

McCurdy, Lauren

RE: Rule 7.1
6/25&26/10 Commission Meeting
Open Session Agenda Item III.MMM.

From: Ruvolo, Ignazio [Ignazio.Ruvolo@jud.ca.gov]
Sent: Wednesday, June 16, 2010 8:54 AM
To: Kevin Mohr; JoElla L. Julien
Cc: Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Tuft, Andrew; Kevin Mohr G
Subject: RE: RRC - III.MMM. 7.1 - Revised Public Comment Chart

I agree with your draft comments.

Nace

From: Kevin Mohr [kemohr@charter.net]
Sent: Tuesday, June 15, 2010 4:11 PM
To: JoElla L. Julien; Ruvolo, Ignazio
Cc: Randall Difuntorum; Lauren McCurdy; Lee, Mimi; Tuft, Andrew; Kevin Mohr G
Subject: RRC - III.MMM. 7.1 - Revised Public Comment Chart

Greetings:

I've attached XDFT2.2 (6/15/10) of the Public Comment Chart for Rule 7.1, for which we have just received public comment requesting some changes. Please review my suggested responses to the OCBA submissions.

I've recommended that we remove the word "intentionally" from Comment [5] of the proposed Rule, which provides:

[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

I thought that OCBA's point has merit and would make their suggested change.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week. Thanks,

Kevin

Attached:
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-15-10).doc

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Rule 7.1 Communications Concerning the Availability of Legal Services
[Sorted by Commenter]

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

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 7.1 and the Comments to the Rule.	No response required.
4	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>1. OCTC supports this rule, but finds many of the Comments more appropriate for treatises, law review articles, and ethics opinions.</p> <p>We support the first sentence of comment [2].</p> <p>We believe Comment [4] should be in the rule.</p> <p>We would strike the second sentence of Comment [5].</p> <p>2. OCTC supports the Standards attached to this rule.</p>	<p>1. As the Commission has noted with respect to other Rules, 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.</p> <p>No response required.</p> <p>The Commission agrees in principle that the definition of "writing" should be in a rule, but it is found in proposed Rule 1.0.1(n). The Comment has been deleted.</p> <p>The Commission disagrees with the suggested deletion of the second sentence which concerns the misleading use of metatag technology. The Commission believes that it provides an important example of the use of technology to mislead the public.</p> <p>2. No response required.</p>

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

Rule 7.1 Communications Concerning the Availability of Legal Services
[Sorted by Commenter]

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

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>inconsistent, and confusing. It might be read as requiring an intent to mislead whereas the rules have been construed to require only that the act be intentional.</p> <p>The OCBA further recommends that the "Standards" be made part of the new rule itself so that the difficulty in navigating Rule 1-400 that now exists can and will be avoided. The reasons for including a separate "Standards" section in Rule 1-400 simply do not exist in this re-written rule.</p>	<p>intentionally</p> <p>The Commission disagrees that the Standards that have been retained in this Rule should be made a part of the Rule. The Commission has made its recommendation to retain the Standards on the advice of the Office of Chief Trial Counsel of the State Bar of California ("OCTC") that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur. After reviewing the current Standards, the Commission concluded that diluting the effect of the Standards would not be appropriate, and it therefore recommends their retention.</p>
2	San Diego County Bar Association	M	Yes	(c)(3)	<p>Revise (c)(3) as follows: "(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, or deceptive, or which <u>tends to</u> confuses, deceives, or misleads the public."</p> <p>Rationale: Would return (c)(3) to language in current rule 1-400(D)(2); removing "tends to" would "heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide."</p>	<p>The Commission did not make the change. The phrase "tends to" is imprecise. Either the ad confuses, deceives or misleads the public or it does not. Retaining the proposed language creates an objective standard.</p>

Rule 7.1 Communications Concerning the Availability of Legal Services
(Commission's Proposed Rule – Clean Version)

- (a) For purposes of Rules 7.1 through 7.5, "communication" means any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any former, present, or prospective client, including but not limited to the following:
- (1) Any use of firm name, trade name, fictitious name, or other professional designation of such lawyer or law firm; or
 - (2) Any stationery, letterhead, business card, sign, brochure, domain name, Internet web page or web site, e-mail, other material sent or posted by electronic transmission, or other writing describing such lawyer or law firm; or
 - (3) Any advertisement (regardless of medium) of such lawyer or law firm directed to the general public or any substantial portion thereof; or
 - (4) Any unsolicited correspondence, electronic transmission, or other writing from a lawyer or law firm directed to any person or entity.
- (b) A lawyer shall not make a false or misleading communication as defined herein.
- (c) A communication is false or misleading if it:
- (1) Contains any untrue statement; or
 - (2) Contains a material misrepresentation of fact or law; or
 - (3) Contains any matter, or presents or arranges any matter in a manner or format that is false, deceptive, or that confuses, deceives, or misleads the public; or
 - (4) Omits to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not materially misleading.
- (d) The Board of Governors of the State Bar may formulate and adopt standards as to communications that will be presumed to violate Rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these Rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

COMMENT

- [1] This Rule governs all communications about the availability of legal services from lawyers and law firms, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful. The requirement of truthfulness in a communication under this Rule includes representations about the law.
- [2] This Rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the

lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

- [3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may avoid creating unjustified expectations or otherwise misleading a prospective client.
- [4] As used in paragraph (a), "writing" means any writing as defined in the Evidence Code.
- [5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.
- [6] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law.

Standards

Pursuant to paragraph (d), the Board of Governors has adopted the following standards related to paragraph (b) of this Rule:

- (1) A "communication" that contains guarantees, warranties, or predictions regarding the result of the representation.
- (2) A "communication" that contains testimonials about or endorsements of a lawyer unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."
- (3) A "communication" that contains a dramatization unless such communication contains a disclaimer that states "this is a dramatization" or words of similar import.
- (4) A "communication" that states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.
- (5) A "communication" that states or implies that a lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

- (6) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the lawyer shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

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

Kevin,

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

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

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

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

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

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

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

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

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

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

www.calbar.org/proposedrules

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

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

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

Attached:

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

June 13, 2010 KEM E-mail to Drafters (Julien & Ruvolo), cc Difuntorum, McCurdy & Lee:

I've attached the following public comment charts, with responses to the comments received through last Friday. Revisions I've made are highlighted in yellow.

1. III.MMM. Rule 7.1, XDFT2 (6/11/10). Only change from the version staff circulated is add response that no response is required for the COPRAC comment. San Diego has simply resubmitted its comment from the initial public comment period. I see no reason to revise the RRC's response to the S.D. submission.
2. III.NNN. Rule 7.2, XDFT2 (5/21/10). This is the draft circulated for the 6/4/10 meeting. Myles Berman's comment was discussed. However, as the Commission defeated a motion to delete 7.2(c) address requirement, (see 6/4/10 KEM Meeting Notes, III.NNN., at paragraph 1A), there is no reason to change the response to Mr. Berman's submission.
3. III.OOO. Rule 7.3, XDFT2 (6/11/10). As with the other rules, San Diego has simply resubmitted its comment from the initial public comment period. I see no reason to revise the RRC's response to the S.D. submission. The only change from the chart version staff circulated on 6/9/10 is to add "The commenter" at the beginning of the last paragraph of the next to last column.
4. III.PPP. Rule 7.4, XDFT2 (6/11/10). As with the other rules, San Diego has simply resubmitted its comment from the initial public comment period. I see no reason to revise the RRC's response to the S.D. submission. The only change from the chart version staff circulated on 6/9/10 is to add "No response required" as the Commission response to the COPRAC submission and the clause, "for the reasons stated by the commenter" in the second paragraph of the RRC response.

Finally, given our responses to the submitted public comment, I do not recommend any further changes to the Rules themselves.

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

Kevin

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

June 14, 2010 Ruvolo E-mail to KEM, cc Julien & Staff:

This looks good to me.

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

Kevin,

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

7.5 (Agenda Item III.QQQ)

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

Attached:

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc

RRC - 1-400 [7-5] - Public Comment Complete - REV (06-14-10).pdf

June 14, 2010 KEM E-mail to Drafters, cc Difuntorum, McCurdy & Lee re 7.5:

I've attached XDFT2 (6/14/10) of the Public Comment Chart for Rule 7.5, for which we have just received public comment requesting some changes. Please review my suggested responses to the OCBA submissions.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week. Thanks,

Attached:

RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2 (06-14-10).doc

June 14, 2010 Ruvolo E-mail to KEM, cc Julien, Difuntorum, McCurdy & Lee re 7.5:

I agree with your proposed responses.

June 15, 2010 McCurdy E-mail to KEM, cc Chair, Vice-Chairs & Staff re 7.1 & 7.3:

Kevin,

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/Kehr (NOTE: We haven't added the synopsis for the Bradley Paulsen comment to the commenter chart yet, but will do so soon.)

7.1 (Agenda Item III.MMM)

7.3 (Agenda Item III.OOO)

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 - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc
RRC - 3-310 [1-7] - Public Comment Complete - REV (06-15-10).pdf
RRC - 1-400 [7-1] - Public Comment Complete - REV (06-15-10).pdf
RRC - 1-400 [7-3] - Public Comment Complete - REV (06-15-10).pdf

June 15, 2010 KEM E-mail to Drafters, cc Staff re 7.1:

I've attached XDFT2.2 (6/15/10) of the Public Comment Chart for Rule 7.1, for which we have just received public comment requesting some changes. Please review my suggested responses to the OCBA submissions.

I've recommended that we remove the word "intentionally" from Comment [5] of the proposed Rule, which provides:

[5] The list of communications under paragraphs (a)(1) through (a)(4) of this Rule is not exclusive. For example, a lawyer's intentionally misleading use of metatags to divert a prospective client to the web site of the lawyer or the lawyer's law firm would also be prohibited under this Rule.

I thought that OCBA's point has merit and would make their suggested change.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week.

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-15-10).doc

June 15, 2010 KEM E-mail to Drafters, cc Staff re 7.3:

I've attached XDFT2.2 (6/15/10) of the Public Comment Chart for Rule 7.3, for which we have just received public comment requesting some changes. Please review my suggested response to the OCBA submission.

We need to submit by 5:00 p.m. on Wed, June 16, 2010. If you can give me your thoughts before then it will help as I have jury duty this week.

Attached:

RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-15-10).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 (Lampert, 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 Ruvolo E-mail to KEM, cc Drafters & Staff re 7.1:

I agree with your draft comments.

June 16, 2010 Ruvolo E-mail to KEM, cc Drafters & Staff re 7.3:

I agree with your additional comment to the Orange County committee.

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

Kevin,

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

**RRC – Rule 1-400 [7.1 – 7.6]
E-mails, etc. – Revised (6/21/2010)**

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/commentsrrc/byrule> .

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

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

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

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

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

Attached:

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

June 17, 2010 Difuntorum E-mail to Drafters, cc Staff:

Rule 7.3 also has comments from OCTC (pasted below) and LPMT (in the attached compilation). Let us know if any revisions to rule are recommended in response to these comments.

Rule 7.3. Direct Contact with Prospective Clients.

1. OCTC supports this rule, but finds most of the Comments more appropriate for treatises, law review articles, and ethics opinions. We support the last two sentences of Comment 8.

June 17, 2010 KEM E-mail to McCurdy, Difuntorum & Lee, cc Drafters & Chair:

I've attached revised XDFT2.4 (6/17/10) of the Public Comment Chart, which includes the comments of LPMT and a suggested response. Neither JoElla nor Nace has had an opportunity to address the latter response, but I have previously circulated versions of the public comment chart for their review.

I do not recommend any changes to the Rule.

Please let me know if you have any questions.

Attached:

RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-17-10).doc

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

I agree with Kevin's comment.

June 17, 2010 KEM E-mail to McCurdy, Difuntorum & Lee, cc Drafters & Chair:

Earlier I sent you the materials on 7.3. Now I'm sending you the materials for the remaining rules in the "7 series" [1-400]:

1. III.MMM. 7.1

- a. Public Comment Chart, XDFT2.3 (6/16/10).
- b. Rule, Post-PCD [#8] (6/16/10), redline, compared to PCD [#7] (5/30/09). Deleted Comment [4], definition of writing, because it is already a defined term in 1.0.1(n), and renumbered the remaining comments to conform to the Model Rule numbering order.
- c. Rule, Post-PCD [#8] (6/16/10), clean landscape version.

2. III.NNN. 7.2

- a. Public Comment Chart, XDFT2.1 (6/16/10).

3. III.PPP. 7.4

- a. Public Comment Chart, XDFT2.1 (6/16/10).

4. III.QQQ. 7.5

- a. Public Comment Chart, XDFT2.1 (6/16/10).

**RRC – Rule 1-400 [7.1 – 7.6]
E-mails, etc. – Revised (6/21/2010)**

- b. Rule, Post-PCD [#8] (6/16/10), redline, compared to PCD [#7] (5/31/09). Sentence added to end of Comment [1] per request of OCTC.
- c. Rule, Post-PCD [#8] (6/16/10), clean landscape version.

Please let me know if you have any questions.

Attached:

RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-16-10).doc
RRC - 1-400 [7-1] - Rule - Post-PCD [8] (06-16-10) - Cf. to PCD [7] (05-30-09) - LAND.doc
RRC - 1-400 [7-1] - Rule - Post-PCD [8] (06-16-10) - CLEAN-LAND.doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - 1-400 [7-5] - Rule - Post-PCD [8] (06-16-10) - Cf. to PCD [7] (05-31-09) - LAND.doc
RRC - 1-400 [7-5] - Rule - Post-PCD [8] (06-16-10) - CLEAN-LAND.doc

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

Kevin,

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

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

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

Attached:

RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (#)
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc (A)
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (A,#)
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-21-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-21-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc (A, R)
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT3.2 (06-21-10)KEM.doc

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

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

**RRC – Rule 1-400 [7.1 – 7.6]
E-mails, etc. – Revised (6/21/2010)**

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

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

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

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

June 21, 2010 Sapiro E-mail to RRC List:

I suggest that we reconsider the response to Orange County at page 67 of the agenda materials. They do not recommend deleting the standards. To the contrary, they recommend moving them into the rule itself. That would neither delete the standards nor dilute the effect of the standards.

June 22, 2010 Julien E-mail to KEM re 7.1:

I agree with your suggested response.

**Rule 7.1. Communications Concerning the Availability of Legal Services.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 1
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		COPRAC supports the adoption of Proposed Rule 7.1 and the Comments to the Rule.	No response required.
4	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>1. OCTC supports this rule, but finds many of the Comments more appropriate for treatises, law review articles, and ethics opinions.</p> <p>We support the first sentence of comment [2].</p> <p>We believe Comment [4] should be in the rule.</p> <p>We would strike the second sentence of Comment [5].</p> <p>2. OCTC supports the Standards attached to this rule.</p>	<p>1. As the Commission has noted with respect to other Rules, 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.</p> <p>No response required.</p> <p>The Commission agrees in principle that the definition of "writing" should be in a rule, but it is found in proposed Rule 1.0.1(n). The Comment has been deleted.</p> <p>The Commission disagrees with the suggested deletion of the second sentence, which concerns the misleading use of metatag technology. The Commission believes that it provides an important example of the use of technology to mislead the public.</p> <p>2. No response required.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 7.1. Communications Concerning the Availability of Legal Services.
[Sorted by Commenter]**

**TOTAL = 4 Agree = 1
Disagree = 0
Modify = 3
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>inconsistent, and confusing. It might be read as requiring an intent to mislead whereas the rules have been construed to require only that the act be intentional.</p> <p>The OCBA further recommends that the "Standards" be made part of the new rule itself so that the difficulty in navigating Rule 1-400 that now exists can and will be avoided. The reasons for including a separate "Standards" section in Rule 1-400 simply do not exist in this re-written rule.</p>	<p>"intentionally."</p> <p>The Commission disagrees that the Standards that have been retained in this Rule should be made a part of the Rule. The Commission has made its recommendation to retain the Standards on the advice of the Office of Chief Trial Counsel of the State Bar of California ("OCTC") that deleting these standards would make prosecution difficult were the conduct proscribed under those standards to occur. After reviewing the current Standards, the Commission concluded that diluting the effect of the Standards would not be appropriate, and it therefore recommends their retention.</p>
2	San Diego County Bar Association	M	Yes	(c)(3)	<p>Revise (c)(3) as follows: "(3) Contains any matter, or presents or arranges any matter in a manner or format which is false, or deceptive, or which <u>tends to</u> confuses, deceives, or misleads the public."</p> <p>Rationale: Would return (c)(3) to language in current rule 1-400(D)(2); removing "tends to" would "heighten the bar for prosecution, and correspondingly lower the public protection the rule is designed to provide."</p>	<p>The Commission did not make the change. The phrase "tends to" is imprecise. Either the ad confuses, deceives or misleads the public or it does not. Retaining the proposed language creates an objective standard.</p>