

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

Ellen,

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 synthesizing 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):

- 3.4 (Agenda Item III.NN)
- 3.7 (Agenda Item III.QQ)
- 5.5 (Agenda Item III.EEE)

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 - PECK - DFT1 (06-09-10).pdf
- RRC - 1-300 [5-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - 5-210 [3-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 5-220 [3-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-300 [5-5] - Rule - PCD [8.1] (09-17-09) - CLEAN-LAND.pdf
- RRC - 1-300 [5-5] - Rule - PCD [8.1] (09-17-09) - CLEAN-LAND.doc
- RRC - 5-220 [3-4] - Rule - PCD [6] (09-19-09) - CLEAN-LAND.pdf
- RRC - 5-220 [3-4] - Rule - PCD [6] (09-19-09) - CLEAN-LAND.doc
- RRC - 5-210 [3-7] - Rule - PCD [7] (12-12-09) - CLEAN-LAND.pdf
- RRC - 5-210 [3-7] - Rule - PCD [7] (12-12-09) - CLEAN-LAND.doc

June 15, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

- 1.1 = VAPNEK (Peck, Ruvolo)
- 1.5 = VAPNEK (Ruvolo)
- 1.16 = KEHR (Foy, Melchior)
- 5.1 = TUFT (Martinez, Peck)
- 4.4 = MARTINEZ/TUFT
- 7.3 = MOHR (Julien, Ruvolo)
- 8.3 = KEHR (Peck, Tuft, Vapnek)
- 8.4.1 = PECK (Martinez)

8.5 = MELCHIOR (Lamport, Peck)

Attached:

RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

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

Ellen,

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> .

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

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

3.7 (Agenda Item III.QQ) 3 Comments: **COPRAC (attached)**; OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

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

8.4 (Agenda Item III.WWW) – Co-Lead with/Vapnek - OCTC (sent with Randy's 6/15/10 e-mail)=

8.4.1 (Agenda Item III.XXX) - 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 - 5-210 [3-7] - 06-15-10 COPRAC Comment.pdf

June 16, 2010 Peck E-mail to Martinez, cc Difuntorum & McCurdy:

RECOMMEND THAT WE NOT MAKE ANY CHANGES TO THE RULE.

THE ONLY NEW COMMENT IS FROM OCTC, WHO THINK THAT EXCEPT FOR COMMENT 2, SOME OF THE COMMENTS SHOULD BE IN TREATISES AND NOT IN THE RULES.

WE DO NOT HAVE ANY DIRECTION FROM OCTC AS TO WHICH COMMENTS SHOULD BE REMOVED OR SHORTENED OR HOW TO SHORTEN THEM. SINCE THIS RULE IS RARELY ENFORCED AND IS USED FOR GUIDANCE, I THINK THAT WE SHOULD KEEP THE COMMENTS AS DRAFTED FOR GUIDANCE.

FOR ALL OF THESE REASONS, I THINK WE SHOULD ADVISE THE STAFF THAT THERE WILL BE NO CHANGES.

PLEASE, PLEASE, PLEASE LET ME KNOW WHAT YOU THINK AS SOON AS POSSIBLE SO THAT I CAN ADVISE THE STAFF.

June 16, 2010 Martinez E-mail to Peck, cc Difuntorum & McCurdy:

Weren't there comments by SD and Law Practice Mgmt? Is there a comment chart showing those?

June 16, 2010 Difuntorum E-mail to Peck & Martinez, cc McCurdy:

Attached are the comments on 8.4.1 that include SD and LPMT. SD re-submitted its prior approval of the rule, so no response is needed. LPMT agrees with the Commission minority and believes that the proposed rule is not effective and that more public protection is needed. I think Ellen reported her recommendation that no change in the rule should be made in response to these comments.

June 16, 2010 Peck E-mail to Difuntorum & Martinez, cc McCurdy:

Randy: Thanks so much for correcting my mistake on their comments. The materials I have included neither remarks.

Raul: Now that I have seen these comments, it does not change my opinion that we should not make any changes. Please let me know what you think.

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

Ellen,

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 - 2-400 [8-4-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-100 [1-15] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 5-210 [3-7] - Public Comment Chart - By Commenter - XDFT1 (06-21-10)-LC.doc
RRC - 5-220 [3-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc
RRC - 1-120X [8-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association	A	Yes		Support as drafted.	No response required.
2	State Bar Law Practice Management & Technology Section (LPMT)	D	Yes		<p>The Law Practice Management & Technology (LPMT) Section applauds the State Bar's noble intentions in reiterating the principles present in the current Rule of Professional Conduct Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice. Discrimination has no place in our society, least of all among those charged with realizing the promise of the Declaration of Independence: that all are equal.</p> <p>We fear, however, that, given the lightness of the remedies available to the State Bar, this Proposed Rule would not be useful.</p> <p>The State Bar may act only after a final judgment in an arena where settlement is the rule, and final judgments are rare. In terms of what the State Bar will do pursuant to the Rules of Professional Conduct, we</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>have come no further than what has been in place under current Rules of Professional Conduct, Rule 2-400.</p> <p>We agree with the Minority Position:</p> <p>“A minority of the Commission has dissented from this provision on the ground that its inclusion renders the Rule unenforceable because it provides no meaningful relief for victims of discrimination by lawyers and creates no rational risk of discipline for even blatant discriminatory conduct.”</p> <p>We therefore request the State Bar and, where appropriate, the Commission to explore more innovative approaches. Instead of putting the issue adrift on ice while being studied, however, please engage members of the bar and bench to grapple with perhaps the defining legal and moral issue in American history. Indeed, this honorable principle is one that runs from before the founding of the Republic to this very day.</p>	

**Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation.
[Sorted by Commenter]**

TOTAL = 3 Agree = 2
Disagree = 0
Modify = 1
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Office of Chief Trial Counsel	A	Yes		Some of the Comments are more appropriate for treatises, law review articles, and ethics opinions. We support Comment [2].	

Rule 8.4.1 Prohibited Discrimination in Law Practice Management and Operation
(Commission’s Proposed Rule – Clean Version)

- (a) For purposes of this Rule:
 - (1) “knowingly permit” means a failure to advocate corrective action where the managerial or supervisory lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination prohibited in paragraph (b); and
 - (2) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes prohibiting discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability, and as interpreted by case law or administrative regulations.
- (b) In the management or operation of a law practice , a lawyer shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, gender, sexual orientation, religion, age or disability.
- (c) No disciplinary investigation or proceeding may be initiated by the State Bar against a lawyer under this Rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this Rule. In order for discipline to be imposed under this Rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.

COMMENT

- [1] Consistent with lawyers’ duties to support the federal and state constitution and laws, lawyers should support efforts to eradicate illegal discrimination in the operation or management of any law practice in which they participate. Violations of federal or state anti-discrimination laws in connection with the operation of a law practice warrant professional discipline in addition to statutory penalties.
- [2] This Rule applies to all managerial or supervisory lawyers, whether or not they have any formal role in the management of the law firm in which they practice. See Rule 5.1. But see also Rule 8.4(g). “Law practice” in this Rule means “law firm,” as defined in Rule 1.0.1, a term that includes sole practices. It does not apply to lawyers while engaged in providing non-legal services that are not connected with or related to law practice, although lawyers always have a duty to uphold state and federal law, a breach of which may be cause for discipline. See Business and Professions Code section 6068(a).
- [3] In order for discriminatory conduct to be sanctionable under this Rule, it first must be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this Rule.
- [4] A complaint of misconduct based on this Rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding thereafter is appealed.
- [5] This Rule addresses the internal management and operation of a law firm. With regard to discriminatory conduct of lawyers while representing clients, see Rule 8.4(g).