

McCurdy, Lauren

RE: Rule 1.8.7
6/25&26/10 Commission Meeting
Open Session Agenda Item III.Q.

From: Robert L. Kehr [rlkehr@ksclip.com]
Sent: Friday, June 18, 2010 7:50 AM
To: Kevin Mohr; Difuntorum, Randall
Cc: kmelchior@nossaman.com; Kevin Mohr G; McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; Mark Tuft; pwvapnek@townsend.com
Subject: RE: FW: ADDITIONAL COMMENTS (1.8.7) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Yes, I agree that we don't need to take meeting time for the modest points involved with this one.

rlk

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Friday, June 18, 2010 5:39 AM
To: Difuntorum, Randall
Cc: Robert L. Kehr; kmelchior@nossaman.com; Kevin Mohr G; McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; Mark Tuft; pwvapnek@townsend.com
Subject: Re: FW: ADDITIONAL COMMENTS (1.8.7) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Randy:

I'm catching up. First, I agree that no substantive changes are required for the other documents; just need to change the parenthetical or footnoted references to the Rule Draft # & date in the Dashboard & Intro. Second, I agree that this rule should be placed on the consent agenda.
Thanks,

Kevin

Difuntorum, Randall wrote:
Bob & Kevin:

Hopeful that no other comments are received on Rule 1.8.7, the edits to comments [4] and [5] have been implemented in a new draft, DFT 9. Please see the following materials for the agenda submission:

- 1) Rule 1.8.7 Clean Landscape DFT9 (06-16-10)
- 2) Rule 1.8.7 DFT9 redline version compared to the final report public comment version DFT8
- 3) Updated Model Rule Comparison Chart (DFT7) [See yellow highlights.]
- 4) Updated Public Commenter Chart (XDFT2.2) [Note: In this document, all I did was add the totals for the caption box in the header row.]

I don't think any substantive changes are required for any of the other Rule 1.8.7 documents.

QUESTION: Do the drafters agree that this Rule should be placed on the consent?

-Randy D.

Randall Difuntorum
Director, Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2161
randall.difuntorum@calbar.ca.gov

This E-Mail message may contain confidential information and/or privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient) , please contact the sender by reply E-Mail and delete all copies of this message.

From: Robert L. Kehr [<mailto:rlkehr@kscllp.com>]
Sent: Tuesday, June 15, 2010 6:26 PM
To: Kevin Mohr
Cc: kmelchior@nossaman.com; Kevin Mohr G; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; Mark Tuft; pwwapnek@townsend.com
Subject: RE: FW: ADDITIONAL COMMENTS (1.8.7) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Here is the completed public comment chart. Am I right to think that staff will make the three modest changes to Comments [4] and [5]?

rlk

From: Kevin Mohr [<mailto:kemohr@charter.net>]
Sent: Tuesday, June 15, 2010 9:39 AM
To: Robert L. Kehr
Cc: kmelchior@nossaman.com; Kevin Mohr G
Subject: Re: FW: ADDITIONAL COMMENTS (1.8.7) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Bob:

Please use the attached as your starting point for inserting responses. I've placed the comments in alphabetical order and substituted "Commenter" for "Commentator" as is our practice. Thanks,

Kevin

Attached:

RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

Robert L. Kehr wrote:

Kevin: I'll hold the commenter chart until tomorrow night to give Kurt the opportunity to voice his views on this.

rlk

From: Kevin Mohr [<mailto:kemohr@charter.net>]

Sent: Monday, June 14, 2010 7:02 PM

To: Robert L. Kehr

Cc: kmelchior@nossaman.com; Kevin Mohr G

Subject: Re: FW: ADDITIONAL COMMENTS (1.7, 1.8.7 & 8.3) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Bob:

I'm fine w/ all of COPRAC's suggestions, as well as your suggested language, below. Thanks,

Kevin

Robert L. Kehr wrote:

Kurt and Kevin: I began my labors with Rule 1.8.7, to which we now have a comment from COPRAC, and I'm providing the Rule 1.8.7 attachments to Kurt as he seems not to have been copied on the message from Lauren.

I'm ok with all three of the COPRAC recommendations but would suggest a minor editing change to its suggestion regarding the end of Comment [5]. This currently read: "... the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent." COPRAC's suggestion is to remove the words I have underlined. If we do that, I would change the language to say: "... the lawyer makes the required disclosure and the clients give consent in court and on the record."

Any thoughts before I work on the commenter chart?

rlk

From: McCurdy, Lauren [<mailto:Lauren.McCurdy@calbar.ca.gov>]

Sent: Monday, June 14, 2010 5:18 PM

To: Robert L. Kehr

Cc: Difuntorum, Randall; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; pwwapnek@townsend.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu

Subject: ADDITIONAL COMMENTS (1.7, 1.8.7 & 8.3) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Importance: High

Bob,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have 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.

1.7 (Agenda Item III. J) Co-Lead w/Mohr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

**Rule 1.8.7 Aggregate Settlements
[Sorted by Commenter]**

As of 6/16/10

TOTAL = 3 Agree = 0
 Disagree = 0
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment that states: "before a licensed court reporter that transcribes the disclosure and consent" as unnecessary and inconsistent with practices in some courts which use audio tapes instead of court reporters for the record.	suggested change.
3	Office of Chief Trial Counsel ("OCTC")	M	No		<p>1. The commenter supports the proposal to use the term "informed written consent" as that term is used in other California rules.</p> <p>However, the commenter finds the rule as written and the Commission's Comments somewhat confusing, especially Comment [4], which is not in the ABA Model Rules. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement that should be stated in the rule, not a comment.</p> <p>2. The commenter agrees with the definition of aggregate package deals in criminal cases in comment [1].</p> <p>However, the commenter asserts there are too many comments and they are too long. The ABA has only one comment on this subject, while these proposed rules have five comments. Comment [2] seems unnecessary in light of proposed rule 1.4. Comment [3] is too long and could be tightened.</p>	<p>1. No response required.</p> <p>The Commission disagrees as to the statement re comments in general and Comment [4] in particular. Comment [4] explains that the scope of the Rule includes only the settlement with adverse parties, not the allocation of the benefits or burdens of a settlement among jointly-represented clients. This explanation of the limits of the Rule is the proper subject of a Comment.</p> <p>2. No response required.</p> <p>As already noted, the Commission disagrees that there are too many comments. Each comment is necessary to provide adequate guidance to lawyers in this area of the law.</p>

Rule 1.8.7 Aggregate Settlements
[Sorted by Commenter]

As of 6/16/10

TOTAL = 3 Agree = 0
 Disagree = 0
 Modify = 3
 NI =

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee	M	Yes		<p>The second sentence of the Rule states: "The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."</p> <p>SDCBA criticizes "among other things" as being vague and not specifically defining exactly what must be covered in a disclosure. It then recommends says that the entire sentence is unnecessary and likely to cause confusion and should be removed.</p> <p>It points out the need for a conforming change to Comment [3] if the second sentence is removed.</p>	<p>The Commission disagrees and did not make the requested change. The phrase "among other things" is an addition to the Model Rule language that does not change its meaning and is intended only to emphasize, as is true of the Model Rule, that information described in the sentence is not intended to be exclusive. On the broader point, removing the sentence would not alter the lawyer's ability to make a disclosure sufficient to obtain "informed written consent", but doing so would leave the lawyer without any guidance as to what needs to be disclosed to obtain "informed written consent". Including the Model Rule sentence does provide some guidance.</p>

<p align="center"><u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 1.8.7 Aggregate Settlements</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.</p>	<p>(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated aggregate agreement as to guilty or <i>nolo contendere</i> pleas, unless each client gives informed <u>written</u> consent, in a writing signed by the client. The lawyer's disclosure shall include, <u>among other things</u>, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.</p>	<p>Changes to the Model Rule. Proposed paragraph (a) is substantially the same as MR 1.8(g). For consistency, the term "aggregate" is used in relation to both civil and criminal matters throughout this Rule and its Comment. Instead of the Model Rule phrase "informed consent, in a writing signed by the client," the Commission recommends retaining California's more client-protective requirement of "informed written consent." Unlike the Model Rule language, "informed written consent" requires by definition a written disclosure. It is noteworthy that the Restatement of Law of Aggregate Litigation § 3.17(a) (Tent. Draft No. 1 4/2008) requires that each claimant "be able to review the settlements of all other persons subject to the aggregate settlement," indicating the predicate of a written disclosure to permit "review." Moreover, current California rule 3-310(D), the counterpart to Model Rule 1.8(g), requires "the informed written consent of each client," which under rule 3-310(A)(2) requires written disclosure. The Commission sees no reason to depart from the well-settled client protection rule currently in place. The statement of the lawyer's disclosure duty in the second sentence of Model Rule 1.8(g) does not provide adequate client protection. Therefore, the phrase, "among other things" has been added to the sentence, and a more expansive explanation of disclosure under this Rule appears in the comment. See Comments [2] and [3]. Approaches in Other Jurisdictions. Several other jurisdictions have added other exceptions to the Model Rule. Some jurisdictions exclude settlements in class actions (Louisiana and N.D.) or, more broadly, any settlement that is approved by the court (N.Y. and Ohio) or that is in the court's written record (Maryland). Minnesota removes criminal matters</p>

* Proposed Rule 1.8.7, Draft 9 (06-16-10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules</p>	<p align="center"><u>Commission's Proposed Rule</u> Rule 1.8.7 Aggregate Settlements</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
		<p>from the Rule.</p> <p>Concerning the requirement of "informed consent," most jurisdictions follow the Model Rule consent language, but there are a number of jurisdictions that provide less client protection than does the Model Rule. Some of these jurisdictions do not require that the consent be in a writing signed by the client, and some even do not require that the consent be in any writing. For example, Illinois has "consents after disclosure" and N.J. requires "informed consent after consultation". N.D. retains the 1983 Model Rule language that the client "consents after consultation", as do Georgia, Mississippi, and Virginia (which have not revised their rules since the Ethics 2000 revisions were published). Washington requires that the consent be confirmed in writing, so it does not require the client's signature because this writing could be one created by the lawyer.</p> <p>Connecticut requires no client consent "... where the lawyer is retained to represent a client by a third party obligated under the terms of a contract to provide the client with a defense and indemnity for the loss and the third party elects to settle a matter without contribution by the client."</p>

<p align="center">ABA Model Rule Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center"><u>Commission's Proposed Comment to Rule*</u> Rule 1.8.7 Aggregate Settlements Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>Model Rule 1.8, cmt. [13]. See below.</p>	<p>[1] <u>This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or <i>nolo contendere</i> plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.</u></p>	<p>Comments [1], [2], and [3] substantially expand on the single Comment paragraph found in the Model Rule but are intended to be consistent with it. These three paragraphs supplement the discussion of what an aggregate settlement is and what information about the proposed settlement a lawyer is obligated to provide to the client. This fuller explanation should aid lawyer compliance and thus add to client protection.</p>
<p>Model Rule 1.8, cmt. [13]. See below.</p>	<p>[2] <u>This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.</u></p>	

* Redline/strikeout showing changes to the ABA Model Rule

<p align="center">ABA Model Rule Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center">Commission's Proposed Comment to Rule Rule 1.8.7 Aggregate Settlements Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>Comment * * *</p> <p>Aggregate Settlements</p> <p>[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.</p>	<p>Comment * * *</p> <p>Aggregate Settlements</p> <p>[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.</p>	

ABA Model Rule

**Rule 1.8(g) Conflict Of Interest:
Current Clients: Specific Rules
Comment**

Commission's Proposed Comment to Rule

**Rule 1.8.7 Aggregate Settlements
Comment**

Explanation of Changes to the ABA Model Rule

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).

<p align="center">ABA Model Rule Rule 1.8(g) Conflict Of Interest: Current Clients: Specific Rules Comment</p>	<p align="center">Commission's Proposed Comment to Rule Rule 1.8.7 Aggregate Settlements Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</p>
<p>[No corresponding provision]</p>	<p>[4] <u>The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients in reaching an agreement at any time on a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.</u></p>	<p>Comment [4] is consistent with the Model Rule but expresses ideas that are not generally known. The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule itself does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement.</p>
<p>[No corresponding provision]</p>	<p>[5] <u>A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).</u></p>	<p>There is no Model Rule counterpart for proposed Comment [5]. The Commission added this Comment in response to public comment, with which the Commission agrees, to clarify that a court's record of client approval of the terms of a settlement is a "written" disclosure and consent, as the Rule requires.</p>

Rule 1.8.7 [3-310(D)] Aggregate Settlements
(Commission's Proposed Rule – Clean Version)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).

[4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not

prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients in reaching an agreement at any time on a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

- [5] A lawyer's obligation to make a written disclosure and obtain written consent may be satisfied when the lawyer makes the required disclosure and the clients give consent in court and on the record. See the definition of "written" in Rule 1.0.1(n).

Rule 1.8.7 [3-310(D)] Aggregate Settlements

(Commission's Proposed Rule – DFT9 (06-16-10) Compared to Final Public Comment Version~~Clean Version~~)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

- [1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.
- [2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

- [3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).
- [4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not

prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to reach an agreement at any time on a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

[5] A lawyer's obligation to make a written disclosure and obtain written consent ~~is may be satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent~~ on the record. See the definition of "written" in Rule 1.0.1(n).

Rule 1.8.7 [3-310(D)] Aggregate Settlements
(Commission's Proposed Rule – Clean Version)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent. The lawyer's disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Comment

[1] This Rule addresses the conflict issues that arise for a lawyer when the lawyer's clients enter into an aggregate settlement. An aggregate settlement occurs when two or more clients who are represented by the same lawyer resolve their claims, defenses or pleas together, whether in a single matter or in different matters. This can occur in a civil or criminal matter, and it includes a civil settlement made before potential criminal charges are filed. An aggregate settlement in criminal matters often is referred to as a "package deal". This Rule adds an obligation to those the lawyer has under Rule 1.7(b) concerning a lawyer's duties when representing multiple clients in a single matter. It also adds an obligation to those the lawyer has under Rule 1.2(a) to abide by each client's decision whether to make, accept, or reject an offer of settlement in a civil matter or to enter a guilty or nolo contendere plea in a criminal case. This Rule applies whether or not litigation is pending. However, it does not apply to class action settlements that are subject to court approval.

[2] This Rule applies in criminal matters in addition to any obligation to obtain the approval of the trial court. All plea offers, whether written or oral, must be communicated to each client. See Rule 1.4.

[3] This Rule permits a lawyer in a civil matter to negotiate potential settlement terms on behalf of multiple clients, but the lawyer must obtain the informed written consent of each client as provided in this Rule before accepting an opposing party's aggregate settlement offer or before making an aggregate settlement offer that would be binding on multiple clients if an opposing party were to accept it. In addition, Rule 1.4, concerning the lawyer's duty to communicate with each of the lawyer's clients, applies during the negotiation of an aggregate settlement; the lawyer is obligated to fulfill the duty to communicate with all the clients. In making written disclosure to each client of the existence and nature of all the claims or defenses involved and of the participation of each person in the settlement, as is required by this Rule in obtaining informed written consent, the lawyer ordinarily must include the material terms of the settlement, what each of the lawyer's clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them. The disclosure also must include the amount of any fee and of any expense reimbursement the lawyer would receive from the settlement. If the lawyer does not yet know the total amount of expenses to be reimbursed, the lawyer must disclose the amounts then known and make a good faith estimate of additional expenses. See also Rule 1.0(e) (definition of informed consent).

[4] The aggregate settlement that is the topic of this Rule is the agreement with the adverse parties. The Rule does not address any process by which the jointly-represented clients determine how to share the benefits or burdens of that settlement. For example, this Rule does not

prevent a lawyer in a civil matter from participating in making an aggregate settlement although the allocation of the benefits or burdens of the settlement is delayed for subsequent agreement among the lawyer's clients, so long as the lawyer complies with the written disclosure and consent requirements of the Rule. See Comment [3]. Also, provided a lawyer complies with those disclosure and consent requirements, this Rule does not prevent the lawyer from assisting the jointly-represented clients from agreeing at any time to a procedure by which a third-party neutral would be authorized to determine what each of the clients would receive or pay if the settlement were accepted, and the method by which expenses (including any expenses already paid by the lawyer and any expenses to be paid out of the settlement proceeds) would be apportioned among them.

- [5] A lawyer's obligation to make a written disclosure and obtain written consent is satisfied when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent. See the definition of "written" in Rule 1.0.1(n).

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

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):

1.0.1 (Agenda Item III.B)

1.7 (Agenda Item III. J) Co-Lead w/Mohr

**RRC – Rule 1.8.7 [3-310(D) & MR 1.8(g)]
E-mails, etc. – Revised (6/21/2010)**

1.8.7 (Agenda Item III.S)
1.16 (Agenda Item III.DD)
8.3 (Agenda Item III.VVV)

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 - KEHR - DFT1 (06-09-10).pdf
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).pdf
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).doc
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.pdf
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.doc
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.pdf
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.doc
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).pdf
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).doc

June 12, 2010 Kehr E-mail to Drafters (Melchior & KEM):

It appears that the only comment on this rule is S.D.'s resubmission dated 5/10 of the comment it made late last year. I see no need to take the time to tinker with the previous RRC Response to that comment. I will check on the 15th to see if any additional comments have come in, but if not I think we can use our earlier work.

I just tried to access <http://calbar.org/proposedrules> to look at Kurt's dissent regarding written disclosures, but it seems the site is down.

June 12, 2010 KEM E-mail to Kehr & Melchior:

First, I agree there is no need to respond anew to San Diego. Our previous response is fine.

Second, try clicking on this link:

<http://www.calbar.ca.gov/calbar/pdfs/ethics/RPC/ProposedRule1873310DiscussionDraft.pdf>

it will take you directly to submission materials for 1.8.7; there's a link in the left margin directly to Kurt's Minority position.

June 14, 2010 McCurdy E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Bob,

Additional comments in opposition or recommending modifications have been received for the following rules previously assigned and updated commenter tables are attached. The comment compilations for these rules are attached, and have 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.

1.7 (Agenda Item III. J) Co-Lead w/Mohr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

1.8.7 (Agenda Item III.S)

8.3 (Agenda Item III.VVV)

If the drafters prepared and shared with staff an updated public commenter chart with proposed RRC responses, we have tried to use that version for this updated assignment. 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 - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1.1 (06-14-10).doc

RRC - 3-310 [1-8-7] - Public Comment Complete - REV (06-14-10).pdf

RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.1 (06-14-10)RLK-KEM-AT.doc

RRC - 3-310 [1-7] - Public Comments Complete - REV (06-14-10).pdf

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1.1 (6-14-10).doc

RRC - 1-120 [8-3] - Public Comment Complete - REV (06-14-10).pdf

June 14, 2010 Kehr E-mail to Melchior & KEM:

I began my labors with Rule 1.8.7, to which we now have a comment from COPRAC, and I'm providing the Rule 1.8.7 attachments to Kurt as he seems not to have been copied on the message from Lauren.

I'm ok with all three of the COPRAC recommendations but would suggest a minor editing change to its suggestion regarding the end of Comment [5]. This currently read: "... the lawyer

**RRC – Rule 1.8.7 [3-310(D) & MR 1.8(g)]
E-mails, etc. – Revised (6/21/2010)**

makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent.” COPRAC’s suggestion is to remove the words I have underlined. If we do that, I would change the language to say: “... the lawyer makes the required disclosure and the clients give consent in court and on the record.”

Any thoughts before I work on the commenter chart?

Attached:

RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1.1 (06-14-10).doc
RRC - 3-310 [1-8-7] - Public Comment Complete - REV (06-14-10).pdf

June 14, 2010 KEM E-mail to Kehr, cc Melchior:

I'm fine w/ all of COPRAC's suggestions, as well as your suggested language, below.

June 14, 2010 Kehr E-mail to KEM, cc Melchior:

I'll hold the commenter chart until tomorrow night to give Kurt the opportunity to voice his views on this.

June 15, 2010 KEM E-mail to Kehr, cc Melchior:

Please use the attached as your starting point for inserting responses. I've placed the comments in alphabetical order and substituted "Commenter" for "Commentator" as is our practice.

Attached:

RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

June 15, 2010 Melchior E-mail to Kehr, cc KEM:

[Here is my dissent, from Randy's disc:](#)

Proposed Rule 1.8.7 Aggregate Settlements Minority Dissent

This Rule requires “informed, written consent” to any aggregate settlement. The idea behind this Rule is noble, but its implementation in many instances will be very problematical; and if literally enforced, the Rule will preclude many settlements.

It must be common ground for all experienced civil litigators -- and probably in multi-person criminal cases as well -- that while ideally, settlements are arranged prior to trial call or its immediate time frame, in fact many settlements are made literally at the courthouse door. Not always are all of multiple clients -- especially multiple plaintiffs -- in immediate attendance. While it is an ideal concept that both the amount and the internal allocation (which is exempt from the Rule's requirement) of a settlement be discussed in detail with all clients in advance, the fact is that these last minute settlements do occur and often involve different terms from those recently discussed, and that in virtually all cases they satisfy the litigants. Experienced lawyers will have

**RRC – Rule 1.8.7 [3-310(D) & MR 1.8(g)]
E-mails, etc. – Revised (6/21/2010)**

had thorough discussions with their clients about the range of possible settlements beforehand and will be acting with their clients' advance general authorization -- i.e., authorization which involves a range of options. But the facts of life are that there may be unanticipated last minute developments, both about the case itself and about a changing settlement picture, which frequently result in settlements. And those settlements will relate to just one of several options which the lawyer may have discussed with his/her clients: Is the lawyer to provide multiple versions of the informed written consent, encompassing all authorized or desired options?

While it is surely the intent of the Rule that the “informed written consent” can be provided orally by the clients on the court record, this is not always possible. First, not all clients may be present in court. Second, the settlement may take place away from a court reporter and in circumstances which do not lend themselves to a full on-the- record report. Third, the “informed” part of the consent picture (a) requires disclosure of often privileged, confidential information which cannot and should not be spread on a record, and (b) would be of enormous benefit to the opposition by disclosing the weaknesses and evaluations of the parties' case, which could be greatly abused if for any reason the settlement failed. Indeed, upon hearing such a candid disclosure, the opposing party may have second thoughts and may try to scuttle the settlement: such things have happened before.

An “informed” written consent, in the experience of this minority, commonly requires numerous pages of written exposition, which should be carefully prepared and reviewed before signing. That is not something that can be done quickly; but settlements are often done in the twinkling of an eye.

We understand that it is the intent of this Rule that in class action settlements, only the named class representatives must provide their informed written consent, though we do not see that in the Comments, where it should be stated.

Adoption of this Rule will surely have one of two serious negative consequences, perhaps both: Last minute settlements, or settlements which require quick acceptance to “seize the moment,” will disappear; and the Rule will almost surely lead to non-compliance and violations. Neither is good for the profession or for the clients it serves.

June 15, 2010 Melchior E-mail to Drafters:

And I agree that there is nothing to add on account of new public comments.

June 15, 2010 Kehr E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Here is the completed public comment chart. Am I right to think that staff will make the three modest changes to Comments [4] and [5]?

Attached:

Rule 1.8.7 - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc

June 15, 2010 Difuntorum E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Staff will update the rule itself and will include in the agenda materials a new clean draft and a redline to the final report public comment version.

June 16, 2010 KEM E-mail to Difuntorum, McCurdy & Lee:

I've attached revised public comment chart, XDFT2.1 (6/15/10), which adds the OCTC comments and provides responses. The response to the first OCTC criticism re Comment [4] has been copied and pasted from the chart for the initial public comment. All additions are highlighted in yellow.

Attached:

RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc

June 16, 2010 Difuntorum E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Hopeful that no other comments are received on Rule 1.8.7, the edits to comments [4] and [5] have been implemented in a new draft, DFT 9. Please see the following materials for the agenda submission:

- 1) Rule 1.8.7 Clean Landscape DFT9 (06-16-10)
- 2) Rule 1.8.7 DFT9 redline version compared to the final report public comment version DFT8
- 3) Updated Model Rule Comparison Chart (DFT7) [See yellow highlights.]
- 4) Updated Public Commenter Chart (XDFT2.2) [Note: In this document, all I did was add the totals for the caption box in the header row.]

I don't think any substantive changes are required for any of the other Rule 1.8.7 documents.

QUESTION: Do the drafters agree that this Rule should be placed on the consent?

Attached:

RRC - 3-310 [1-8-7] - Compare - Rule & Comment Explanation - DFT7 (06-16-10)-RD.doc
RRC - 3-310 [1-8-7] - Rule - Post-PCD [9] (06-16-10) - CLEAN-LAND.doc
RRC - 3-310 [1-8-7] - Rule - Post-PCD [9] (06-16-10) - Cf. to PCD [8] (12-14-09).doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-16-10)-RD.doc

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

Bob,

You may already be aware of these, but I just realized I didn't note the following comments in my earlier message to you. I'm really sorry, I know how difficult all of this must be to keep up with, especially under the time-constraints we're giving you. . . .

- 1.0.1 (Agenda Item III.B) – **ALSO:** OCTC; and, Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)
- 1.7 (Agenda Item III.J) – Co-Lead w/Mohr – **ALSO:** OCTC; and, Zitrin/Law Professors (comment sent by Randy's 6/15/10 e-mail)
- 1.8.7 (Agenda Item III.S) **ALSO:** OCTC (comment sent by Randy's 6/15/10 e-mail)
- 1.16 (Agenda Item III.DD) **ALSO:** OCTC (comment sent by Randy's 6/15/10 e-mail)
- 8.3 (Agenda Item III.VVV) **ALSO:** Law Practice Management & Technology Section (comment sent by Randy's 6/15/10 e-mail)

Fingers crossed that you have already picked up on these comments.

**RRC – Rule 1.8.7 [3-310(D) & MR 1.8(g)]
E-mails, etc. – Revised (6/21/2010)**

June 18, 2010 KEM E-mail to Difuntorum, cc Drafters & Staff:

I'm catching up. First, I agree that no substantive changes are required for the other documents; just need to change the parenthetical or footnoted references to the Rule Draft # & date in the Dashboard & Intro. Second, I agree that this rule should be placed on the consent agenda.

June 18, 2010 Kehr E-mail to Drafters, cc Staff:

I agree that we don't need to take meeting time for the modest points involved with this one.

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

Bob,

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 - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc
RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc
RRC - 3-310 [1-8-6] - Public Comment Chart - By Commenter - XDFT2 0(6-21-10)ML.doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

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

Lauren: The commenter chart you attached to your message of late this afternoon appears to be the same one that I provided last week and is in the agenda materials beginning at p.31 of the blue materials, except that some of the yellow highlighting was missing. There don't seem to be any additional or overlooked public comments, so I am resubmitting the same item with highlighting added. Is there something more for me to do on this?

June 22, 2010 KEM E-mail to Kehr, cc Drafters, Chair, Vice-Chairs & Staff:

I'll respond for Lauren. You are correct. Nothing more to do on 1.8.7. You might have some other charts that tell the same story, i.e., you have already responded to all the public comment received and we're circulating them to the lead drafter for one final looksee. As always, thanks.

June 22, 2010 Tuft E-mail to RRC List:

Comment [4] says the aggregate settlement rule applies only to agreements with adverse parties and does not apply to how jointly represented clients decide to allocate settlement payments or obligations. The same comment tells lawyers they may assist the joint clients in agreeing "at any time" on a procedure by which a third party neutral could determine what each client receives or pays - provided the lawyer complies with the disclosure and consent requirements mandated by the rule. Rule 1.8.7 and Comment [3] provides that written disclosure shall include the participation of each person in the settlement. Lawyers will likely have trouble understanding how the rule applies (1) if the lawyer assists the joint clients in agreeing to a process for deciding each person's participation at the outset of the case and before there are any settlement prospects and (2) if the lawyer assists the joint clients in agreeing to a process after the terms of a settlement demand or offer are known.

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

As of 6/16/10

TOTAL = 3 Agree = 0
 Disagree = 0
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	M	Yes	Comment [4]	The last sentence of Comment [4] contains certain awkward language that may be corrected by replacing “. . . this Rule does not prevent the lawyer from assisting the jointly-represented clients <i>from agreeing</i> at any time to a procedure” with “. . . this Rule does not prevent the lawyer from assisting the jointly-represented clients <i>in reaching an agreement</i> at any time on a procedure. . . .”	The Commission agrees and has made the suggested change.
				Comment [5]	Comment [5] states: “A lawyer’s obligation to make a written disclosure and obtain written consent <i>is satisfied</i> when the lawyer makes the required disclosure, and the clients give consent, on the record in court before a licensed court reporter that transcribes the disclosure and consent.” COPRAC believes it would be more accurate to change “is satisfied” to “may be satisfied.” This is because, read in isolation, the Comment as currently phrased would improperly suggest that disclosure and consent in court before a licensed court reporter on the record is the <i>only</i> way to satisfy the disclosure and consent requirements of this Proposed Rule.	The Commission generally agrees and has made the suggested change with a slight rewording.
					We recommend deleting the portion of the	The Commission agrees and has made the

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

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

As of 6/16/10

TOTAL = 3 Agree = 0
 Disagree = 0
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					Comment that states: "before a licensed court reporter that transcribes the disclosure and consent" as unnecessary and inconsistent with practices in some courts which use audio tapes instead of court reporters for the record.	suggested change.
3	Office of Chief Trial Counsel ("OCTC")	M	No		<p>1. The commenter supports the proposal to use the term "informed written consent" as that term is used in other California rules.</p> <p>However, the commenter finds the rule as written and the Commission's Comments somewhat confusing, especially Comment [4], which is not in the ABA Model Rules. If the Commission is seeking to allow clients to agree that a neutral third-party may determine the allocation of the aggregate settlement that should be stated in the rule, not a comment.</p> <p>2. The commenter agrees with the definition of aggregate package deals in criminal cases in comment [1].</p> <p>However, the commenter asserts there are too many comments and they are too long. The ABA has only one comment on this subject, while these proposed rules have five comments. Comment [2] seems unnecessary in light of proposed rule 1.4. Comment [3] is too long and could be tightened.</p>	<p>1. No response required.</p> <p>The Commission disagrees as to the statement re comments in general and Comment [4] in particular. Comment [4] explains that the scope of the Rule includes only the settlement with adverse parties, not the allocation of the benefits or burdens of a settlement among jointly-represented clients. This explanation of the limits of the Rule is the proper subject of a Comment.</p> <p>2. No response required.</p> <p>As already noted, the Commissions disagrees that there are too many comments. Each comment is necessary to provide adequate guidance to lawyers in this area of the law.</p>

**Rule 1.8.7 Aggregate Settlements.
[Sorted by Commenter]**

As of 6/16/10

TOTAL = 3 Agree = 0
 Disagree = 0
 Modify = 3
 NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee	M	Yes		<p>The second sentence of the Rule states: “The lawyer’s disclosure shall include, among other things, the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”</p> <p>SDCBA criticizes “among other things” as being vague and not specifically defining exactly what must be covered in a disclosure. It then recommends says that the entire sentence is unnecessary and likely to cause confusion and should be removed.</p> <p>It points out the need for a conforming change to Comment [3] if the second sentence is removed.</p>	<p>The Commission disagrees and did not make the requested change. The phrase “among other things” is an addition to the Model Rule language that does not change its meaning and is intended only to emphasize, as is true of the Model Rule, that information described in the sentence is not intended to be exclusive. On the broader point, removing the sentence would not alter the lawyer’s ability to make a disclosure sufficient to obtain “informed written consent”, but doing so would leave the lawyer without any guidance as to what needs to be disclosed to obtain “informed written consent”. Including the Model Rule sentence does provide some guidance.</p>