

McCurdy, Lauren

RE: Rule 1.8.2
6/25&26/10 Commission Meeting
Open Session Agenda Item III.L.

From: Ellen R. Peck [pecklaw@prodigy.net]
Sent: Thursday, June 17, 2010 9:14 AM
To: Kevin Mohr
Cc: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi; JoElla L. Julien; Ignazio J. Ruvolo; Mark Tuft; Harry Sondheim; Kevin Mohr G
Subject: Re: RRC - 1.8.2 [3-100] - III.L. - 06/25-26/10 Meeting Materials

This is good with me, Kevin. Thanks for your hard work. Ellen

Kevin Mohr wrote:

> Greetings Lauren:

>

> I've attached the following:

>

> 1. Public Comment Chart, XDFT1 (6/16/10).

>

> 2. Rule, Post-Public Comment Draft [#5] (6/16/10), redline, compared
> to PCD [#4] (1/24/10).

>

> 3. Rule, Post-Public Comment Draft. [#5] (6/16/10), CLEAN-LAND.

>

> Notes & Comments:

>

> 1. I don't think that OCTC's comment (the only comment received on
> Rule 1.8.2) warrants a change to the Rule.

>

> 2. Nevertheless, because we have changed the defined term from
> "information relating to the representation" to "information protected
> by Business and Professions Code section 6068(e)" in both 1.0 and 1.6,
> I recommend that we revise the Rule and its title to incorporate that
> term. The changes I propose should be self-explanatory. Probably best
> to look at the redline comparison to the public comment draft.

>

> 3. My co-drafters have not had an opportunity to review my proposed
> changes. My apologies for not getting this to them sooner but these
> last few days have been hectic.

>

> Please let me know if you have any questions. Thanks,

>

> Kevin

>

> Attached:

> RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT1
> (06-16-10).doc RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) -

> Cf. to PCD [4]

> (01-24-10) - LAND.doc

> RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - CLEAN-LAND.doc

>

> --

> Kevin E. Mohr

> Professor

> Western State University College of Law

> 1111 N. State College Blvd.

> Fullerton, CA 92831

McCurdy, Lauren

From: Kevin Mohr [kemohr@charter.net]
Sent: Thursday, June 17, 2010 8:00 AM
To: McCurdy, Lauren; Difuntorum, Randall; Lee, Mimi
Cc: JoElla L. Julien; Ellen Peck; Ignazio J. Ruvolo; Mark Tuft; Harry Sondheim; Kevin Mohr G
Subject: RRC - 1.8.2 [3-100] - Ill.L. - 06/25-26/10 Meeting Materials
Attachments: RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT1 (06-16-10).doc; RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - CLEAN-LAND.doc; RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - Cf. to PCD [4] (01-24-10)- LAND.doc

Greetings Lauren:

I've attached the following:

1. Public Comment Chart, XDFT1 (6/16/10).
2. Rule, Post-Public Comment Draft [#5] (6/16/10), redline, compared to PCD [#4] (1/24/10).
3. Rule, Post-Public Comment Draft [#5] (6/16/10), CLEAN-LAND.

Notes & Comments:

1. I don't think that OCTC's comment (the only comment received on Rule 1.8.2) warrants a change to the Rule.
2. Nevertheless, because we have changed the defined term from "information relating to the representation" to "information protected by Business and Professions Code section 6068(e)" in both 1.0 and 1.6, I recommend that we revise the Rule and its title to incorporate that term. The changes I propose should be self-explanatory. Probably best to look at the redline comparison to the public comment draft.
3. My co-drafters have not had an opportunity to review my proposed changes. My apologies for not getting this to them sooner but these last few days have been hectic.

Please let me know if you have any questions. Thanks,

Kevin

Attached:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT1 (06-16-10).doc
RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - Cf. to PCD [4] (01-24-10) - LAND.doc
RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - CLEAN-LAND.doc

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Kevin E. Mohr
Professor

Rule 1.8.2 Use of Current Client's Information Protected by Business and Professions Code section 6068(e)
(Commission's Proposed Rule – Post-PCD [#5] (6/16/10) – CLEAN VERSION)

A lawyer shall not use a current client's information protected by Business and Professions Code section 6068(e) to the disadvantage of the client unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act.

Comment

- [1] Use of information protected by Business and Professions Code section 6068(e), whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty. See Rule 1.6, Comments [3] to [6]. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of information protected by Business and Profession's Code section 6068(e) unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act. See Rules 1.6, 1.9(c), 4.1(a)(2), and Business and Professions Code section 6068(e).

Rule 1.8.2 Use of Current Client's Information Relating to the Representation Protected by Business and Professions Code section 6068(e)¹

(Commission's Proposed Rule – Post-PCD [#5] (6/16/10) – COMPARED TO PCD [#4] (1/24/10))

A lawyer shall not use a current client's information relating to a client protected by Business and Professions Code section 6068(e)² to the disadvantage of the client unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act.

Comment

[1] Use of information ~~relating to a client~~ protected by Business and Professions Code section 6068(e),³ whether or not confidential,⁴ to the disadvantage of the client violates the lawyer's duty of loyalty. See Rule 1.6, Comments [3] to [6].⁵ This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of ~~client information~~ protected by Business and Professions Code section 6068(e) unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act. See Rules 1.6, 1.9(c), 4.1(a)(2), and Business and Professions Code section 6068(e).

¹ The title has been changed because the defined term we use in our Rules is "information protected by Business and Professions Code section 6068(e)."

² See footnote 1, above.

³ See footnote 1, above.

⁴ Question: Given that Comments [3] to [6] are expansive in including non-confidential information, the phrase "whether or not confidential" is arguably redundant. However, KEM recommends keeping it ("it can't hurt").

⁵ A cross-references to Comments [3] to [6], which clarify the scope of the defined term, has been included.

Rule 1.8.2 Use of Current Client's Confidential Information Relating to the Representation [3-100, 3]
[Sorted by Commenter]

TOTAL = __ Agree = __
 Disagree = __
 Modify = __
 NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel ("OCTC"), State Bar of California	M	Yes		OCTC supports the rule and especially the use of informed written consent. Comment [1], however, seems unnecessarily long. The examples could either be stricken or tightened.	The Commission disagrees that Comment [1], which closely tracks Model Rule 1.8, cmt. [5], is unnecessarily long. The Commission has determined that it provides appropriate guidance on a lawyer's use of a client's information.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

Rule 1.8.2 Use of Current Client's Information Relating to the Representation

(Commission's Proposed Rule – Clean Version)

A lawyer shall not use information relating to a client to the disadvantage of the client unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act.

Comment

- [1] Use of information relating to a client, whether or not confidential, to the disadvantage of the client violates the lawyer's duty of loyalty. This Rule applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer, to the disadvantage of the client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. This Rule prohibits disadvantageous use of client information unless the client gives informed written consent, except as permitted by these Rules or the State Bar Act. See Rules 1.6, 1.9(c), 4.1(a)(2), and Business and Professions Code section 6068(e).

June 9, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.6 (Agenda Item III.I)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr
- 1.18 (Agenda Item III.FF)
- 7.1 (Agenda Item III.MMM)
- 7.2 (Agenda Item III.NNN)
- 7.3 (Agenda Item III.OOO)
- 7.4 (Agenda Item III.PPP)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - MOHR - DFT1 (06-09-10).pdf
- RRC - [1-18] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10)2.doc
- RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM22.doc
- RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.pdf
- RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.doc
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).pdf
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).doc
- RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.doc
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.pdf
- RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.doc

June 16, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

It's finally your turn . . . you have exactly 40 minutes to complete this work J . . . I'm sure you're way ahead of me, but just in case . . .

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentstrrc/byrule> .

- 1.6 (Agenda Item III.I) OCTC (sent with Randy's 6/15/10 e-mail)
- 1.7 (Agenda Item III.J) Co-Lead w/Kehr - OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 1.8.2 (Agenda Item III.L) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.18 (Agenda Item III.FF) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)
- 5.4 (Agenda Item III.DDD) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.1 (Agenda Item III.MMM) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.2 (Agenda Item III.NNN) OCTC (sent with Randy's 6/15/10 e-mail)
- 7.3 (Agenda Item III.OOO) OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 7.5 (Agenda Item III.QQQ) OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - [1-18] - 06-14-10 COPRAC Comment.pdf

June 17, 2010 KEM E-mail to Staff, cc Drafters & Chair:

I've attached the following:

1. Public Comment Chart, XDFT1 (6/16/10).

**RRC – Rule 1.8.2 [3-100]
E-mails, etc. – Revised (6/21/2010)**

2. Rule, Post-Public Comment Draft [#5] (6/16/10), redline, compared to PCD [#4] (1/24/10).
3. Rule, Post-Public Comment Draft [#5] (6/16/10), CLEAN-LAND.

Notes & Comments:

1. I don't think that OCTC's comment (the only comment received on Rule 1.8.2) warrants a change to the Rule.
2. Nevertheless, because we have changed the defined term from "information relating to the representation" to "information protected by Business and Professions Code section 6068(e)" in both 1.0 and 1.6, I recommend that we revise the Rule and its title to incorporate that term. The changes I propose should be self-explanatory. Probably best to look at the redline comparison to the public comment draft.
3. My co-drafters have not had an opportunity to review my proposed changes. My apologies for not getting this to them sooner but these last few days have been hectic.

Please let me know if you have any questions.

Attached:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT1 (06-16-10).doc
RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - Cf. to PCD [4] (01-24-10) - LAND.doc
RRC - 3-100 [1-8-2] - Rule - Post-PCD [5] (06-16-10) - CLEAN-LAND.doc

June 17, 2010 Peck E-mail to Drafters, cc Chair & Staff:

This is good with me, Kevin. Thanks for your hard work.

June 21, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff:

Kevin,

The moment you've been anticipating . . .

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

Attached:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (#)

**RRC – Rule 1.8.2 [3-100]
E-mails, etc. – Revised (6/21/2010)**

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc (A)
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (A,#)
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-21-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-21-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc (A, R)
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT3.2 (06-21-10)KEM.doc

June 22, 2010 KEM E-mail to McCurdy re 1.7, 1.8.2, 5.4 & 7.5:

I've reviewed the charts you sent and updated them where necessary. Please substitute the following files for the files you sent me:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2].

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT2.doc [document you sent me was not alphabetized, which I've done; also note that I will review Bob's revisions to the chart and send in my responses later].

RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc [Draft # should have been #2 and it's been alphabetized].

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10).doc [Draft # should have been 2.3, also alphabetized and response to LACBA Access to Justice Committee].

Rule 1.8.2 Use of Current Client's Confidential Information Relating to the Representation [3-100, 3-101, 3-102]
[Sorted by Commenter]

TOTAL = 2 Agree = 1
 Disagree =
 Modify = 1
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Office of Chief Trial Counsel ("OCTC"), State Bar of California	M	Yes		OCTC supports the rule and especially the use of informed written consent. Comment [1], however, seems unnecessarily long. The examples could either be stricken or tightened.	The Commission disagrees that Comment [1], which closely tracks Model Rule 1.8, cmt. [5], is unnecessarily long. The Commission has determined that it provides appropriate guidance on a lawyer's use of a client's information.
2	San Diego County Bar Association	A	Yes		We approve of the new rule in its entirety.	No response necessary.

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED