

E-mails, memos,

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

Stan,

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 synopsisizing 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):

**RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (6/21/2010)**

1.5.1 (Agenda Item III.H)

1.8.1 (Agenda Item III.K)

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 - LAMPORT - DFT1 (06-09-10).pdf

RRC - 2-200 [1-5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc

RRC - 3-300 [1-8-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc

RRC - 2-200 [1-5-1] - Rule - PCD [9.1] (10-13-09) - CLEAN-LAND.pdf

RRC - 2-200 [1-5-1] - Rule - PCD [9.1] (10-13-09) - CLEAN-LAND.doc

RRC - 3-300 [1-8-1] - Rule - PCD [15] (12-15-09) - CLEAN-LAND.pdf

RRC - 3-300 [1-8-1] - Rule - PCD [15] (12-15-09) - CLEAN-LAND.doc

June 15, 2010 McCurdy E-mail to Lamport, cc Chair, Vice-Chairs & Staff:

Stan,

A new comment in opposition or recommending modifications has been received for the following rule and an updated commenter table is attached. The comment compilation for this rule is attached, and has also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

2.1 (Agenda Item III.GG)

The assignment deadline for this rule is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - [2-1] - Public Comment Complete - REV (06-15-10).pdf

RRC - [2-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

**RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (6/21/2010)**

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

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 should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule>).

1.5.1 (Agenda Item III.H) - OCTC (sent with Randy's 6/15/10 e-mail)

1.8.1 (Agenda Item III.K) - 3 Comments: **Balin/Dilworth (attached)**; OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

2.1 (Agenda Item III.GG) - 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

3.6 (Agenda Item III.PP) – 2 Comments: **LA Public Defender-Michael Judge (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

5.3.1 (Agenda Item III.CCC) – 1 Comment: 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 - 5-120 [3-6] - 06-14-10 LAPD (Judge) Comment.pdf

RRC - 3-300 [1-8-1] - Balin-Dillworth Comment.pdf

June 16, 2010 Lamport E-mail to Difuntorum, cc RRC:

I also have not had a chance to confer with Paul on this Rule, but I have been through the comments. I am not recommending any changes.

We received comments from OCTC, who believes the Comments are not appropriate for a disciplinary rule and should be deleted. We received a comment from Zitrin et al, who want more of the ABA Model Rule Comments incorporated, In particular they want the second sentence in Comment [2] restored (which states, "Purely technical legal advice, therefore, can sometimes be inadequate.") They want Model Rule Comment [3] and the first two sentences of Model Rule Comment [5] added back in. We also received a comment from Barbara Weber that does not appear germane to the Rule.

RRC – Model Rule 2.1
E-mails, memos, etc. – Revised (6/21/2010)

I think the Comments we now have in the draft rule are appropriate and explain the Rule. The Commission rejected Comment [3] from the Model Rule because the proposition stated therein could be construed as creating a substantive legal standard that goes beyond the Rule itself. The Commission rejected Model Rule Comment [5] because it is covered in Rule 1.4. The second sentence of Comment [2] was deleted because it may suggest to some lawyers that there is a risk of disciplinary exposure if a lawyer provides competent advice but does not also provide advice on moral issues. Zitrin et al proposed a minor revision in the wording that would not resolve the concern the Commission had with the Comment. There is nothing in the Zitrin et al comment that addresses the reasons why we did not adopt the Comments they would like in the Rule or offers a rationale that would cause us to rethink our position.

The Zitrin et al comment also expressed interest in seeing the independent judgment definition that the Commission added at the last meeting, which will they will have an opportunity to see.

Overall, I did not think we need to make any further revisions to the Rule.

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Robert K. Rogers	M	No		I believe that the Rules should apply to an attorney's professional advice based upon the facts and the law. Extending the professional relationship to include more socially or morally relevant terms would tentatively impose a duty that is more personal than professional. The proposed change balances this by excluding the broader duty and merely making reference to it in a permissive way in the notes.	
2	COPRAC	A	Yes		Support as drafted.	No response necessary.
3	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response necessary.
4	Barbara Weber	M	No		These comments are regarding attorney discipline as it relates to construction defect claims and suits, and Proposed Rule 2.1. Prevent solicitation by Plaintiff counsel via mass mailings and door to door solicitation. Concerned with "ambulance chasers" and "witch hunts." Attached examples of "fraudulent solicitation letters to unsuspecting homeowners."	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Plaintiff counsel, at time of filing, must record notice of claim/suit to the property. This will protect unsuspecting purchasers or subsequent owners by notifying them upon title search that named property is in litigation/claim status. Owners commonly will not disclose this type of info to subsequent owners which is in direct violation of Cal. Civ. Code section 1102.6.</p> <p>Claimants shall receive a one page summary that shall be signed and notarized by Claimant and submitted with filing of claim to courts. Example: Truth in Lending Act of 2009 for Credit Cards which was enacted has made the dissemination of legal jargon much more user friendly.</p> <p>Real Property filings; at any time during the process of a claim/suit, the ownership of the property changes from original named claimant, property shall automatically be dismissed. New owner of property would need to sign new claim document (see paragraph above) in order for property to remain in claim/suit.</p> <p>In order to fully comply with litigation, Claimant must be present in court in order to file. Again, this would help to prevent</p>	

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>frivolous filings. If a Claimant knew that he/she had to attend a court filing, they would be fully and completely aware of what they have initiated.</p> <p>SB 800 claims and construction defects claims that are not properly filed as stated in Civil Code should immediately be dismissed from court and the filing attorney group FINED for monopolizing the court system. Due to the current recession, all sorts of lawsuits have put a strain on the court system, which currently is overburdened and understaffed due to state deficits at an all time high. The impact of unfounded lawsuits impacts the availability of the court system to handle legitimate claims and filings. If you hit them in their checkbooks, they will think twice before filing an illegitimate claim.</p> <p>Tougher disciplinary standards for violations of professional conduct should include fines at the least, up to and including, disbarment. It is mandatory that the State Bar protect the public from lawyers who take advantage of homeowners. These firms need not conjure up issues in a home that do not exist. Homeowners are already on edge with the economic conditions and these suits/claims only exacerbate the problems by further</p>	

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					devaluing properties.	
5	Office of Chief Trial Counsel	A	Yes	Comments [1] & [2]	Comments [1] and [2] seem more appropriate for treatises, law review articles, and ethics opinions.	
6	Richard Zitrin, on behalf of a group of law professors	M	Yes		<p>Re: Strengthening the comments: The Commission has chosen to adopt a weakened version of this rule. In particular, in order for this rule to be effective, the truncated comments must be expanded to include, ¶ 3 and the first two sentences of, ¶5 of the ABA rule. Also, the Commission eliminated the sentence in, ¶ 2 of the Comment that states, "Purely technical legal advice, therefore, can sometimes be inadequate." Apparently, this occurred because some Commission members were concerned about creating a "gotcha" civil liability against lawyers. This could be easily remedied by replacing the word "inadequate" with "insufficient," and striking the word "therefore."</p> <p>Re: Independent professional judgment: We understand as this letter is being distributed for signature, some effort may be made by Commission members to add a definition of "independent professional judgment" to this rule. While we have no draft of that proposal, we <i>strongly caution</i> the Board about</p>	

**Rule 2.1 Advisor.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
 Disagree =
 Modify = 3
 NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					adopting a sudden definition of this complex and exceptionally important term without it being fully and completely vetted. This is particularly true of any <i>effort</i> to equate "independent professional judgment" with "loyalty" - two vital and important concepts that are nevertheless not the same.	

Rule 2.1 Advisor

(Commission's Proposed Rule – Clean Version)

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice may involve facts and alternatives that a client may find unpleasant and may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] In some cases, advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Although a lawyer is not a moral advisor, in rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.