

E-mails

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

Dom,

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 15<sup>th</sup> 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 15<sup>th</sup> 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):

- 3.5 (Agenda Item III.OO)
- 6.1 (Agenda Item III.HHH) NRFA
- 6.3 (Agenda Item III.JJJ)

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](http://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 - SNYDER - DFT1 (06-09-10).pdf
- RRC - 5-300-[3-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - [6-3] - Rule - PCD [3] (06-08-09) - CLEAN-LAND.pdf
- RRC - [6-3] - Rule - PCD [3] (06-08-09) - CLEAN-LAND.doc
- RRC - 5-300 [3-5] - Rule - PCD [5.1] (10-19-09) - CLEAN-LAND.pdf
- RRC - 5-300 [3-5] - Rule - PCD [5.1] (10-19-09) - CLEAN-LAND.doc

**June 10, 2010 Sondheim E-mail to RRC re June 25-26, 2010 Agenda:**

Since I am going out of town this Saturday until June 24 with 2 of my grandchildren and will not have time to send e-mails regarding the proposed RRC responses to comments on our rules (including oral comments we heard today) as I will be busy taking care of these grandchildren, I want to send a few thoughts on some of the comments or rules based upon a quick review of what we have received and heard so far.

**Rule 1.4**

While this is not based upon a comment, in reviewing this rule it seemed to me that there may be an inconsistency between (c)(2) and comment 6.

**Rule 1.8.1**

The COPRAC comment appears to me to be a clarification of out intent.

**Rule 3.4**

While I realize that most, if not all, of the SDCBA comments are reiterations of what was submitted before, I think further consideration should be given to Comment 1 regarding (e) (3).

**Rule 6.3**

We should give further consideration to what we mean by "legal service organization." Do we mean just those organizations covered by B&P section 6213? If so, then we should make a reference to 6213. I have asked Toby Rothschild to give this matter some thought and he may be sending an email regarding his views.

Based upon the oral testimony we heard today, I have the following observations:

Rule 1.5

It is my understanding that Barry Tarlow believes that "non-refundable" and "earned on receipt" language is useful in avoiding forfeiture, seizure, etc. of the attorney's fee and that if this language is permitted, he would not be adverse to requiring the fee agreement to state that the client "may or may not be entitled to a refund." I would suggest that consideration be given to this type of language, rather than our proposed disclosure regarding seeking a return of the fee. As to the disclosure that the client can terminate the representation, it was my understanding that he believes this language would create a greater risk that the fee may be forfeited, seized, etc. He pointed out that this language is not required by our proposed rules in other types of fee agreements. We can discuss this further at the meeting.

Rule 6.1

Toby pointed out that we deleted the last sentence of ABA comment 4 and suggested that the sentence be retained as it makes it clear that the attorney's fees can be donated when the matter has been referred to someone willing to do pro bono work. At least one other speaker supported this view. We may want to reconsider this deletion.

**June 11, 2010 Snyder E-mail to KEM:**

I've attached two revised commenter charts as we discussed. Does this look right? I added something in response to the comment that emails should be sent to attorneys instead of a pro bono rule.

**Attached:**

RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

RRC - [6-3] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

**June 13, 2010 KEM E-mail to Snyder:**

The chart for 6.3 looks fine but I've changed "Commentator" to "Commenter" as the heading for second column. I've attached Draft 2.1 (6/13/10) of the Chart. Thanks,

**Attached:**

RRC - [6-3] - Public Comment Chart - By Commenter - XDFT2.1 (06-13-10).doc

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

Dom,

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>).

1.2 (Agenda Item III.D) – 3 Comments: **CPDA (attached)**; HALT; and, OCTC (sent with Randy's 6/15/10 e-mail)

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

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

6.3 (Agenda Item III.JJJ) - 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 - [1-2] - 06-14-10 CPDA Comment re Rule.pdf

**June 17, 2010 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

Do you know if there will be any recommended revisions to Rule 6.3?

**June 17, 2010 KEM E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:**

Nope. I'll be sending you comment chart presently.

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

On Dom's behalf, I'm attaching XDFT 2.2 (6/17/10) of the public comment chart for Rule 6.3, which we discussed earlier in the week but which was not completed until today.

No revisions to the Rule are recommended.

Our apologies to the co-drafters for not getting something out to you earlier.

Please let me know if you have any questions.

**Attached:**

RRC - [6-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10).doc

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

Dom,

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 22<sup>nd</sup>.**

**Attached:**

RRC - [6-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10).doc

RRC - 5-300 [3-5] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc

RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10).doc

RRC - [6-2] - Public Comment Chart - By Commenter - XDFT2 (6-21-10)ML.doc

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

**Rule 6.3 Membership in Legal Services Organization.  
[Sorted by Commenter]**

TOTAL = 3    Agree = 2  
 Disagree =     
 Modify = 1  
 NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 6.3 and the Comments to the Rule.	No response necessary.
3	Office of Chief Trial Counsel ("OCTC")	A	Yes		OCTC supports this rule, but the Comments are more appropriate for treatises, law review articles, and ethics opinions.	Concerning the comment on the Rule itself, no response is necessary. As to the commenter's position concerning the Comments to the Rule, the Commission notes as it has for other rules that the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.
2	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	M	Yes		The proposed rule does not define "legal service organization(s)". Could not find a definition of that exact term anywhere in the proposed rules, the State Bar rules, the California Codes, the Federal Statutes, the Code of Federal Regulations, the ABA Rules, or the Model Rules. Also, the term is confusingly similar to other terms of art such as "legal service corporations" governed by federal law to provide legal services to the poor, qualified employer sponsored tax-exempt prepaid group legal plans under Internal Revenue Code sections 120 and 501(c) 20, and lawyer referral services, which	The Commission disagrees. As the commenter noted, there is no readily available definition of "legal services organization." No other jurisdiction has seen the need to create such a definition. An attempt to define the term would run the risk of excluding from the Rule's <i>permissive</i> coverage activities that should be encouraged.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 6.3 Membership in Legal Services Organization.  
[Sorted by Commenter]**

TOTAL = 3    Agree = 2  
 Disagree =     
 Modify = 1  
 NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>are not intended to be included in the proposed rule.</p> <p>The proposed rule should be modified to include the intended definition of "legal service organization" by citing to the intended definition if one exists or defining the term in a new subsection (c) as follows:                      "(c) The term "legal service organization" means those defined in section(s) _____ of _____ [and/or the case of _____]."                      OR                      "(c) The term "legal service organization" means . . . "</p>	

### **Rule 6.3 Membership in Legal Services Organization** (Commission's Proposed Rule – Clean Version)

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.6, Rule 1.7 or Business and Professions Code section 6068(e); or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

respect can enhance the credibility of such assurances, including assurances that confidential client information will be protected.

#### **COMMENT**

- [1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a lawyer-client relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.
- [2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this