included with anyone else who helped or attempted to help consumers, is that lawyers now -- if a consumer comes to them and they're about to lose their home -- well, let me interrupt myself and say first, when I started doing this, I was like most people.

I'm a very conservative republican and I had to the belief that people who were losing their home probably deserved to lose their home. I started thinking that most

people who are suffering from these problems, got into it because they got in over their heads. I don't feel that way anymore.

I think in the year-and-a-half -- little more than a year-and-a-half, year-and-three-quarters that I've been doing this work, I've seen fewer than three people who meet that description.

So when a consumer comes in now, it's because their hours were reduced, they were laid off, one of the spouses lost their job. They just can't afford their mortgage. And yes, the majority of those were in adjustable rate mortgages.

And the majority of those were told when they entered these adjustable rate mortgages by the mortgage brokers and the banks, that they would get out of this situation. This was temporary, this was an adjustable rate, it would adjust five years. Don't worry, we'll refinance you three, four years down the line.

And what happened of course was, it became impossible to refinance. Because their house was what's called, "now underwater or up-side-down." They owed far more to the lender than the house was worth. Perhaps 50 percent of the mortgage was now the value of the house.

As attorneys for centuries have been able, successfully, to represent homeowners in their dealings with

the banks. The banks, unfortunately, were able to convince the state legislature, among other people who I'm sure worked on the state legislature, that there were too many people taking money from people in distress. And I totally agree with that. There were and still are too many people in California wrongfully taking money from people in distress.

I can't count either the number of clients -- we're talking dozens and dozens of clients, who come to my firm after they've gone to one, two or even occasionally three other offices, for help. And yes, some of those offices call themselves law firms. Usually it's an attorney-backed mod company or an attorney-owned mod-company.

But frequently, it was an attorney and it was a law firm that robbed these people who were already in such distress. And yes, that needed to be stopped. And the problem is astronomical still, even after SB 94.

But what we need is policing of the attorneys who are doing this to the clients. But what we've done here, is effectively taken away the right of the consumer who needs help, from seeking an attorney -- an honest attorney, a good attorney, a capable attorney who wants to help them.

Many of the people who work for me -- at one point it was most of the people who work for me, have lost their

own homes. They understand the situation. They've gone it themselves and they want to help people.

But right now, I can't have a client come to my office and offer to pay me to negotiate with their lender. That's a crime. I want to help them.

I've actually had one couple who came to my office from my own church, knowing what I do. And they came and asked if I would help them with a loan modification. Interestingly, it was one week after the law changed, and I had to tell them I can't do it.

Now since that time, myself and a few other attorneys, have decided the only way we can do anything to help the clients, is to sue to the banks. Because it's legal to sue a bank that's done something wrong. Of course the banks all deny they've done anything wrong. Sue a man, sue a bank, sue a person. They 100-percent deny they've done anything wrong.

Well, look at the news about Bank of America and Countrywide. Look at the news about Chase and WaMu. But they still swear under oath in court against me, that they've done nothing wrong, and we have nothing but frivolous grounds for a lawsuit.

I've had a major law firm throughout the state, that has offices throughout the nation and the world, testify under oath that I filed cookie-cutter complaints --

couldn't be further from the truth.

We spend hours with every client, gets the facts and tailor the complaints. And my response is always, if this is similar to the complaint you got last week on another party, it's because your bank committed the same crimes against both of them.

I have had some federal court judges who hear or are given these cases by the banks, who for a period of time, have consistently tried to remove the case to federal court, thinking it will do better there. Have those judges kick it right back to state court. So not only were we burdening the state courts, we're burdening the federal courts.

We have clients who can't afford to pursue a lawsuit. We know that in most cases. And we counsel them that a lawsuit will be more than you can afford if carried to trial.

Their hope and ours is always that there will be some reasonable, meaningful negotiation. And we can allow these people to stay in their family home.

We had a bank attempt to kick out a retired air force captain from his home, that he was living in with his 82-year-old mother in her wheelchair. And we were in court, fortunately, the day before this happened, and allowed them to save their home.

But that's the extent these banks have gone through. We had a lady whose husband was dying of brain cancer. And we had a different bank attempt to throw them out with, interestingly, less than two-weeks notice -- that's another issue -- and we helped save their home in San Diego.

We have had banks who will negotiate with us, or, before we're hired, with the homeowner, and simultaneously hire a different law firm, so there's no communication between the two, to evict them. Failed to give them notice or they'll claim to have posted it, and then serve them finally with a five-day unlawful detainer, at the same time the family was fully believing that, hey, we've got a house to stay in. We can settle this.

This is fraud, this is deception. This is what attorneys deal with, this is what we're used to and trained to deal with. Yet what we force the homeowners in this State to do now, is go to the criminal -- go to the bank, and plead for help.

You've all see the commercials, Bank of America primarily, on T.V. I'm Jim, I'm Bob, I'm Lynn, I'm Carol, we're here to help. Bank of America has a heart, we want to help you save your home.

Bank of America has told us, and we had this on our office tape recorder twice, we don't have any duty to

the homeowner -- well, that's the law in this state, that's another issue. But they've also said in reaching a settlement with these people, to do a short sale. Where they then insulted us by saying, "yeah, we did give you approval, but we need another 20 -- or $10,000. On two occasions they said this.

We got them 10 or 20,000 more from whoever was going to buy on a short sale, and their response was, "no, that's not acceptable." The money has to come from the homeowner. We said, "that's not logical. That doesn't make financial sense." Both times, on a tape recording, the statement of Bank of America was, "we want them to share our hurt."

This is what attorneys are here to fight. Now, when a client comes in, we take a few thousand dollars from them to file a lawsuit. We tell them very clearly on three different occasions during the course of procedures, up first before they pay, during the interview, and afterwards, that this will get you in court for a filing of a complaint. This will allow us to respond to a demur, which you can fully expect.

But for additional motions, you will have to pay us, sometimes seven or 800, sometimes a thousand or 1,100, to proceed. We pay to an attorney service for filing complaints, anywhere from 8,000 to $22,000 a week. We're

living in what looks like a laundromat for an office.

A few blocks north of the South Coast Plaza, but it's in Santa Ana. We're next door to a gas station, and a motel that seems to specialize in one-hour visits. But that's all we can afford, and we're behind on our rent.

We're not doing this to become wealthy. We want to help. Every one of us there wants to help. But we can't charge an advance fee, so we're forced to look for something the bank's done wrong. Believe me, it's not hard.

Some of our complaints have five charges, some of them have 14. And that's just the surface of it. We don't want a 40-page complaint. We wouldn't have to do this if we could simply be hired, as the people from my church wanted, to negotiate a modification.

So they're forced now to do whatever the bank says, which is either, you don't meet our qualifications -- but they don't tell you that until you've gone into a three to six-month process. At least tell the homeowner what the qualifications are going to be up front -- no. Or they'll tack on whatever's in default to the end of the mortgage. Pay it later --

MR. SONDHEIM: Mr. Lane, let me just point out to you --

MR. LANE: -- uh-huh?

MR. SONDHEIM: -- you've got a couple more

minutes.

MR. LANE: Thank you, I understand.

MR. SONDHEIM: As I pointed at the beginning, we'll give each speaker --

MR. LANE: I appreciate it. I'm almost done.

MR. SONDHEIM: -- up to 15 minutes. And let me also point out to you that we're the Rules Revision Commission.

MR. LANE: Uh-huh.

MR. SONDHEIM: We don't have anything to do with SB 94 --

MR. LANE: I understand that.

MR. SONDHEIM: -- the legislature, policing or court proceedings. So we're just working on the rules themselves.

And there may be concerns that you've expressed that involve other entities and other situations, where you need some help. But the Rules Commission only deals with the Rules of Professional Conduct.

MR. LANE: I thank you. I do understand that. I am concerned though, because right now, I'm violating those rules. If I don't file a lawsuit and I help those people at my church.

So my point is, the banks are not helping the clients, the homeowners on their own. They will give them a

reduction in their interest rate for a period of a couple years, and then they'll go right back where they started, and lose their home.

So I'm pleading with you to give attorneys in this state, the opportunity without violating those rules, of collecting an advance fee. Let them have a bond -- which is what they're asking other people to do. A bond is fine. Let me help those clients without burdening the court system.

Judge Fermat, Judge Nakamura, both in Santa Ana are supervising these cases, are pleading for help from the state legislature, they are so overburdened.

But right now the State Bar is part of the problem, by prohibiting attorneys from collecting that advance fee. We'll follow any rules you set, but allow us to that, please. That's all I have to say.

MR. SONDHEIM: What do you find in the rules that are proposed, that inhibits your practice?

MR. LANE: It's not the proposed rules, it's the existing rule which supports SB 94, where the Bar has specifically stated, that attorneys are understood to be included in SB 94.

MR. SONDHEIM: Okay. But what do you find in the current rules, that prohibits you from doing what you want to do? Which rule?

MR. LANE: Board of Governors' statement that they refuse to oppose SB 94 as being applicable to attorneys.

MR. SONDHEIM: Okay. That's not in our rules, and we're not involved in that --

MR. LANE: Yeah, but do not the rules --

MR. SONDHEIM: -- just so you understand.

MR. LANE: -- okay. But do not the rules require that attorneys in their practice, as part of their ethical requirement, obey the state legislative laws, which the Bar has said they do not oppose and they are applicable to attorneys. That's my rationale in appearing here.

MR. SONDHEIM: All right. Thank you very much.

MR. LANE: Thank you, thank you all.

MR. SONDHEIM: Mimi, do we have --

MS. LEE: Next on our list is Christine Owens.

MR. SONDHEIM: Okay.

(Pause.)

MS. OWENS: My name is Christine Owens -- can you hear me? First I'd like to thank you for your time. It means a lot to the public, that the Bar Association provides the opportunity to be heard. I'm here to seek your advice and feedback in regards to the proper behavior of opposing counsel.

I'm going to go through various scenarios, which I have documentary evidence on, and I'd like to get your

feedback on.

MR. SONDHEIM: Let me just indicate, so you understand. We only deal with the Rules of Professional Conduct.

MS. OWENS: Right. What I looking --

MR. SONDHEIM: Individual cases --

MS. OWENS: -- what I'm looking at --

MR. SONDHEIM: -- we won't -- we won't provide advice on individual cases.

MS. OWENS: -- okay. I'm sorry, I meant rule, like, for example, I'm talking about Rule 3.4, a fairness to opposing party and counsel.

MR. SONDHEIM: Okay. Go ahead.

MS. OWENS: Okay. So, in regards to this, I don't see where the -- when it's -- what are boundaries to what opposing counsel can do to an opposing client. And I was wondering what the remedies are under one of the rules, when opposing counsel exceed those boundaries, and what are the consequences for inappropriate behavior.

The first scenario, is it ethical if opposing counsel knows that an opposing witness is dying of cancer, to hire a process server to break-in or trespass, harass the ill -- the very ill witness on the first service? Can an attorney hire someone to break a law?

Second attorney scenario is, can an attorney give

leading responses to a deponent? Can an attorney mislead the judge by stating 48 witnesses versus eight witness?

Can an attorney state that he does not know something, when the Deputy Attorney General of California say that's not true, and in fact he does know. And, I guess I'm differentiating. The Deputy Attorney General said there's an error -- is where an attorney states two years versus three years, compared to a misleading statement, such as 48 witnesses compared to eight witnesses.

If a deponent is asked a question, can the attorney ask the deponent if she needs to speak to her outside before responding to questions? Then the deponent's attorney goes outside, speaks to the deponent for eight minutes, and the deponent answers in completely different manner than originally.

Can opposing counsel cut the opposing counsel's question in mid-sentence five times in a one-hour deposition? Can an attorney state on the record, "wait, sh-sh," quote, "to avoid having a deponent answer a question."

Can an attorney be allowed to put their hands in front of the mouth of a deponent, and can an attorney write misleading information in the brief?

The last scenario is a time issue, is how much deposition is appropriate? For example, if one deponent is deposed 10 times for a total of 55 hours, while the other

deponent is deposed for only 15 hours -- if it's contingency case, and the plaintiff were -- had no incentive to protect the plaintiff, while the defense is paid hourly, what are the boundaries -- what are the reasonable limits? Can a rich opponent just outspend other party?

And why is there a limit of eight hours on deposition time in Illinois, when I'm not familiar with the limit time in California, if there is none?

And is it reasonable to have four defense attorneys gang up on one ill deponent?

So those are my -- that's, in general, my summary, and I'd like to get thoughts in terms of what, again, what are the consequences for inappropriate behavior?

MR. SONDHEIM: Our role is to draft proposed Rules of Professional Conduct.

MS. OWENS: Okay.

MR. SONDHEIM: 3.4, for example, has not yet been adopted.

MS. OWENS: Right.

MR. SONDHEIM: And the concerns that you've express seem to have arisen perhaps out of your personal experience, and that's not something that we can assist you on.

MS. OWENS: So I'm trying --

MR. SONDHEIM: You -- you will have to -- if you

had an attorney at the time, consult with that attorney. And if you in some way feel that something was wrong under the current Rules of Professional Conduct, the State Bar can be contacted with a complaint, if that's what you feel is appropriate.

MS. OWENS: -- well, I just -- I guess I asked several questions, and I didn't know --

MR. SONDHEIM: But we're not going to answer them, because we're not here to answer questions of that type. We're here to draft rules.

MS. OWENS: -- right. And is there a rule that is drafted or can we create a rule that was drafted to incorporate that?

MR. SONDHEIM: We have drafted 3.4 --

MS. OWENS: I saw that.

MR. SONDHEIM: -- and that's the guidance that we currently, subject to change, hope the Board of Governors and the Supreme Court will eventually adopt.

MR. MARTINEZ: Can I point out, also, that comment three specifically states that the rule does not establish a standard governing civil disputes, especially on discovery context.

And a lot of the concerns that you have, I would think would be addressed by the judge handling the case and the discovery. And there are plenty of rules that govern

lawyer's conduct in depositions, for example.

So this rule is designed not to interfere with how a court handles these kind of disputes that come before the judiciary. So it has limited effect.

MS. OWENS: I guess I was trying to figure what rule am I missing that -- that opposes this? So that if there is a State Bar complaint, that which rule should be addressed to deal with these issues, unless -- unless that is acceptable behavior?

MR. MARTINEZ: I think that the rule is designed to allow those kind of disputes to be resolved by the court, and not necessarily to a disciplinary system of the State Bar.

MR. KEHR: You also asked some hypotheticals that deal with candor towards the tribunal, and that's Rule 3.3 -- or proposed Rule 3.3.

And it's possible that, although we still -- we don't understand exactly what the facts are --

MS. OWENS: Right.

MR. KEHR: -- in your hypotheticals, that there would be questions of honesty under Business and Professions Code Section 6106.

MS. PECK: I think it's very difficult to take the fact that -- or the hypotheticals that you've presented, and apply any of the rules or the statutes that may exist, to

those rules or discuss any remedies for you in this -- in this hearing.

And so, again, I would urge you to consult with an attorney, or as Mr. Sondheim has suggested, to consult with a disciplinary system of the State Bar, if you so desire.

And I just don't think that we can try and figure out whether or not one of our proposed rules -- or how many of the proposed rules affects those issues that you have raised.

MS. OWENS: Well, I first want to thank you, Mr. Kehr, for giving me very specific information, because it allows me to go back and read that and understand what's involved.

And so I have consulted actually several attorneys. Their response is that -- that the State Bar does not handle complaints against opposing counsel, no matter if they broke the law or not. That's what I was told by a counsel, so that was my -- perhaps I was mislead, but that's what I was specifically told.

So that was a concern, and I thought there was a rule that was drafted -- and so I appreciate you allowing me it.

MS. PECK: Thank you for sharing your concerns. Our -- we're still looking at the Rules of Professional Conduct that are going forward --

MS. OWENS: Right.

MS. PECK: -- but don't concern disciplinary procedure --

MR. OWENS: Okay.

MS. PECK: -- or the regulation of the State Bar disciplinary process. They merely describe the conduct of lawyers, going forward in the future, if the Supreme Court -- if the Board of Governors --

MS. OWENS: Right.

MS. PECK: -- and the Supreme Court adopt these rules. So, we're unable to address any current conduct by anybody that you are now describing.

MS. OWENS: Right. Well, Ms. Peck, I appreciate that. I guess one of the rules that I thought about was, like I said, in Illinois, there's a limit on deposition time, and you have to go and pursue that.

And I didn't know -- I recognize that you're here for professional conduct, but it's almost -- that's another issue, that there are certain rules that --

MS. PECK: Correct. And thank you for bringing that to our -- our attention, that Illinois rule. Thank you.

MS. OWENS: -- well, I -- I -- I just meant to look at it from a perspective where, in California, it seems like, if the opposing counsel decides to continue to motion,

motion, then there's allowed unlimited amount of time. So that was where I just wanted to get some clarity.

And also, too, like I said, when I looked at -- and I will look at 3.3. again. I just have 3.4 in front of me when I looked at, you know, what can and cannot be done, and how some of the issues that I've seen with documentary -- what I've talked about, there's documentary evidence of. I just summarized it and asked very -- questions.

But like -- like you said, the disciplinary's one, but I was shocked when I heard from a counsel that I had, where he said you cannot -- if you file a complaint to the State Bar on opposing counsel, even with documentary evidence, that they will basically not look at it.

MS. PECK: I -- you know, I know that I appreciate the issues you've raised. We're, again, we're unable to address issues in the disciplinary system or their procedures. It's not within the scope of our work here.

MR. SONDHEIM: Let me also point out to you that 3.3 and 3.4 are proposed rules.

MS. OWENS: Right.

MR. SONDHEIM: So that they're not necessarily current rules.

MS. OWENS: Right.

MR. SONDHEIM: But I do want to join Mrs. Peck, in saying that we appreciate your appearing here. It's not

often we get a member of the public to come here, as you can tell from the speakers who've proceeded you.

MS. OWENS: Well, I'm --

MR. SONDHEIM: So we do appreciate your appearing here.

MS. OWENS: -- well, I, once again, I want to thank you for giving the time to speak at, you know -- allowing the public to speak. And also I was hoping that some of the areas that I touched on, could be, you know -- influence some of the rules that you're looking at.

In terms of professional conduct, I -- my father's an attorney, my brother's an attorney, my uncle's an attorney, my grandfather's an attorney -- my whole family's a bunch of attorneys. And so, I have tremendous respect for attorneys.

And I would like to see that there are rules to kind of -- how can I say it, as the judge says, 'a fair fight.' And I hoping that, with these rules, that you can make that possible.

MR. SONDHEIM: All right. Thank you very much.

MS. OWENS: Thank you again, Mr. Sondheim, Mr. Martinez.

MS. PECK: Thank you.

MR. SONDHEIM: I think what we'll do is maybe take a short break of 10 minutes, and then we'll continue. We

have two speakers, as I understand it left --

MS. LEE: There are three --

MR. SONDHEIM: -- to deal with 1.5.

MS. LEE: -- three.

MR. SONDHEIM: "Three"?

MS. LEE: Yes.

MR. SONDHEIM: All right. So we'll take a break.

(Proceedings recessed briefly.)

MR. SONDHEIM: Okay, then let's resume. And we need the next speaker.

MR. TARLOW: If I could have a minute to unpack.

MR. SONDHEIM: We will count that towards your time.

MR. TARLOW: And my name is Barry Tarlow. I'm appearing for CACJ, the Criminal Defense Bar Association in this State.

Ann Moorman, the president, submitted the opposition of CACJ, but either fortunately or unfortunately, she was elected to the Superior Court on Tuesday, and so asked me to come and share my views, which through some coincidence, seem to coincide with many of the positions taken by CACJ.

I have -- I have some points that I thought were important that I have eliminated, to attempt to comply with the time that's involved.

It's my strong belief that Rule 1.5 will detrimentally and drastically detrimentally impact on the practice of law in California. Among the things it will affect are the economics of practicing law, the ability of people in need to retain counsel. It will create unnecessary complexity and confusion for those of us who practice law in -- in the criminal field and in other fields.

It will expose lawyers acting in good faith, to disciplinary charges, arbitration and civil suits. It will seriously undermine the lawyer-client relationship. And of significant importance, it will prevent clients from obtaining the lawyer of their choice, by facilitating restraint and forfeiture of legal fees.

I have attempted to characterize -- or have strained to characterize in a few words, what this statute -- or the rule is about, or what the problems are.

And like every idea that you think is good, I'm sure someone has thought of it before. But I firmly believe that this is a solution in search of a problem. The rule or the -- eliminating nonrefundable retainers was soundly rejected in 1991, when the Commission proposed rules that would result in that.

It was rejected again in 1997 when COPRAC tried to do it. And in 2008, this Committee heard from the vast

membership of the Bar that responded, what the significant problems were.

MS. PECK: Mr. Tarlow?

MR. TARLOW: Yes.

MS. PECK: Can I just ask you a question?

MR. TARLOW: You can ask me anything you'd like.

MS. PECK: I think, with respect to your last comment about what was rejected. It wasn't the concept of a nonrefundable fee that was -- was addressed by the Supreme Court. But rather, the requirement that an advanced fee would be placed in a trust account, that was rejected, was it not? Is that -- does that coincide with your recollection?

MR. TARLOW: No. I'm not talking about the Supreme Court rejecting anything. I'm talking about the State Bar, in 1992 --

MS. PECK: Yes.

MR. TARLOW: -- having a proposal from the Commission. And the solution was, that nonrefundable retainers would go into trust accounts --

MS. PECK: Right.

MR. TARLOW: -- therefor creating any number of problems. The Board of Governors rejected that.

MS. PECK: Okay.

MR. TARLOW: And said, "nonrefundable retainers

are perfectly proper and appropriate in California." And what the lawyers need to do is simply write, "earned when received," in the fee agreement. Which, incidently, we did with ours and many other people did.

So, it was proposed, it was sought to done, and it was not accomplished.

MS. PECK: My -- my recollection is different than yours, but I just -- so we can -- we can maybe disagree on history, as people of our age sometimes do --

MR. TARLOW: Well, I'm not sure --

MS. PECK: -- and that's fine.

MR. TARLOW: -- if you -- were you there, or?

MS. PECK: Yes, I was there.

MR. TARLOW: I think -- I think I was.

MS. PECK: I was there, and I was there on the -- I followed the latter one that you were talking about, too, which had also -- I have a little factual difference with you but -- on that. But are you also aware that our current trust account Rule 1.15, does not require that advances for fees be placed in the client trust account.

MR. TARLOW: I certainly do.

MS. PECK: Okay. Okay, good. Then I -- I won't impede your -- your testimony any further. Thank you.

MR. TARLOW: I -- I would -- I would definitely -- you're not impeding it. It's probably helping me to talk

about what the Commission is interested in, rather than what I'm interested in. But, in any event --

MR. SONDHEIM: Let me just interject, hopefully not impeding you.

MR. TARLOW: -- well, no, I --

MR. SONDHEIM: But trying -- trying to clarify for you, that we are concerned with the issues that have been raised by you and others, and we have been giving further consideration to what we originally proposed, which you may recall, was to preclude any agreement that said nonrefundable.

And, as a result, let me just ask you a question with regard to the nonrefundable or earned on receipt. Currently, you have, as you've indicated, agreements with clients that use those terms, am I correct?

MR. TARLOW: -- yes.

MR. SONDHEIM: Okay.

MR. TARLOW: Well, it says -- it says, "nonrefundable, earned when received," trying to comply with what COPRAC said, and the Board of Governors said we should do. That's absolutely correct.

Could I just ask you one quick comment, Mr. Sondheim? Does this count against my time?

MR. SONDHEIM: Go ahead, please.

MR. TARLOW: And no, no -- no, no -- I must say

that I'm interested in hearing from you, because I was very surprised at reading some or all of the later e-mails that I've seen from you.

And I asked -- I took something that I thought was relatively persuasive and impressive that you were saying, ask somebody who wrote that, and you might be chagrin to know, that instead of saying you, they've said me. So, I'm happy to hear your questions, sir. Tell me what you're --

MR. SONDHEIM: Under -- under the current agreements that you have, and given the law as it exists today, would you agree that a client can terminate his or her relationship with you, if the client so desires?

MR. TARLOW: -- absolutely.

MR. SONDHEIM: Okay. Would you also agree, that under current law, a client may under some circumstances, be entitled to a refund of the quote "nonrefundable," or the "earned on receipt" fee.

MR. TARLOW: Without question, include -- without question, absolutely, and it is part of the concept. That is, no lawyers that I know take some position that you strictly construe "nonrefundable."

You and I could think of a dozen unanticipated situations where the money would be returned. And if you ask criminal lawyers that you know, they would give you exactly the same situation. I characterize them as

unanticipated situations by and large, as with any contract.

Such as a conflict developing. Such as the client just walking in a week later, and two weeks later you haven't done much work, and saying, "I want another lawyer." So there -- there are any number of those things, and neither I nor anyone I know has any problem with it.

MR. SONDHEIM: All right. Given what you've just said, would you see anything wrong in having a rule that says you can use the concept of nonrefundable, earned on receipt, but you must also advise the client that he or she may terminate the relationship, and he or she may, under some circumstances, be entitled to a refund.

Is there anything wrong in telling the client that?

MR. TARLOW: I think there a couple of things that -- that fit into this analysis, that are important for you to consider. And by the time I finish my answer, I would have answered your question.

MR. SONDHEIM: Sure.

MR. TARLOW: Like so many legal questions, I think the answer is, it depends. But let me do the best I can to do this.

The rule on fixed fees doesn't require you to do all the work in order to get all of the fee that's paid. It's just a substantial fee. Interestingly --

MR. KEHR: When you say, "substantial fee," you mean a substantial portion of your work?

MR. TARLOW: -- work is -- work is relative. You can do -- certainly one of the great complaints about lawyers is they do a lot of work -- and of course some lawyers do a lot of work, nothing's accomplished.

So, I'm someone that might do -- my problem might be, I do too much work, because I can never can get it quite right. But, it's -- I have the exact wording in my filing. I can get for you, it happens to be in my notes -- but I don't want to stop, but it's -- I only think it depends how much of the work -- how much quotes, "the work," because there's no -- there's no way to define this.

I do know, though, and I am positive, that with the proposition that you will get -- that the client is entitled to fire you without cause. It creates an extraordinary number of problems.

One is the conflict that you -- in complex cases. Not only can you be disqualified from all the co-defendants and any witness, and any subsequent case based on investigation, probably a whole small firm, maybe a large firm.

So, the question's how in this rule are you paid for that disqualification? What about the cases you've turned away because in complicated cases, you can't do too

many of them?

There is -- there is a, what I can is a terrific rule -- I can so terrifically comment that. There's a -- there's an exceptional rule that's worth looking at. I believe it's in footnote 14 of what I have provided.

It is -- they had this same kind of conversation in North Carolina, of all places, about -- two different ethics panels about nonrefundable retainers. And they came up with some quote, "suggested contract language." One of it being a minimum fee. It doesn't mention what we would call the dreaded "nonrefundable" word. It's, "you pay a minimum fee," and you can -- you can find it. The cite will be in there.

But you -- and they have draft fee agreements for other -- for the whole case, fixed fees, for everything. But the minimum one is interesting to me, because it deals with the -- with the problem that you have with (e)(1) about true retainers.

Something which, incidently, I agree with the author of a recent article about true retainers in the Cal Bar Journal, which Mr. Difuntorum has also cited someplace as agreeing with. That this true retainer is some vestige from the past.

Clients aren't stupid ordinarily. They don't want to pay a lawyer for availability, and then they pick up the

phone -- and then they -- then the lawyer has to call the D.A. or read a pleading, or have a meeting with a client about what's going on in the case, and you can't do that because you lose your true retainer.

So, the -- in North Carolina, they drafted a very simple agreement. I think, no -- I shouldn't be one to say that simple is good, based on the length of what I filed, but -- but it is.

And it -- without any of the -- without any of these problems that I have raised, they have this minimum fee agreement, it's -- the money is earned, you do substantial work, it's not refundable unless -- the same thing that actually applies to nonrefundable retainers. Unless it's -- unless it's unconscionable, because obviously a nonrefundable retainer is not a license to steal money from every -- from anybody.

And -- and assuming the lawyer does the work, or the work signed up for. But -- excuse me one second. I'm taking medicine of some kind. It causes me to have a dry mouth. I would like to chew on a life-saver --

MR. SONDHEIM: Of course. Please do.

MR. TARLOW: -- if nobody is offended by it.

MR. SONDHEIM: And if you want to take a break?

MR. TARLOW: No, I don't need a break. No -- some judges have said what happens -- and it's, well, I can't

talk anymore. And they said, well that's not such a bad thing. But if I can do that, take a little water, I'm fine.

MR. SONDHEIM: Sure. Let me just focus though, on the question that I asked you.

MR. TARLOW: Well, let's "focus." Let's get to --

MR. SONDHEIM: Which, let's assume that we don't deem nonrefundable to be, as you've put it, "dreaded."

MR. TARLOW: Uh-huh.

MR. SONDHEIM: But we accept the concept that a fee can be nonrefundable or earned on receipt, or whatever terminology you want to use.

Is there anything wrong in telling the client, who is signing for this nonrefundable, earned on receipt, whatever language, fee, that he or she can terminate the relationship, which is in accord with current law, and may, under some circumstances -- without trying to figure them out, just indicate that the client may be entitled to a refund of some or -- of the fee. Is there anything wrong in putting that into the agreement?

MR. TARLOW: A little modification might help. Which is in the North Carolina rule, where they put in, "may or may not."

MR. SONDHEIM: Okay.

MR. TARLOW: So -- so why not put in that they may not? The other -- the other thing about it is unfortunately

-- and unfortunately what that will -- what that will cause is the following scenario. And, you know, having done this for the amount of time I have, I know that this will happen.

This applies -- what you're doing applies to lawyers in all fields of law. This isn't just about criminal lawyers. This is about tax lawyers, it's about appellate lawyers, it's about divorce lawyers. Many people have, and continue to use nonrefundable retainers.

But I do know this. A lot of the people that we represent, as criminal lawyers, because of their character, because of their financials situations -- there's a phrase that has been -- been coined, was the subject of several articles, which all criminal lawyers -- is drummed into the head of every criminal lawyer. "Get it in front or you get it in the end."

And -- and you have to worry -- you have to worry whether you're going to get paid. Because sometimes, we put in a lot for people that aren't nice people. Some clients are wonderful. Some clients are even innocent.

But there's -- what will happen, once you put that in and people start thinking of it -- the case is going great, people are happy. Something goes wrong or often even when it doesn't go wrong -- this is I think what will be the result for sure.

If you're stuck in that case for that

nonrefundable retainer, and you've given the client the idea that it is refundable, the cases in which the client will pursue the refundability of the fee, will be those cases where you've done a bunch of work in the case, and you're stuck in that case.

You know, I know, Harry, you practiced in state court. In federal court, it's unfortunately different -- and I'm not a civil lawyer, but I know in federal court, there are -- there are reported cases. Judges don't let lawyers off cases as easily as I believe happens in state court.

And in criminal cases, if you've -- if you've staged the fee to be paid in time, and you've made a general appearance, you're there, you're it. You've got to -- you've got to -- you got to --

MR. KEHR: But doesn't that go to the question of whether you obtain the payment in advance, as opposed to whether you describe it as being nonrefundable?

MR. TARLOW: -- it does, but I guess it's -- it's the concern that I have, if you have a staged case -- well, a lot of people can't afford some of these expensive lawyers that are around, and so they want to make payments.

MR. KEHR: Well, okay, I appreciate that, but I'm -- I'm not clear on why that means -- I mean if you're -- if you're unpaid, then the question of refundability is -- is

hardly a central issue.

MR. TARLOW: Well --

MR. KEHR: The question is, in the federal court, whether you can get out when you haven't been paid, and that's not our department.

MR. TARLOW: -- well, let me -- let me get to answer your question --

MR. SONDHEIM: Okay.

MR. TARLOW: -- Mr. Sondheim, because I think it's an important question.

MR. SONDHEIM: Here's -- here's what I'd like to do though. You answer the question, and then your time in a sense is up, but it is --

MR. TARLOW: My time is up?

MR. SONDHEIM: -- because we've taken a lot of your time. And what I'd like to do is then, call on the remaining two speakers, and then you come back --

MR. TARLOW: I can "come back"?

MR. SONDHEIM: -- and then you can say whatever else you want.

MR. TARLOW: Okay. That's fair. Fair enough. Let me -- let me -- let me answer that as best I can.

The situation that we'll have is this. You do a lot of work in the case. Those are the cases -- those are the cases, and there's more to do. Those are the cases

where the client will never ask for the fee back. That's going to be the reality.

You get a good result in a relatively short period of time because of your skill, because of your effort, because of the work that you've done, because of other cases you've turned down, and so you have time to work on the case. Those -- those cases are the cases where people are going to pursue you, because you told them in advance that this fee is refundable, if they want. They can just fire you and get it back.

MR. SONDHEIM: No, no, you've said -- you've said it may -- to use your terminology, "may or may not be refundable." You haven't told them it is. It's just that's the way current law provides. And --

MR. TARLOW: Uh-huh. I -- yeah, I'm sorry, go ahead.

MR. SONDHEIM: -- we'll continue this afterwards.

MR. TARLOW: I'm not sure we have much difference, if at all on this point, other than maybe some wording. So I -- I agree with you, I guess. That's a --

MR. SONDHEIM: Okay. You can give it more thought, and we can continue it. Meanwhile, we'll take the other two speakers, and then we'll come back to you. And we've scheduled this until 2:00 o'clock, so we'll give you extra time. There's no problem.

MR. TARLOW: Thank you, sir.
MR. SONDHEIM: All right. Mimi, next speaker.
MS. LEE: Next speaker is Eric Preven.
MR. SONDHEIM: Is he here?
MS. LEE: Yes.
MR. SONDHEIM: "Yes," okay.
MS. LEE: Okay. Valerie Alexander.
MR. SONDHEIM: Okay. Okay. Now, just for the information of the Commission, there is a sheet of paper that we got from Valerie today. And you may want to take a look at that, just so you know where, in a sense, she's coming from. And I think copies have been made for everybody. All right. Please.
MS. ALEXANDER: I will probably not be as entertaining as the previous speaker, but I promise you I will be briefer.
MR. SONDHEIM: Probably a better lawyer.
MS. ALEXANDER: Well, not a lawyer currently, so. I -- in fact, it was not my intent to speak here today.
I'm the owner of Alexander Continuing Legal Education, and I was here simply only for my own education. Which was to stay current with these rules and the process in which they're created. We have a course called Legal Ethics in Popular Culture, and I want to make sure that what we're teaching California attorneys is correct at all times.

But our first speaker expressed concern about educating California attorneys about the rule change. And to the extent that that concern has gone into the record, I think a counter to that concern should also go in the record.

I had the privilege this past semester of teaching legal ethics at the Berkeley Law School, which, in our day, was all called, "Boalt Hall." So, legal ethics at the law school level is taught based on the ABA model code. And while law students are imbued with intellectual curiosity, they generally like to learn that which they are going to be tested on.

And to the extent that the Multi-state Professional Responsibility Exam only tests the ABA model code, I don't believe the great majority of California attorneys have studies the California Rules of Professional Conduct. I believe they studied the ABA model code. They have learned that.

And in fact, Monday night I was at an alumni event and I was speaking with a judge in California. And I was talking about our MCLE class, and he was not aware that the California rules were substantively different than the model code.

So, I just want to assure this panel, which is something I'm sure you don't need to be told, but to the

extent it should be on the record. Any California attorney, especially one admitted in the past 15 years to Bar, is going to be more familiar with the model code.

And to the extent that our current rules come more in line with the model code, we will have an attorney base that is more informed about the rules, because they will be more familiar with those substantive rules than they have been with CRPC in the past.

And that is all.

MR. SONDHEIM: All right. We thank you very much.

MS. ALEXANDER: Thank you.

MR. SONDHEIM: I think, Mr. Tarlow, you're free to get back on.

MR. TARLOW: I'm back on. Nothing -- nothing is as simple as it may first appear, because after -- after looking in this, I like the idea, but I -- I had omitted another concern, which I think has to be dealt with in the drafting. And that is, that I know that this would get rid of this -- you see, the issue -- the issue about the property being the lawyer's -- the issue of five, as it's now written, has great impact on the forfeitability argument, which I -- which I'd like to talk about if we get to this.

But if we create something that is giving, that -- which is -- which is making it the property of the client,

or making -- or giving the client an interest in the property, the greatest concern that we have, those of us who have lived through this -- these three decades of jeopardy assessments and forfeitures, and I don't think -- since so many bar associations, maybe even including this one, have expressed a deep concern and opposition to forfeiture of fees which -- and costs for that matter, or taking of funds or restraining orders, which leave the -- which leave the client who has funds, with the inability to retain a lawyer, or retain an accountant expert. And then saying to them, well, you know, you can't have the funds to do that, but if you win you get the money back -- without the lawyer of your choice.

So if it's said, I think the question is, how it's said, and that you're not giving -- I mean, you have, I think, read and noticed the people who have responded on this forfeiture issue, and the seriousness with which it has been taken by courts and by lawyers who -- some of whom have gotten paid -- done the work, tried the case, and then after that got -- had their fee forfeited.

So if, in other words, I have little -- I have little problem with something which -- something which talks about -- one difficulty is the more you talk, the more problems it becomes.

But if -- I believe as strong as I feel about

nonrefundable retainers, it is very clear that they can't be unconscionable or unreasonable, the amendment that failed before the Board -- before this Committee, I guess, or before the Board earlier.

But -- and it's not a licence to take a bunch of money from someone and do no work. And of course the client should have that back.

MR. KEHR: Could I jump in with a question?

MR. TARLOW: Absolutely.

MR. KEHR: I want to make certain I understood your -- your prior comment.

Were you suggesting that if language were required, that when a lawyer takes a fee that is described as nonrefundable or earned on receipt, the lawyer must tell the client in writing that he, nevertheless, may fire the lawyer at any time, and might have the right to some refund of unearned fees, That having that language increases the risk that the client's creditor or the client's receiver or whomever might be able to get at the money in the hands of the lawyer. You're suggesting that that would increase the risk?

MR. TARLOW: Yes. I mean, and don't forget, I'm suggesting based on hearing this and thinking about it for the first time now. But what I'm saying is, I guess we have to be sure that we're not doing that.

I don't think anybody would feel that it is fair that you should take a person's funds, which aren't the proceeds of a crime -- I'm not talking about bank robbery proceeds -- but money that, under some kind of alternative assets' theory, meaning that you can't get money that was supposedly earned by crime, but we're taking your house which you've had for 50 years.

And then -- and then say, "well you can't get a lawyer." Well, you can't hire -- I had a client in a case with over a million documents that were given. Relatively wealthy man before this happened, who lived out here. He was tried in Minnesota. They gave him a public defender who was a good lawyer, but no money to touch the documents, which he had before -- which he had.

So what -- I guess what I'm saying is, that -- that you can't do that. And I'm trying to look for a minute -- could I --- could I look for a moment --

MR. SONDHEIM: Sure. Take your time.

MR. TARLOW: -- at footnote 14, which talks about this, which I like -- which talks about this North Carolina --

MR. MARTINEZ: It's on page 19 of your submission.

MR. TARLOW: -- I -- yeah. I know where it is in the submission, but I'm trying to find the language without having to go to the North Carolina case. Because -- because

I didn't -- I didn't see that problem with what they called a minimum fee -- what they labeled as a minimum fee in North Carolina.

MR. MARTINEZ: In a true retainer situation, right?

MR. TARLOW: In a true -- in a true -- yeah, you can do it for -- you can do it for the whole case, unless there's a jury trial, for example, the client would have to pay more.

But it -- yeah, it was without question a true retainer situation if you -- if you accept or embrace the concept that the lawyer can't do any work for the money, he just sits around waiting for the phone to ring. Which, I mean economically, I think that's a -- that's a hard sell to any lawyer. Well, what are you going to do for this? Well I'm going to wait. Well what happens if you -- what happens if you -- what happens if you're waiting, and you got to read something. Well, you'll have to pay me extra for that.

And it just -- it just isn't used that much here in California. But let me just -- 19. Let me just look at that. You know, it actually --

(Proceedings recessed briefly.)

MR. SONDHEIM: I have a problem with the power. So you're okay?

MR. MARTINEZ: We're okay, your Honor. Thank you.

MR. SONDHEIM: All right.

MR. TARLOW: Actually this is doing almost the opposite. If you look at -- I'm sure you don't have it handy, but if you look at the -- other than Mr. Martinez. But -- right name?

MR. MARTINEZ: Yes.

MR. SONDHEIM: Uh-huh.

MR. TARLOW: Okay. Because I can't see the signs with these glasses. But:

> "When the lawyer's representation ends, client will not be entitled to a refund of any portion of the minimum fee, even if the representation ends before lawyer has provided legal services equivalent in value to the minimum fee, unless it can be demonstrated the minimum fee is clearly excessive fee under the circumstances."

I have no problem living with something like that.

And on a quick answer, without thinking forfeiture law through which is a tremendously complex area of the law, I think that would not say that the client has any interest. All it really says is, if the lawyer cheats you, you can get your money back.

MR. MARTINEZ: I think where the chair's proposal

is coming is the idea -- and you said it, that we're not trying to cheat the client, and there are circumstances where the client -- we all agree, there are circumstances where the fee can be refunded.

I think all we're trying to do is tell the client that there are those situations. But that's -- that option is available because, some clients will understand that when they sign a contract and it says nonrefundable, it's cast in concrete, they will never get their money back, under any circumstances.

MR. TARLOW: That's true. But I guess I'm talking about something that's not listed in a fee agreement, and I'm calling them unexpected consequences, because you can't -- this I don't think involves the -- I mean, putting aside the situation of the client coming in a week later and saying I would like my money back.

And I just don't know people that would keep the money -- or two weeks later, and say I want the money back. If he had done a little bit of work, maybe he gets a couple dollars -- or she gets a couple dollars. But I don't know anyone that would keep that fee because it says --

MR. MARTINEZ: But we don't want to do -- we don't want to draft Rules based on trust or based on the assumption of what lawyers will do. I mean, you have to assume that 99 percent of lawyers will do the right thing

and give the money back. It's the one percent of the lawyers that we have to watch out for.

MR. TARLOW: That -- that I agree with you. But I believe in Mr. Sondheim's e-mail, he seemed to say that he thought there weren't a whole lot of crooks running around practicing law, who are going to steal people money through a nonrefundable retainer.

MR. MARTINEZ: We don't know. They may never surface, because they don't know if they have cause of action or a claim.

MR. SONDHEIM: We also don't know what a client thinks when he or she signs an agreement that says nonrefundable. It may indicate to clients that it is nonrefundable. And we, I think, are in agreement that there are circumstances when it is refundable.

MR. TARLOW: But you could never -- yeah, I think that's right.

MR. SONDHEIM: Okay. So the thought is, and we've been giving this a lot of consideration, and we have, let's say, tried to accommodate the entire Bar, not just the criminal defense Bar but -- because it impacts everybody. We've tried accommodate them, as well as the clients.

And the question that Mr. Kehr raised is if you put it in to the agreement.

(Proceedings recessed briefly.)

MR. KEHR: So it looks like our speaker can't leave.

MR. SONDHEIM: Yeah, we may have a lot of time here. But to go back then to Mr. Kehr's question, why does it -- is it your view, let me put it that way, that by putting into the agreement --

(Proceedings recessed briefly.)

MR. SONDHEIM: -- okay. So, why would it be that putting into the agreement what we, I think, are in accord on, that that is the law. Why does putting it into the agreement in any way affect whether it is or isn't subject to seizure or whatever. Because a lawyer, let's say who's with the IRS, would know, under our Rules that a client may get a refund, that's a given under some circumstances.

MR. TARLOW: It's -- I'm sorry, go ahead.

MR. SONDHEIM: So, why does it increase the risk if you just put it in writing what everybody understands to be the law?

MR. TARLOW: Well, the first thing is the situations are narrow in which you can get -- these unanticipated circumstances. And they're unanticipated because we could never draw up that list, and leave things off, it would always be something else. I mean, the lawyer dies, the clients dies. It -- there are so many of them.

But the answers are the same if the lawyer is just

applying other rules. That is, the fee -- if -- well, let me just get sick instead of dying. But if I'm sick and can't do it, obviously the fee become unconscionable, whether it's nonrefundable, whether it's anything.

And -- I mean, I have seen, and it's kind of interesting, that lawyers can't describe the fee agreements that they're writing. They're always -- they're trying to create one kind of agreement and they write something else. And in some states they get disciplined simply because they -- they think they -- in California they write -- lawyers write retainer or something. And they think it means one thing, when it doesn't.

So, what I'm saying is, if -- if you look at this North Carolina rule, this says just the opposite. That is in the fee -- that is in the fee agreement, they're saying almost the same thing -- almost the same thing as in this -- what Ms. Karpman has called the gold-plated rules, but the fixed fee clause, that actually presently exists in California. That once the lawyer has done, I think it's material amount of work, you can't get the money back.

MR. KEHR: Can I jump in again with one comment?

MR. TARLOW: Absolutely.

MR. KEHR: You said that if the lawyer becomes ill and, in fact, provides only some small fraction of the contemplated services, that the fee becomes unconscionable.

MR. TARLOW: I think so.

MR. KEHR: All right. But if you look at -- and I'm looking at the current publicly circulated draft of 1.5, it says, "unconscionablity --"

(Proceedings recessed briefly.)

MR. SONDHEIM: I think the 15 minutes for building security is soon to expire. I am sorry, Mr. Kehr, I -- I think you stopped.

MR. KEHR: In proposed Rule 1.5(b) --

MR. SONDHEIM: Right.

MR. KEHR: -- the last sentence says:

"Unconscionablity of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into, except where the parties contemplate that the fee will be affected by later events."

But it's not so clear to me that if the lawyer --

(Proceedings recessed briefly.)

MR. KEHR: -- I feel as though I need to speak quickly. It's not so clear to me, that if there is a subsequent event that's not built into the fee agreement, as being a factor in determining the work to be done, that the subsequent event will come into the unconscionablity standard.

The place in which this, at least in my experience, commonly comes up, is with contingency fees. Where the lawyer is able to obtain the -- or the contingency occurs with the lawyer doing very little work. And the client complains that 30 or 40 or 50 percent contingency is unconscionable, because the lawyer didn't have to try a case and there was no jury, and there were jury instructions, and there was preparation for trial, because the case settled so quickly.

MR. TARLOW: Well, I haven't -- I haven't gotten up to looking at (d) lately, but I --

MR. KEHR: It's (b).

MR. TARLOW: -- "(b)," okay.

MR. KEHR: Yeah, 1.5 --

MR. TARLOW: Well, I certainly haven't gotten up to (b).

MR. KEHR: -- "b" as in boy.

MR. TARLOW: But on your question, it is built-in to the agreement. You're supposed to do the work. In other words, in a nonrefundable retainer, it says I'll -- you know, I'll try your case if there's a trial. Otherwise I'll go to the end of the case, but I won't do any appeals.

So that's built-in that you're going to do that. If you're dead, it's an impossibility. And I don't -- I don't really think -- I mean, that if I asked you -- on --

well, let's assume you get -- you get a nonrefundable retainer. And then you get sick, you're bedridden. You can't do anything else, and you haven't really done much work. Did you -- did you earn that fee, would you give that fee back?

I just don't believe -- dangerous to ask you those things, but I don't think anybody says no to that question. In using -- using that -- using that example. I, you know, I can't -- I can't quote (b) off the top of my head because, you know, my -- what I know is about being a substantive criminal lawyer, not as you people, being ethics specialists, in terms of doing a job, a demanding and difficult job in what you are doing.

But I do think the reason they're unanticipated -- and maybe someone who is civil lawyer understands this a little better than me, but it probably comes up in civil contracts all the time, about some strange thing happening.

Someone's supposed to get paid for doing the linoleum in a building that's being built in Santa Monica. The earthquake collapses the building, and they're supposed to be paid by 1995 or whatever. The building collapses, do they still get their money? I don't believe so, even though it wouldn't be covered in the -- let's assume it's not -- earthquakes aren't covered in an agreement.

So, that would -- that would be my answer to this.

And when we say clients are being -- you know, a client might be cheated, because not understanding what nonrefundable retainers are about. The first thing is I think we're talking about a minuscule part.

And Mr. Sondheim asked a good question about, what about the one percent out there? Well, lots of people steal money by using hourly fees, and double bill. People steal money out of trust accounts all the time -- not many but some.

But we don't eliminate double billing in spite of all the -- excuse me, we don't eliminate hourly billing to avoid a double billing problem, and we don't get rid of trust accounts to avoid people stealing.

We assume that most people in the Bar are honorable people, in spite of what we read in the Bar Journal about those -- those who are disciplined and -- for one reason or another.

MR. MARTINEZ: The difference there, involving the -- in the billable hours situation, is the client knows that he or she can contest the billing. In a nonrefundable fee agreement --

MR. TARLOW: Why?

MR. MARTINEZ: -- where it doesn't give the client that option, the client may not know that they can contest the refundability of the fee. That's the difference.

MR. TARLOW: Well, why does the client know they can -- see, I don't necessarily agree with that, that the client knows they can contest the billing. They might think they can file a lawsuit, but if the person has worked -- I mean, there are cases where people have done a great deal of work.

There is a case, a discipline case, and actually a civil refund case by a judge in the superior court, against one of the largest firms in town, where in a misdemeanor case, they billed some million dollars plus in the case. And that was a city that happened to sue.

But I think clients think, well the person did the work, they completed the case, they did the hours, it's an hourly -- it's an hourly computation.

We don't tell them you -- in an hourly fee agreement, you can sue us if you don't like the way the computation has come up, or you think we spent too many hours.

MR. MARTINEZ: Well, it depends on their level of sophistication. I have insurance companies, in the insurance defense area, that question our bills all the time. They go through the hourly rates and they go through the amount of time spent.

MR. KEHR: Isn't there -- isn't there another difference, which is the hourly fee is not labeled as being

nonrefundable. And if there's a fee agreement that says that the advanced payment for future services is a nonrefundable fee, isn't it inherently misleading, if you agree that that's not really a true statement, that the client depending on future events, might have a right to a reimbursement of some part of that, Then isn't it misleading the client, particularly the unsophisticated client?

MR. TARLOW: No, and I don't think there are a lot of -- I don't think there are a lot clients that hire lawyers who are particularly dumb.

I had people ask me how's your health and what happens if you can't make it. Now, they didn't do that a long time ago, but they asked those questions.

And if you have a properly worded fee agreement, and you explain the questions to the client, they understand it. Do they -- do you -- do they understand every possible unanticipated situation? No, they do not.

But I -- in fact, I don't want to make any admissions, but putting aside the number of fee agreements that I've had -- known -- or that I -- that my office has made, of nonrefundable fee agreements -- and friends of mine, I have literally -- I've certainly never had a case -- never had a case where anyone claimed in -- came in and said, the case is over now or it's the middle of the case.

I didn't understand what nonrefundable retainer was when I signed that fee agreement.

Is it some possibility that there's somebody who can't read the fee agreement, and is a dumb client and may not do it? Yes. Yes, there is.

But weighing that unknown person -- or those unknown people against the problem that is caused -- the forfeiture problem, which affects all people who face criminal prosecution -- and civil -- and people in civil cases. It happens in the SEC all the time. Where the SEC tries to take back a fee that's been given to a lawyer to represent them.

So, what -- I think what I -- what I'm saying is, do it carefully. Do it in some way, you know, we don't -- you know, the fixed fee agreement --

(Proceedings recessed briefly.)

MR. TARLOW: -- the fixed fee agreement may be another example. We don't tell people working on a fixed fee that they may be entitled to a refund. I just don't -- I don't think you put those things ordinarily in.

(Proceedings recessed briefly.)

MR. TARLOW: And, as an example, in -- as far as a client coming in and saying they want to get another lawyer. Clients, while they might feel a little uneasy about saying that, come in and do that from time to time. And they ask,

you know, well what happens with my fee? And well, here it is. And that's just what by and large -- that's what just by and large lawyers are doing.

So, I think what I say is, I think you're on a good track on this, and the only this is, don't create other problems, the forfeiture problems, which are horrendous problems to deal with.

MR. SONDHEIM: We don't control what the IRS decides to do with any fee that you obtain. What we can do is set a Rule that talks about what happens when you want to say it's a nonrefundable fee. And if we say, "it may or may not be refundable" -- it's called nonrefundable, but the client is made aware that he or she may or may not get a refund, how does that change the IRS's ability to do whatever they're going to do, from what is currently the situation, which is that the client may or may not be entitled to a refund?

It isn't in the agreement, but it's in the law. So how does that change or put you at greater risk, or your client at greater risk, with regard to the fee, which was the question that Mr. Kehr asked, if we put it in the agreement?

MR. TARLOW: I don't think -- or I didn't think that you had such great faith that prosecutors were going to -- prosecutors -- not prosecutors, agents were going to act

with a restraint in doing this, because they never have.

I do know though, about -- about something -- I do know about something else, which is on point, it's in the pleadings that I filed, and I think may relate to what we're talking about, just a different word instead of nonrefundable retainer.

While you don't invent things, because someone's always thought about it before, I theoretically created the litigation strategy and talked about it, and persuaded lawyers about it, won cases is the court, involving jeopardy assessments. Where you can get a prior, what I called back then, "irrevocable assignment" of a legal fee. And that would bar the IRS from getting the legal fee at all.

Now, that was used again, by hundreds of lawyers through the state. It's in the two cases I cited, Vermouth and Bucker, but used by everybody.

We had a case involving -- involving the Bar, where I was called as an expert witness on the case for the Bar. Not to do anything, not to arrive with some preordained result, but the Bar trial lawyer said to me, I want to find out what really goes on with these nonrefundable retainers and these fees.

Why -- why does -- he was prosecuting someone else, or thinking of -- I don't remember the exact status, thinking about filing disciplinary charges against somebody

else, because he took the whole $25,000 under this irrevocable assignment -- which I created. I don't know if there's such a thing or not.

And he said, I want to find out what happens here. What happens with this, quotes, "irrevocable assignment"? He took all the money, things can happen, you can die, whatever -- he didn't get to that one.

But -- and -- and then I testified, told them yes, lawyers throughout the whole State of California are doing this. The reason is the IRS is filing bogus jeopardy assessments, making up the numbers they're putting in there. And the way to get through that bogus jeopardy assessment for forfeiture or tax purposes, where they're getting it, is it's irrevocably assigned to you as legal fees.

That doesn't mean you necessarily end up with it. There may litigation, there may be something else. And the Bar lawyer then dismissed the case saying, okay, that's how it's done, that's what you do, no problem. And the name of the lawyer, if I have my cases straight, it was Arthur Margolin (sic.) when he worked for the Bar -- Margolis, excuse me, when he worked for the Bar.

So, in that case, it -- is it appropriate to tell the IRS person that, well this guy can get his money back get a different lawyer if he wants. And they would then say, well, no the -- the jeopardy assessment is good. It

applies against this money, when either you give it to the other lawyer, or if you give it back to the client.

But the system worked under the conditions that we were doing it. And people weren't just stealing money from these nonrefundable retainers, which often, as the law developed, the -- what do you call it -- the Franchise Tax Board would actually simply hand over to the lawyer, without even going to Court after a while, after they learned about -- that we were -- if we were a prior assignee, we would have the money.

So, I think it's the same situation that, would you put in those contracts that -- well, the client can fire you and get his money back without cause, which would result in those contracts not being valid.

But the IRS would say, okay, then I take the -- then I -- we will assert a lien against whatever the client's interest is in those funds.

And the other -- the other forfeiture problem that comes into play is, we say we want the lawyer -- the client to be able to change lawyers. If you have a forfeiture type problem or a restraining order, or an SEC restraining order, or any of those type of situations, you can't give the money back to the client. It can't be done, because you committed either contempt, criminal or civil, or obstruction of justice.

If -- if -- yeah, the client can fire you, under this -- under the statute as it now says. But if there is one of these restraints, the lawyer cannot give back the funds without violating that restraining order. Might be able to ask a judge, and the judge -- you know, I don't know what the judge would say. But as well, if the client has a claim against that money, then it has to go to the IRS.

So that's the -- that's the best I can do by -- by way of examples, I think. And I mean, I would -- you know, I would -- I guess -- dangerous to ask questions of people who are questioning you, but, Mr. Sondheim, would you -- would you ask that in that situation where I'm saying, "I'm taking an irrevocable assignment," that I should put in the fee agreement all the reasons why it's not really irrevocable, and why I wouldn't be entitled to it -- all the ones I can think up?

MR. SONDHEIM: Without -- without trying to specify all the reasons why, what's wrong with putting it into the fee agreement?

The IRS knows that the client can fire you, the client may be able to get a refund. All you're doing is saying you may or may not, as you've suggested. And it puts in the IRS in no different position than they are currently.

MR. KEHR: And I don't think anyone is suggesting that the fee agreement needs to identify all of the future

eventualities that might trigger an obligation on the part of the lawyer to refund some part of the advance fee. Only that it's a topic, it's a potential topic of discussion.

MR. TARLOW: Would that -- would that be inconsistent at all with putting in the final paragraph that I read from this North Carolina fee agreement, which is -- that is, if you're saying it may or may not be, this -- what was -- what in California is called the "fixed fee cause," about doing material work, but with this one, which I think is better:

> "When the lawyers representation ends, client will not be entitled to a refund of any portion of the minimum fee, even if the representation ends before lawyer has provided legal services equivalent to the value of the minimum fee, unless it can be demonstrated that the minimum fee is clearly excessive -- an excessive fee under the circumstances."

MR. MARTINEZ: So you would substitute the word "unconscionable"? The California term for excessive fees would unconscionable. So you would --

MR. TARLOW: Yeah --

MR. MARTINEZ: -- use that terminology?

MR. TARLOW: -- yes. Yes, I -- well, you know, I -- I know that's an issue that you had. I -- and I don't know -- tell me this. In a civil case, if you're getting sued about fees, you have to prove their unconscionable or just that they're excessive?

MR. MARTINEZ: The practical reality is if they're unreasonable, as a lawyer, you're not going to collect them. I think every lawyer knows that.

MR. TARLOW: Yeah, well that -- I mean, that's my view of that issue. I don't quite understand the other side, but my view is, if it's unreasonable, it would be covered by either -- either the common sense that most lawyers have and the integrity of giving back the money, and it would be covered by the -- you know, I say "unreasonable fee" -- actually I've probably been using "unreasonable," rather than "unconscionable," because I don't think you have to get there.

MR. MARTINEZ: Is that the only circumstance? Let's assume you go with the North Carolina exception, and it only talks about the fee being excessive, whether you call it unreasonable or unconscionable. Aren't there other situations, besides the fee context, where the client might be entitled to a refund?

I guess what I'm saying is, I don't want to foreclose other possibilities. If you make it too narrow

when you talk about excessive fees --

MR. TARLOW: Well --

MR. MARTINEZ: -- that doesn't cover the universe of possible exceptions.

MR. TARLOW: -- it -- it does -- well, I guess -- I guess you're right, and that's the -- that's the problem with listing -- with listing and writing, because let's assume there's an after-developed conflict. After all this happens, a conflict arises that nobody knew about. So I would guess that there are as many things as we can think of or not think of.

MR. MARTINEZ: The best you could do is say, "including but not limited to," or raise a few possibilities that we'll explain about --

MR. TARLOW: Well, I think the more you raise, the more trouble you get in. And other than my concern about the forfeiture, which I have to think through, I don't have any -- I don't have a problem with -- with the -- problem that I can see now.

Because, with the idea that you're saying, in getting rid of all of this language and all of the problems, and, you know, letting the language be used, and just having, you know, just having a sentence, "may or may not."

MR. SONDHEIM: Okay. If you -- if you --

MR. TARLOW: It seems -- it seems fair, fair to

lawyers, fair to clients.

MR. SONDHEIM: -- if you find any more problems with that that you haven't thought of right now, you've got until June 15th to send in whatever thoughts you have.

But let me allow you, in a sense, to continue whatever you wanted to say. Because I know we have taken up a lot of time on this issue, and I think -- at least, I believe I understand your concerns.

MR. TARLOW: Well, here's -- here's what I don't quite -- quite understand. If from what everyone seems to -- almost everybody seems to be asking me, you've kind of shifted gears and improved what you were doing without there being a significant downside. Does it -- does it -- is it useful for me to talk about other points which have -- which have passed, you know, which have gone by the wayside?

MR. SONDHEIM: They may still be there. What were you --

MR. TARLOW: "They may still be there."

MR. SONDHEIM: -- I think --

MR. TARLOW: Let me --

MR. SONDHEIM: -- what we've been trying to suggest to you, is that we have spent a lot of time of this, rethinking it. And, at least as I can see it, we've made an effort, which is only tentative, to try and accommodate those lawyers who want to use language such as

"nonrefundable, earned on receipt" --

MR. TARLOW: -- earned when received.

MR. SONDHEIM: -- and at the same time provide something to the client, so that the client -- who may or may not be dumb, we don't know. It may only be one percent of the lawyers who may act unethically, but it may be 10 percent of the clients who misunderstand what nonrefundable means, or earned on receipt. And so we've tried to think of perhaps a way that we can balance the two things.

MR. DIFUNTORUM: Mr. Sondheim, may I ask --

MR. SONDHEIM: Sure.

MR. DIFUNTORUM: -- Mr. Tarlow a question? Go ahead, Randy.

One of the things that's under consideration, is the idea that a true retainer fee is something that could be required to be in writing. And likewise, we would be considering whether a flat fee is something that should be required to be in writing.

And recognizing that the State Bar Act has written fee agreement provisions already, and they don't have an enforcement remedy with the Bar, they're really going to just the collectibility of the fee, as opposed to any lawyer discipline.

What would be your views on a new provision in the rules that would require true retainer fees, as well as flat

fees, to be in writing? And since they're required under the rules, therefor a cause for discipline if they're not in writing.

MR. TARLOW: Well, I understand that under the Business and Professions Code, there are a couple of exceptions like, I guess, corporations.

MR. DIFUNTORUM: "Corporations."

MR. TARLOW: Emergencies is an important exception. You got a criminal case with the whole world collapsing, and you don't have time to do a fee agreement, but I don't have any -- I mean, I -- everything we do, it has a fee agreement, other than somebody maybe says they don't want one, and there really wasn't a case, and do you really have to -- do you really have to have one, which is for some relatively small amount of money, I don't see any problem with having written fee agreements.

In fact, interestingly to me, when the Rule first came in, I thought it was terrible. Back then, you shook hands with somebody, they said they would pay, you said you would do the work, and you did it.

I found out later that it's a good thing. When there's a dispute, there's something there. When the client says you're supposed to take my case to the Supreme Court, it's there that the trial court is the end of it.

So, I have no problem with written agreements that

-- other than those special circumstances which are in the rules.

MR. SONDHEIM: All right. Why don't you then go on with what other points you'd like to make.

MR. TARLOW: Let me also see what I can get rid of. I'll go through here quickly.

I don't -- I'm satisfied about what we've covered today, assuming -- assuming my sense of what's going on has some relationship to our conversation. The -- the only -- I guess I have a question which I wanted to speak at -- to talk at some length about forfeiture, and the problems in forfeiture that -- that face us.

But I think that, from what I heard, that you're going to be conscious of the forfeiture issues. And not doing something which is going to -- in other words, not doing something which is going to create more forfeiture problems for us than those that already exist. But were there any questions that anyone had about --

MR. DIFUNTORUM: Actually, I have one other question for you on the topic of forfeiture.

MR. TARLOW: -- I'm sorry, Randy, what -- the concept?

MR. DIFUNTORUM: Yeah. Let me just say hypothetically, the Commission considers a rule that says, if you use the term "nonrefundable" or "earned upon receipt"

in connection --

MR. TARLOW: Well, we use both, actually.

MR. DIFUNTORUM: -- yeah, if you use both, let's say, then you're required by the rule to also mention that the client can discharge the lawyer at any time, and may or may not be entitled to a refund. Let's imagine that's the direction, just hypothetically.

MR. TARLOW: Okay.

MR. DIFUNTORUM: I just want to ask you one question. Would it help at all, if the comments to the rule had something along the lines of, "the requirement in this rule for disclosure that the client may terminate and may or may not be entitled to refund is not intended to affect or change standards of forfeiture, seizure," or whatever the magic words for describing that law?

If we said expressly in the comment to the rule, that our disclosure requirement is not going to impact or intended to impact the substance of law that you're concerned about. That -- and in fact, we're trying to preserve whatever the law is now. The addition of this disclosure requirement is not supposed to change that. Would that help at all?

MR. TARLOW: No, and for -- for another reason. This is why I felt that the -- that the language that you are using is so important. Because I had thought we got

down to a very small sentence which says, where -- what do you call it, where -- that "the client may or may not be entitled to a refund." Not putting in something, "the client can discharge at any time," because that phrase creates extraordinary forfeiture problems.

It makes -- it clearly points out the interest that the client has in the funds. It encourages, I think, the client to discharge where there has been a great deal of work done on the -- excuse me, and clients -- encourages the client to discharge the lawyer where there has been a relatively less work, and a great deal of success, other than some minor things that can be pointed out.

MR. KEHR: Can I follow up on that?

MR. TARLOW: Sure.

MR. KEHR: You're talking about two different questions.

MR. TARLOW: Right.

MR. KEHR: One is whether a client is encouraged to discharge the lawyer. I want to leave that one aside and focus on the forfeiture side of it.

MR. TARLOW: Yeah.

MR. KEHR: How do you visualize that language creating a greater risk that the -- when you say forfeiture, I presume you mean that the lawyer will be --

MR. TARLOW: Restraint -- I'm sorry, go ahead.

MR. KEHR: -- I presume you mean that the lawyer will be required to pay out an advance fee previously taken into the general account by the lawyer.

MR. TARLOW: Or the client could be prevented from paying the lawyer any money, to start with. That is, there could be a restraining order which, if they don't pick up the money and take it, don't put a lien on the house or something, which says the lawyer can't receive any money -- the client can't give any money to anybody.

MR. KEHR: Well, let's do them one at a time.

MR. TARLOW: Okay.

MR. KEHR: How would this prevent the client -- the potential client, from paying an advanced fee to the lawyer?

MR. TARLOW: No lawyer would take it if there were -- advance fee after the -- after the restraining order has come into existence?

MR. KEHR: Yeah.

MR. TARLOW: No lawyer would take it, you would be nuts.

MR. KEHR: Well, but if the order is there -- I don't understand how this proposed language would alter the fact that -- let us assume for example, the Federal District Court has entered an order at the request of the SEC requiring that all of the potential client's funds be paid

over to a receiver.

MR. TARLOW: Uh-huh.

MR. KEHR: And the potential client is going to pay a lawyer instead to defend this civil proceeding. If the order is there, I don't understand how this language affects the prior existence of that Federal District Court order. Why does this language --

MR. TARLOW: No -- no, it's not the -- which -- wait a minute. Which language -- you see, I'm not sure now which language we're referring to.

MR. KEHR: -- well, as I understood what you said, your -- one of your points is, that if this Rule were to include language about the right to terminate --

MR. TARLOW: Yes.

MR. KEHR: -- that the client would be prohibited from paying over an advance fee to the lawyer. And I'm trying to understand how that could be true.

MR. TARLOW: No. It fits in the situation that you asked me about. If -- the problem with the language of the client -- of the client being able to forfeit the money -- excuse me, the client being able to fire the lawyer and get the money back, goes to a totally different issue. That goes to the issue of, does the client have any interest in the funds that are subject to seizure?

It does give the client that money, that interest.

It also, for example, assuming the client's had a -- assuming the client has paid a trial fee or a motion fee, and there are no -- there is no trial and there is no motion. In other words, if you've broken it up and said, "this is trial fee," then -- then the client clearly has some interest if you're talking about a trial fee in that portion of the fee. Because obviously if there's no trial, the client gets the money back. The agency seizing is going to say, we want this money which the client has a contingent interest in.

So, I don't -- I think I'm talking to several subjects at the same time. And what I was saying is, that putting the language about the client having the right to fire the lawyer, is a red flag and a forfeiture problem, and of great concern not only to me, but of the experienced forfeiture lawyers who have written -- who have written about it, because the argument is this contingent interest can be forfeited.

And if the lawyer -- if the lawyer gives it afterwards -- if the lawyer signs up after the money has been transferred, they could say -- they say, "fine, we want that money back." We want -- in fact, interestingly, the lawyer -- whose name begins with P, who I don't know. Who was, I think, assistant director of enforcement for the SEC, talks about something in his letter, which is a concept

foreign to most of us, but the concept of ordering the client to bring the money back or repatriate the money somehow.

So -- and he's saying that he believe that the SEC could order the client -- take the money back from the lawyer. Take it back, the lawyer hasn't done any work, take the money back.

So, I think that that -- that piece of the thing, giving the client some kind of contingent interest and putting up a big red flag saying he can get rid of this lawyer at any time and get the money back, a, creates problems as far as the forfeiture itself, and b -- and b, it ensures that the client will never see the money. That's the other thing.

Because the lawyer can't give it back if the client has the -- the contingent interest is what's triggering this. In a nonrefundable retainer, it's yours, period, just like in the other thing that I created, in jeopardy assessments, the irrevocable assignment. It is yours. It can't come back to anyone else.

Putting up a big red flag saying the client can get it whatever time he wants, is -- creates, I think as set out in the materials and in the letters from the independent lawyers, creates an enormous physical problem. We don't put that in any other fee agreement, why do we need to put it in

one that's reserved for certain kinds of lawyers?

MR. SONDHEIM: Let me just ask if there is anybody else who wants to speak, because I want to make sure that we can take that person within the time limits. Okay. Fine.

MR. TARLOW: Yeah. The piece that I -- that I -- and that's why I was asking before, are we on the -- do we show we were on a similar track? I thought the piece I was being asked about, and then what I was answering is the piece about, can we say the lawyer may or may not be entitled to -- to refund.

And there are practical problems about what the client will do if the client sees -- that's when I was talking about some clients being not very nice people, and who's going to get stuck in a case, and who's going to get fired, when you put in front of them something which says that you can fire the lawyer whenever you want.

And then it goes to this forfeiture thing. That's -- that's the contingent interest, that maybe the clients, for example, for jeopardy assessment purposes. It clearly is, does he own anything here? And there's no question that he's getting, by that statement, he's getting some kind of interest. And since, in many of these cases --

MR. SONDHEIM: The statement being that the client can terminate the relationship? Is that the statement you're talking --

MR. TARLOW: The statement -- and if you add to that, which is -- which is the thing. If we assume -- if that's the California law now, if we add to that, "without cause," which it really -- I mean, it really is without cause that we're talking about.

None of us would have any dispute about that concept if it was -- if the client has cause they can get rid of the lawyer. I mean that's perfectly appropriate. But it's --

MR. SONDHEIM: Would then language that says, "attorney-client relationship can be terminated upon cause," would that be a problem?

MR. TARLOW: -- no.

MR. SONDHEIM: Okay.

MR. TARLOW: NO, I mean good cause.

MR. SONDHEIM: "Good cause."

MR. TARLOW: Doesn't like THE color of my -- well, if can't be the color of my hair. If he doesn't like the --

MR. MOHR: That's not the rule.

MR. SONDHEIM: I know, I understand.

MR. TARLOW: -- my hair or one of my guys.

MR. MOHR: Could I ask you a question? Again I apologize for my voice. And I hope -- can you hear me okay?

MR. TARLOW: -- I can hear you fine.

MR. MOHR: Okay, fine. How is it that putting

that language in a fee agreement, which is being put in the fee agreement simply so that the client will not be mislead, creates any more of an interest than the law doesn't already create? All we're doing is restating what the law is.

So I don't see how we're creating an interest by requiring that that statement be put in a fee agreement. The fee agreement doesn't create any interest. It just is a statement of the law, so the client will not be mislead.

MR. TARLOW: I think it is -- well, it does two things. The purpose of the nonrefundable retainer in many cases, and involving jeopardy assessments and everything else, has insulated the lawyer from attack and seizure.

In many, many cases, the fees have not been -- have not been -- they've not been able to seize them because it's a nonrefundable retainer. Because it all belongs to the lawyer.

Just as in the jeopardy assessment thing, when I was talking about irrevocable retainer. But it's no less irrevocable in a jeopardy assessment if the lawyer dies. There's no reason the client should have to pay the fee. The estate would have to give it back.

And -- and what you are doing is creating something that can be seized. If the client has -- and can be seized very, very easily. If -- if the money is to the lawyer, if it is a transfer that is not voidable -- in other

words, you can't just give the money to the lawyer, with the idea you're going to give it back to the client. Because that -- that situation does not -- that situation, without question, presents a -- a fact pattern where these agencies can forfeit the fee.

MR. MARTINEZ: But you can still use the word, "earned on receipt" and "nonrefundable." Doesn't that give you some protection, in terms of the property status at the time of its receipt? Now there may be subsequent events that allow a refund, but it's still the lawyer's property.

MR. TARLOW: Yeah, but the test is -- the test is not what the client has day one. The test is, what the -- what the client gets in the future.

MR. MARTINEZ: Right. But if you say, "earned on receipt," doesn't that give the lawyer a property interest that can prevent a forfeiture?

MR. TARLOW: Well, that's what we have right now.

MR. MARTINEZ: Well, that's -- I think that's what we're suggesting. We're saying that you can say that it's nonrefundable, you can say it's earned on receipt, but you have to tell the client that there are circumstances where there might be a refund.

MR. TARLOW: But you -- but you don't do that in any other kind of case.

MR. MOHR: But that's because in other kinds of

cases, you don't claim that it's nonrefundable or earned on receipt.

MR. TARLOW: Well, forget the magic words --

MR. SONDHEIM: Wait, wait, wait. I thought, and correct me if I'm wrong, that you had no problem if it said, "it may or may not be refundable."

MR. TARLOW: -- yes.

MR. SONDHEIM: Am I right?

MR. TARLOW: That's correct.

MR. SONDHEIM: Okay.

MR. TARLOW: I mean --

MR. SONDHEIM: I just to make sure.

MR. TARLOW: -- yeah, I'm trying to be -- well, I'm trying to see if there's some need that needs to be filled, and this will -- and this solves the problem.

I did not say that about these extra words that got added in. About the lawyer can fire -- the client can fire the lawyer at any time. I never even on a quick look, thought that was appropriate. I'm sorry, miss?

MS. PECK: No, I -- finish your statement. I just wanted to let our chair now that I have a question of you when you're finished with your statement.

MR. TARLOW: How about right now?

MS. PECK: Okay, great. So, let me see if I understand you. Is what you're saying, that in the law of

forfeiture, if a client has some contingent future interest in the fees, that they will continue to be -- able to be -- be it -- seized -- thank you. Is that you're telling us?

MR. TARLOW: Yes, yes. Absolutely.

MR. KEHR: I think there are actually two things. One is the question of whether the lawyer can give an unearned apportion back to the client.

MR. TARLOW: Well that -- that's -- I mean, without --

MR. KEHR: And the second is whether the -- a third-party can take the money directly from the lawyer --

MS. PECK: Right, but I --

MR. KEHR: -- under the theory that they haven't been earned yet, even though you've said they're earned on receipt.

MS. PECK: -- right. So -- but I want to -- the fact that -- I'm trying to get it, what -- how the law works, because I don't understand that part of the law. The -- the forfeiture --

MR. TARLOW: Neither do a lot of lawyers that are practicing.

MS. PECK: -- no -- I know, and that's why -- that's why your help is invaluable. So, if a client has a right to get an unearned portion back, does that mean that during the time when we don't know whether it's earned or

unearned, it's capable of being seized?

MR. TARLOW: Yeah -- well, retrained would be a better word, or seize could -- seize could apply, but restrained, because the restraining orders say, "no transfers." I mean it's clear as -- it's clear as a bell. In fact, I --

MS. PECK: Right. I'm not looking to restraining orders right now. I want to --

MR. TARLOW: -- no, they're issued with the forfeiture orders.

MS. PECK: -- okay.

MR. TARLOW: They're issued with the forfeiture orders, telling you, in other words --

MS. PECK: Let me try a hypothetical, and maybe I can understand it better.

MR. TARLOW: -- yeah, let me give you a -- let me give you a hypothetical, because this is related to forfeiture, but I think talks to what you did.

In San Francisco, a person was sentenced and he had to pay restitution.

MS. PECK: Right.

MR. TARLOW: He, I believe later -- but he may have had an auto accident. He then hired a -- and he was sentenced to five years -- or some -- some. So he wanted to appeal his case. He goes and hires a lawyer in San

Francisco, name is Allen Ellis. The opinion is unreported.

Allen Ellis says, "okay, I'll represent you." And when you get -- when you get some money, you'll pay me. Not a sound business decision ordinarily in criminal law.

Ellis then works for him, and maybe a year or two later, comes in and -- the client comes in and says, "I got a check for my auto accident. Here's the fee, Mr. Ellis. You take it." Ellis works, finishes up all the work he's supposed to do for that fee.

The judge in San Francisco finds out, and goes -- berserk isn't a nice name for a judge, but Ellis almost came close to getting disciplined and disbarred.

And while sometimes you see an opinion which you would like to have on your gravestone, that would be the last thing, what you want to say -- what that judge said about the impropriety.

That money should have gone for restitution he said, even though there was no lien, there was no anything, it just should have gone there, because he shouldn't pay the lawyer with it. And this wasn't something someone issued a forfeiture order. The judge then issued a restraining order. It was -- it was nothing like that. And so that's the example.

But in -- in forfeiture cases, to make this -- to maybe put some clarity on this, there is a -- there's a

concept that is -- one simple forfeiture is, you're driving the car, it's got drugs in it, so they take the car.

Another forfeiture is, you've cheated people, like Bernie Madoff -- well, that's too big an example -- but you've cheated someone out of some money. You no longer have that money available. So there -- they can't grab the money which is the proceeds of the fraud.

However, there is a provision in federal law -- maybe in state law, but I'm sure, but in federal law, called "substitute assets." That let's them take any asset they ever find. If they don't have the original money, they can go and get anything.

The first assets -- they don't have to prove they can't find the original assets. The first assets they find, they hold as either forfeiture or substitute assets.

The law is very, very harsh. It's creates extraordinary problems for lawyers and clients who can afford representation, but who don't get representation by private lawyer of their choices -- of their choice. And that's -- that's kind of the way it worked. I'm telling you, if something happens later.

MS. PECK: That's why I wanted to ask you --

MR. TARLOW: The guy gets the lottery, six --

MS. PECK: -- let me --

MR. TARLOW: -- six months later.

MS. PECK: -- may I ask a hypothetical --
MR. TARLOW: Of course.
MS. PECK: -- of my own?
MR. TARLOW: Sure.
MS. PECK: And then, because I'm not sure -- I do understand what you have said. You've been very clear on this, but I want to see if I understand it.
So, let's say you have a person who has been found by the SEC to have defrauded investors and the money is no longer there. So there's a substitute asset, forfeiture order out in ether --
MR. TARLOW: Don't know about the "SEC," but take most others. Most other forfeitures involve other crime, rather than the SEC, and those statutes are -- in other words, if it was money laundering, which would go along with any kind of SEC violation. And money laundering doesn't mean sending it to Switzerland, it just means moving it to a different bank account --
MS. PECK: -- okay.
MR. TARLOW: -- from your -- from the fraud.
MS. PECK: So -- so there's some kind of an order out in the ether, in the federal system, saying that the federal agents have a right to seize this person's property. So, okay, this will be person "x."
MR. TARLOW: Right.

MS. PECK: Okay. So then "x" comes to attorney "a" and says, "I've been charged with a new federal crime -- not the -- not the other stuff, but a new one. And I would like to receive representation from you, Ellen Peck," okay.

So, here is $9,999 --

MR. TARLOW: Very bad mistake. Never do that. Clients think that's smart not to do that, but --

MS. PECK: -- I know.

MR. TARLOW: -- but's it's --

MS. PECK: Here's that --

MR. TARLOW: -- not a good strategy --

MS. PECK: -- okay.

MR. TARLOW: -- to avoid the --

MS. PECK: Okay, 9,000 --

MR. TARLOW: -- yeah.

MS. PECK: -- it's $9,000 in cash -- I'm trying to avoid the issue myself --

MR. TARLOW: Right.

MS. PECK: -- of having to report that.

MR. TARLOW: Okay. Uh-huh.

MS. PECK: So $9,000, it's going to go -- and -- and I'm giving this to you as an advance, for you to handle this criminal case, Ellen Peck, okay. So I -- now, that's an advance fee, and I say it's nonrefundable and earned upon receipt. But in fact, under California law, it is

refundable if -- if I get sick tomorrow and I'm unable to help the client, correct?

MR. TARLOW: Yes.

MS. PECK: Okay. So, would you agree that it is potentially refundable?

MR. TARLOW: Well, it does -- you don't even get to the fee agreement, because any lawyer who knew about the first case, would know that there is a restraining order in effect, directed at the client --

MS. PECK: Okay.

MR. TARLOW: -- and directed at -- at any lawyer or person that knows about it.

MS. PECK: So I can't even take that?

MR. TARLOW: You -- you -- no. You would call me up and --

MS. PECK: Okay. So -- so --

MR. SONDHEIM: See, it's the out in the ether -- out in the ether part of it that's --

MS. PECK: -- "out in the ether," okay. So, let me take hypothetical number two then. In hypothetical two, I know that -- that client "x" is being prosecuted in other federal courts for other things.

MR. TARLOW: Uh-huh.

MS. PECK: Okay. But the prosecutions are ongoing and haven't been resolved. I agree to represent client "x"

in yet another criminal matter in state court, and the client gives me some money to -- for an advance fee, all right?

MR. TARLOW: Okay.

MS. PECK: Okay. Subsequent to my accepting this fee, an order comes out for a seizure or a forfeiture or however you would call it.

MR. TARLOW: "Subsequent," you mean --

MS. PECK: Subsequent to my accepting the fee --

MR. TARLOW: -- okay.

MS. PECK: -- and accepting the case. I have an ongoing -- there's an ongoing state prosecution. I'm representing that person in that ongoing prosecution -- I don't do criminal law at all ,because I'm not competent to practice in the criminal law field, so I'm -- forgive me if I say the wrong things.

MR. TARLOW: I have the same problem with ethics law.

MS. PECK: Understood. So -- by the way, I'm sure you know a lot more about ethics than I do about criminal law, so.

So I represent this person, and then the -- and then some kind of a seizure order does come out.

MR. TARLOW: But none existed previously?

MS. PECK: Did not exist prior to my accepting the

fee, and I'm four months into representing this person in a criminal case. Okay. Now we know that, again, that fee that I received is potentially refundable if I get sick tomorrow, right?

MR. TARLOW: Yeah.

MS. PECK: Okay. So can -- is the fact that under California law, if I get sick tomorrow, that may be potentially refundable to the client. Is that fact -- is that fact -- does that make that fee that I have received, advance fee, if there's any left in my account anywhere, can that be seized by the government?

MR. TARLOW: Or they can also seize what you've already spent or earned.

MS. PECK: Okay. So what would --

MR. TARLOW: But not in your -- you're saying it comes out after the fact.

MS. PECK: -- yes.

MR. TARLOW: Well --

MS. PECK: So why would -- so here's what I'm asking. How does your -- the way you would write your fee agreement now, it's nonrefundable and earned upon receipt. How does that change that? How does that change the government's ability to get that fee? That's what I don't understand.

MR. TARLOW: -- all right. You're a BFP when you

get it, right?

MS. PECK: Right.

MR. TARLOW: You're a BFP when you get it.

MS. PECK: Because there's no seizure order at the time I received the fee.

MR. TARLOW: Right, right. They can still go -- okay. And assuming you're a BFP --

MS. PECK: Uh-huh.

MR. TARLOW: -- they can't go over. However, let's -- let's assume the order says, "if the case is dismissed in municipal court -- "

MS. PECK: Uh-huh.

MR. TARLOW: -- we'll take a state case. "If the case is dismissed in municipal court, I'll give you back half your fee." But let's assume you get 10,000. You say 5,000 for the prelim in municipal court, and if not -- if not, I will do the trial. But if you get -- if I get you dismissed in municipal court -- excuse me, we don't have municipal courts. If I -- if on your preliminary hearing --

MS. PECK: Yeah.

MR. TARLOW: -- you get the case dismissed, the client gets a $5,000 refund.

MS. PECK: Uh-huh.

MR. TARLOW: That thing -- that -- that would -- that will allow them to take the money --

MS. PECK: Uh-huh.

MR. TARLOW: -- if the case was dismissed.

MS. PECK: Okay. But let me go back to my -- what I'm trying to get at. I take the 100,000 to represent this person in this state criminal case.

MR. TARLOW: Okay.

MS. PECK: Okay. And I say it's a flat fee, okay, whether we settle tomorrow, you do a deal, the case is dismissed, I win at trial, I have to go all the way to the California -- the U.S. Supreme Court, a hundred-thousand dollars is my fee for the case, as a flat fee, okay.

MR. TARLOW: Okay. Clearly, you're taking a nonrefundable retainer.

MS. PECK: Right -- well, no, it's the --

MR. TARLOW: That's what you call it right in the agreement, nonrefundable.

MS. PECK: -- well, okay.

MR. TARLOW: Earned when received.

MS. PECK: Whether it's nonrefundable or not, okay. Can the government, in the situation I described, seize those fees?

MR. TARLOW: Where the -- you haven't --

MS. PECK: Where it comes -- where the seizure order comes out after I have received the fee and I'm gaged -- am engaged.

MR. TARLOW: -- as -- as a generality, no, unless they had a reason to believe that the client had an interest --

MS. PECK: Okay.

MR. TARLOW: -- in the fees.

MS. PECK: Okay, now --

MR. TARLOW: Now "believe" in those circumstances, is a very flexible word. It's a suspicion -- it's grab all the assets, or potential assets, and we'll discuss it later in court.

MS. PECK: -- okay. If it's in a trust account --

MR. TARLOW: That fast.

MS. PECK: -- what?

MR. TARLOW: As fast as I -- if you put it in a trust account, that's how fast they'll take it.

MS. PECK: Okay. Okay, thank you.

MR. TARLOW: And that's the -- but, if you put it in your own account, and there's some kind of a refund provision, they -- you know, they'll say we'll take the interest of the client. But the trust account one is the perfect example, because it doesn't belong to you.

MS. PECK: Right. But let me ask one follow-up question --

MR. SONDHEIM: Sure.

MS. PECK: -- and Harry, I'm sorry. This is

fascinating. Okay, so what if my fee agreement says, "you pay me $2,000." I don't have any language about nonrefundable, earned upon receipt, okay, and I put it in my account, my general account, not my trust account.

What is the answer then, in terms of seizure, under that same thing, where the order comes out after the fact?

MR. TARLOW: The order comes out after the fact. They know that you've got a hundred-thousand of the client's money -- I mean, they'd have to know that --

MS. PECK: Sure.

MR. TARLOW: -- the agents would -- could well show up at your front door, knock on the door, saying, "we're here for Don Hernandez's money."

MS. PECK: So the -- so the words, "nonrefundable" and "earned upon receipt" are critical --

MR. TARLOW: "Nonrefundable," particularly. Because, you say, this is my money. This is not the person's money.

MS. PECK: -- those words are --

MR. TARLOW: He's going to use this to defend his case.

MS. PECK: -- these are -- these words are critical to being able to assert that the money doesn't belong to the client, and indeed belongs to the lawyer for

the representation of the client, is that correct?

MR. TARLOW: Yes, yes. And I was going to -- I was going to tell you that, had you consulted me and --

MS. PECK: I wish I had now.

MR. TARLOW: -- for giving me -- for giving me all this extra time, you can have one free consultation. But if you had consulted me, I would tell you, never, never write an agreement like that in a -- in the kind of case that's going to be a forfeiture, because you're going to lose it.

And as to your trust account, I got a perfect example for you. I got into a fraud case. A very good lawyer from Orange County named Jim Riddet, represented the co-defendant. I took a nonrefundable retainer. He put his in a trust account. And he's a very smart guy. I don't know what he was doing. They came and took his fee --

MS. PECK: Uh-huh.

MR. TARLOW: -- and left me alone once they found out it's nonrefundable and it's my money, not the -- not the guy -- not the client's. He can't get it back.

MS. PECK: Thank you very much.

MR. TARLOW: You're welcome.

MS. PECK: It's very helpful.

MR. TARLOW: Thank you for your patience.

MR. SONDHEIM: Anything else? Subject to our --

MR. TARLOW: Only, don't invite me probably,

but --

MR. SONDHEIM: -- our closing at 2:00 o'clock.

MR. TARLOW: -- but I appreciate your attention, the time and your interest.

MR. SONDHEIM: And thank for your patience with us.

MS. PECK: Yes. We peppered you with questions.

MR. TARLOW: Do I have -- do I have a choice? No, I really -- I sincerely appreciate two things. The -- the difficulty of the job that you have in doing this, and understanding not only the underlying law, which you need to understand to start with this ethics thing, but understanding all of these rules.

I'm talking about one section and one rule, and so I sincerely appreciate what you've been doing there, and I certainly appreciate the time and your interest. Thank you.

MR. SONDHEIM: Thanks.

MS. PECK: Thank you.

MR. SONDHEIM: As you know, I inquired if there was anybody else in the room who would like to speak, and apparently there is nobody. So I'm going to adjourn our public hearing.

Do we need to look outside, Randy? All right, we'll look outside.

MS. LEE: Clear.

MR. SONDHEIM: Okay. We've looked outside to see if there's anybody on their way, and there appears to be no one.

So I want to thank all of the speakers and other attendees. It is now three minutes to 2:00, and our public hearing is adjourned. Have a good afternoon. Thank you.

(Proceedings concluded.)

CERTIFICATION OF TRANSCRIBER

I, Holly Martens, do hereby certify that the foregoing 130-page transcript of proceedings, recorded by digital recording, represents a true and accurate transcript of the hearing in the matter of the Public Hearing, held on June 10, 2010.

_____ _____

Date Transcriber

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May 25, 2010

Howard B. Miller
State Bar President
Girardi & Keese
1126 Wilshire Boulevard
Los Angeles, California 90017

Special Commission for the Rules of Professional Conduct
c/o: Ms. Audrey Hollins
The State Bar of California
Office of Professional Competence, Planning & Development
180 Howard Street
San Francisco, California 94105

Re: Opposition to Proposed New Rule of Professional Conduct, Rule 1.5(e)(4-200) Abolishing Non-Refundable Retainers

Dear Mr. Miller,

As the current President of California Attorneys for Criminal Justice (hereafter "CACJ"), I am writing to object to proposed rule 1.5(e) ("the proposal") currently under consideration by the State Bar Board of Governors. There are many features about the proposal that raise strong concerns for our membership, some of which I highlight herein.

California Attorneys for Criminal Justice (CACJ) is a non-profit California corporation and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers. It is administered by a Board of Directors and its bylaws state a series of specific purposes, including the defense of the constitutional rights of individuals and the improvement of the quality of the administration of criminal law. CACJ's membership consists of approximately 2,000 criminal defense lawyers working in both the private and public sector from around the State of California and elsewhere, as well as members of affiliated professions. For over 36 years, CACJ has appeared before numerous courts including the United States Supreme Court as *amicus curiae* on matters of importance to the administration of justice, to our members and to our clients. We write in this capacity to urge the proposed amendment be rejected as unnecessary; essentially interfering with the ability of lawyer and client to contract in a way that benefits the client.

Non-refundable retainer agreements have been accepted as a proper fee arrangement for many years. In October of 1992, the State Bar Board of Governors concluded that a non-refundable retainer (one that is "earned when paid") was an appropriate fee arrangement. In fact, the Board of Governors endorsed the continued use of "fixed fees," "flat fees," and "non-refundable retainers" as long as the written fee agreement expressly described the arrangement and included the language that the fees paid in advance of legal services are "earned when paid."

We are unclear why the Board is now considering a ban on non–refundable fee agreements. As I understand it, there have not been a substantial number of complaints from consumers/clients about such fee arrangements. Without a factual basis to justify the ban or the modifications as proposed, the action seems to be lacking in utility.

As with all fees and fee agreements, non-refundable fee arrangements are subject to well-established professional rules that prohibit charging an unconscionable fee and/or keeping an unearned fee. These rules include: 1) the rule against charging excessive fees (Rule 1.5(a)) and 2) the longstanding rule requiring lawyers to refund unearned fees upon withdrawal from representation (Rule 1.16). These existing rules seem to curb abuses by unscrupulous lawyers. Further action seems to be lacking justification.

As proposed, Paragraph (e)(1) and Comment [8] prohibit the established practice of charging a minimum fee to ensure availability (true retainer) when the client will also be credited for future work done, whether on an hourly basis or for the amount of the true retainer. It deprives the lawyer and the client of the ability to contract in a way that is beneficial to the client by insuring the attorney's availability and prevents the lawyer from receiving a true retainer earned when received if he/she performs any legal work whatsoever. These types of fee arrangements are very common. They give a sense of certainty or security to the client and protect the attorney from being uncompensated.

Paragraph (e)(2) and Comment [5] would often require that the "non-refundable" "flat fee" cover fees for the entire length of the case, including trial. This is not required under current rules and is not practical. Since the proposal would require the "flat fee" to cover contingencies (*e.g.*, trial or an administrative evidentiary hearing) that often cannot be accurately predicted (or, truly foreseeable) at the inception of the agreement, the flat fee that covers these contingencies may need to be significantly higher than it otherwise would be at the outset. In other words, lawyers may be feel the need to charge a larger fee to cover unforeseen contingencies, even those that are not truly likely to occur. This will make certain services unaffordable and in the absence of a true justification, is not in the best interest of either the consumer/client community or the Bar.

Paragraph 1.5(e)(2)'s new requirement that specific, detailed wording be included in flat fee contracts presents a trap for the honest lawyer who is not familiar with these new rules and the complex fact patterns that potentially will develop. It is also inconsistent with the "sanctified' State Bar fee forms that have been distributed by the Bar for approximately the past 20 years and represent the "gold standard" for California lawyers.[1]

We also think the proposal overlooks some of the realities of law practice. Flat fees, earned when paid, often work to the benefit of the client especially in criminal matters when clients typically have less money available to hire a lawyer. Certainty about the cost of the case gives the client comfort and confidence that they have the lawyer they want and can afford and are not required to make decisions to avoid additional fees. Often lawyers quote flat fees that are far less than what the cost would be if charged

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[1] In her article in the California Bar Journal, legal ethics expert Diana Karpman urges California lawyers to use these State Bar fee forms:

> "Lawyers are urges to use the State Bar fee forms [. . .] . These represent the 'gold standard.' The clauses are tested, blessed and familiar to fee arbitrators. If an expert had to testify Regarding issues involving an agreement, it's a stronger case if it's the sanctified State Bar Fee agreement . . ." Diane Karpman, *"Time for Tuning Up Those Fee Agreement"*, California Bar Journal (February 2010)

Paragraph (e) is irreconcilably inconsistent with the existing and widely-used "fixed fee clause" at pp. 30-31 of *"The State Bar of California Sample Written Fee Agreement Forms"* available at http://www.calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

at an hourly rate. If the lawyer agrees to non-refundable "flat fee" that is earned when received and substantially underestimates the legal work ultimately performed, s/he will certainly not be terminated by the client. However, when the lawyer through reputation, skill and ability has, in a short time, obtained a significant result that may curtail the case or cuts short the life of the case, the Proposal encourages clients to terminate the representation without cause and obtain a refund of a substantial portion of the "flat fee", which, under this Proposal would no longer be "the lawyer's property" to which the lawyer is entitled. This is not a just result.

For these and other reasons, CACJ urges the State Bar Board of Governors to reject the proposed amendment (Rule 1.5(e)(4-200). Thank you for your consideration of this letter.

Very truly yours,

ANN C. MOORMAN, President
CACJ Board of Governors

cc:

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State Bar Vice President
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TESTIMONY OF GARY LANE
ATTORNEY AT LAW, PRESIDENT AND CHIEF EXECUTIVE OFFICER
CONSUMER PROTECTION LEGAL SERVICES, INC.
2911 SOUTH BRISTOL, SANTA ANA, CALIFORNIA 92704
DELIVERED AT THE STATE BAR OF CALIFORNIA
CALIFORNIA RULES OF PROFESSIONAL CONDUCT
PUBLIC HEARING, THURSDAY, JUNE 10, 2010, 10:30 AM
AT LOS ANGELES, CALIFORNIA

Topic: How Best to Help California Homeowners in Distress

SB 94 has made it illegal for attorneys to collect fees to perform loan modification work in advance of having completed the work.

This has had the effect of removing the most effective loan modification experts from the arena, and left distressed homeowners with only banks to work through to obtain any assistance. Yet we attorneys have seen first hand just how little these banks are willing to do to assist distressed homeowners. Some will tack past due payments onto the end of a mortgage, or lower a monthly payment temporarily, for a few years, only to return the mortgage to its original rate and then extend the amount of payments to end up with every dime they were to get and more.

Many lenders just say they will modify a loan, tell the consumer they are now on a trial plan, get payments for 90 or 180 days, only to tell the consumer they were denied for a modification. This happens time after time, and in the vast majority of cases.

Consumers are just not able to deal with banks on their own. That is why they have always come to attorneys.

Attorneys have been negotiating mortgage modifications for centuries. They have been referred to previously as "workouts." To prohibit attorneys from charging advance fees is the same as prohibiting attorneys from doing workouts.

Another irony is that the California law, SB 94, which the State Bar concurred in having apply not just to all those phony loan mod companies, but also to those honest attorneys who have been working to help consumers, would only apply to owner-occupied one to four unit owner-occupied residences. If you own a rental home or four-plex or an apartment building or a skyscraper, you can hire an attorney and pay him an advance fee to negotiate a workout. But if you live in your one to four unit property, you cannot pay an attorney advance fees to modify your loan.

The practical impact of the rule, which the State Bar is now enforcing, is that people who need legal services are not able to obtain them. And that is because

distressed homeowners are not able to convince lawyers to do the work without paying their lawyer in advance. This is due to the fact that clients just will not pay an attorney for modification work after the fact.

These homeowners are already troubled financially. Where they do pay in advance, due to some other legal work being involved, such as law suits against banks, after a modification is obtained, clients frequently request a refund from the attorney, saying the bank granted the modification and they did not need the attorney after all.

Banks are notorious for claiming to homeowners that attorneys never submitted information to them and telling the homeowner to stop using an attorney and deal with the banks directly. How do you expect this makes a client feel about paying an attorney? Banks frequently send the modification paperwork the attorney has worked so hard to achieve, not to that attorney's office, but instead directly to the homeowner, bypassing the attorney. This only makes it more likely the client will demand a refund from their attorney, or refuse to pay the attorney in the first place.

And due to SB 94, in order to help a client, an attorney is forced to look for fraud by a bank, violations of other laws, concealment, or a variety of other predatory lending tactics, in order to file a lawsuit against the bank. All this, in the hope many times, of just obtaining a reasonable loan modification for the client.

The filing of all these lawsuits only results in clogged courts, overworked and overburdened judges, expensive litigation bills for clients, and long waits for a homeowner to see if the courts will order a reasonable settlement for them.

In Orange County, the courts are so overburdened with these cases that they have established a special program to expedite such homeowner litigation. But this does not save the client from having to pay large bills for litigation, when they could otherwise merely pay an attorney to handle the negotiations for them without the litigation.

Lenders generally do their best to circumvent attorneys. They call and write directly to clients. They act as if the attorney does not exist. Many lenders actively discourage clients from working with "third-party providers." Chase has such a discouragement on its recorded hold message.

I submit that the best way to handle these problems is to allow honest representation of distressed homeowners by real attorneys and law firms, not "attorney backed" or "attorney owned" outfits; which should be outlawed. By once again allowing legitimate attorneys to handle mortgage loan modifications, the costs to consumers can be made more reasonable, and the huge burden on the

courts could be lifted. Distressed homeowners would be helped more quickly and for far less cost. Isn't that what all this should be about?
If the posting of a bond were necessary for law firms to be allowed to save distressed homeowners, that would be far superior than depriving distressed homeowners of their greatest chance of saving their homes, hiring an attorney!

Thank you.

Respectfully,

Gary Lane #050960
Attorney at Law
President & CEO
Consumer Protection Legal Services, Inc.
Santa Ana

GARY LANE garylane@cox.net, 504 Monte Vista, Irvine, California 92602, (714) 422-9616

PROFILE

ATTORNEY – GENERAL COUNSEL

Real Estate - Contracts - Regulatory - Transactional - Legal Problem Solving - Environmental Consumer Protection - General Business - Legislative - Health & Hospital - Food & Nutrition

HIGHLY ACCOMPLISHED PROFESSIONAL WITH DIVERSE EXPERIENCE, READY TO MOVE TO POSITION WITH GREATER OPPORTUNITIES. MAKE DEALS HAPPEN. ELIMINATE ROADBLOCKS. DETAIL ORIENTED. PATIENT AND THOROUGH. PEOPLE SKILLS. BIG AND SMALL PICTURE AWARENESS. HIGHLY COMPETENT NEGOTIATOR. EXCEPTIONALLY WELL ORGANIZED. MULTI-TASKER. STRONG INTERPERSONAL SKILLS. HIGHLY COMPUTER LITERATE.

CORE COMPETENCIES

- Drafting and Negotiation
- Analysis
- Policy and Procedure Administration
- Technical Expertise
- Cross Functional Team Coordination
- Operations Management
- Conflict and Dispute Resolution
- Vendor Relationships
- Legal Counseling

PROFESSIONAL EXPERIENCE

Law Offices of Consumer Protection Legal Services, Inc., Orange County, CA. **President and Chief Executive Officer**. 2008-Current. Represent consumers in matters relating to their finances, real estate, home ownership, mortgages, lending/borrowing, fraudulent transfers, federal/state lender violations.

The Khoshbin Company, Inc., California, Texas, Arizona, North Carolina, Pennsylvania, Ohio. **General Counsel**, 2005-2008. Real Estate Investment Corporation. Insure Completion of the Deal. Investments. 1031 Exchanges and Tenant in Common Ownership. Commercial & Industrial Property, Purchase, Sale, Management. Oversee all legal transactions, contracts, and corporate compliance, environmental, regulatory.

Abraham Lincoln University School of Law, Los Angeles, CA. **Dean** of Law School, 2004. A prominent national and worldwide high technology and Internet law school, sited in California. Also taught Legal Ethics.

Estate Planning Of California, Long Beach, CA **Supervising Attorney**, 2001-2003. A financial investment, health care planning and legal services corporation protecting homes, headquartered in Long Beach, California.

- Provide Management, Administrative and Legal Services to a multi-state corporation.

Gary Lane Law Offices, Los Angeles, CA, Washington, DC, and New York City, NY. 2001 and earlier

- Draft contracts for exclusive distribution of food products in Eastern Europe.
- Consultant to several Congressional Committees.
- Highly computer and technology proficient.
- Licensed Real Estate Broker in NY prior to permanent move to California

California Pacific School of Law, Bakersfield, CA, **Dean** of Law School. 1997-2000

- Supervise 40 attorneys. Organize statewide Moot Court Competitions. Teach Health Care Law.

Nissan North America, Torrance, CA. Temporary Senior Counsel, as Contract Attorney. 1997

- Create Database system for tracking all legal matters. Involved in Global Satellite Tracking System creation. Sales and Contract reviews.

Pepperdine University, School of Law and Graduate School of Business and Management, Los Angeles and Malibu, CA. 1980-1996

- Adjunct Professor of Law and Business Administration. Teach Legislation and also Business and the Regulatory Environment.

Nestle USA, (and Carnation Foods) Los Angeles, CA, **Senior Attorney,** 1991-1992

- Resulted in 35% time savings of executives in contracting. Legal review of advertising and marketing programs and contracts. Coordinate, systematize and help organize a health and nutritional research and marketing program for Fortune 500 Company.

- Revise real estate and equipment leasing agreements. In charge of all real estate leasing issues.
- Settled Major Roof Collapse Litigation. Negotiate and expedite settlement of major litigation. Manage litigation for Fortune 500 Company, including building construction and renovation defects, environmental, breach of contract and personal injury issues. Public Affairs Counsel.
- Resolve major international distribution dispute for Fortune 500 Company.

Memorial Health Services (Long Beach Memorial Medical Center, Saddleback Memorial Medical Center, Memorial HealthTech Labs, Memorial Cancer Institute), Long Beach, CA, **Senior Associate Counsel**: 1987-1990

- Systematized, simplified, and consolidated a major hospital chain's recruitment and retention, practice management programs, director contracts, office space leases, purchasing and supply agreements.
- Negotiated, drafted, reviewed and revised hundreds of physician and managed care contracts. In charge of physician contracting for one of the West's largest hospitals.
- Negotiate exclusive joint research program and intellectual property rights with the University of California for the first time in history. Valued at approximately $100 million. Successfully negotiate with physicians, hospital administrators, officers, staffs and attorneys for the creation of one of the West's premier cancer centers.
- Brought in U. S. Government contracts of additional $8 million per year. Create master and sub-agreement contracting structure, meeting U. S. Government deadline, without any obligation of corporate client's money. Only contractual structure of its kind in California.
- Supervise environmental compliance.
- Negotiate and revise real estate and equipment leasing agreements.
- Saved over 80% per year of legal budget by bringing contract reviews in-house.
- Manage regulatory, political, and government affairs concerns of major California corporation.
- Financial planning and legal review of marketing programs.
- Negotiate and renegotiate agreements with major International Corporation, through three reversals of decisions by client's Board of Directors. Provided full client protection and successfully got corporation in, out and back in again, to major contract.
- Revise and systematize purchasing, materials management and contract terms.
- Negotiate the creation of a major radio-isotope center.
- Develop independent contractor agreements for major corporations.
- Counsel on employment, human resources and immigration issues.

Simke, Chodos, Silberfeld & Anteau, Attorneys, Los Angeles, CA, Health Department **Supervising Attorney**. 1986-1987

- Improve productivity by 50% within 1 year. Coordinate and litigate more than 400 cases, and manage a litigation department of a major law firm. Deposed Physicians.
- Commended personally by County's Supervising Judge, for excellent litigation representation.

O. W. Coburn School of Law, Tulsa, OK, **Professor of Law**. 1983-1986

- Taught Contracts and Commercial Law, Administrative Law & Regulatory Affairs, State and Local Government, Legislation.
- Member, Hospital Research Review Board
- Create and coordinate Business & Law Joint Degree Program.

Pittsburgh Corning Corporation (as **Contract Attorney** to Southern California Counsel, ***Overton, Lyman & Prince***, attorneys). 1983

- Defense Counsel for Fortune 500 Company on all health and asbestos litigation in Southern California. Deposed Physicians.

Lutheran Hospital Society of Southern California (Pacific Health Resources) (California Medical Center, Santa Monica Hospital, et al), Los Angeles and San Diego, CA, **Supervising Attorney**. 1981-1982

- Improve efficiency and cut costs by over 35% within 1 year. Coordinate legal services for seven major California hospitals.
- Supervise antitrust concerns and criminal matters.
- Financial Enforcement Department Supervisor.
- Supervise and manage both the Los Angeles and San Diego offices for major Healthcare Corporation.
- Collected large additional funds for Hospitals. Responsible for collections, third party and insurance reimbursement, litigation and financial enforcement, of thousands of actions, for a large group of California hospitals.

Major Properties, ***Real Estate***, Los Angeles, CA, **General Counsel**. 1980-1981

- Manage campaign for Mayor of Los Angeles. Daily interaction with all News Media.
- Largest Independent Commercial Real Estate firm in Los Angeles.

Delaware Law School, Wilmington, DE, **Professor of Law**. 1976-1977

- Taught Contracts and Commercial Law, Administrative Law & Regulatory Affairs, State and Local Government, Legislation, Election and Campaign Finance (PAC) Law.
- Create and coordinate the first Business & Law Joint Degree Program in the State of Delaware.

PUBLIC SERVICE

Federal Emergency Management Agency, Washington, DC, **Counsel**. 1984-2000

- National Defense Executive Reserves. Presidential appointee. Legal advisor on Regulations, in times of emergency.
- Hold "secret" level security clearance

BAR ADMISSIONS AND ASSOCIATIONS

- Member of the Bars of the States of CALIFORNIA, NEW YORK, and the DISTRICT OF COLUMBIA.

EDUCATION

Harvard Law School, Certificate, Program in Law, Business and Government for Lawyers. 1976
New York University, LLM, in Constitutional and Regulatory Affairs. 1974
University of Southern California, Master of Arts, in Policy Processes. 1972
George Washington University, LLM, in Legislative Practice. 1970
University of San Diego, Juris Doctorate. **Highest Grade in Class**: Administrative Law and Constitutional Law. **Moot Court Award**. Elected **Editor-in-Chief**, Woolsack, law school newspaper. 1969
City University of New York, Bachelor of Arts, Pre-Med Major; additional Major in Government. Regents Scholarship. 1966.

PUBLICATIONS

The President Versus the Congress (officially cited by the U.S. Senate); Why Congress?; Voter Registration (prepared for the U. S. Senate Post Office & Civil Service Committee); Affirmative Action and Discrimination (prepared for the U.S. Civil Rights Commission).