

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

Mark,

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

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

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

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

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

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

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

- 1.0 (Agenda Item III.A)
- 3.3 (Agenda Item III.MM)
- 4.3 (Agenda Item III.WW)
- 5.1 (Agenda Item III.ZZ)

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

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

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

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

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

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

**Attached:**

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - TUFT - DFT1 (06-09-10).pdf  
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT1 (04-22-10).doc  
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.pdf  
RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.doc  
RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.pdf  
RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.doc  
RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.pdf  
RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.doc  
RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.pdf  
RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.doc

**June 11, 2010 Difuntorum E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Lauren relayed to me your question about the Rule 1.0 commenter chart. Attached is an updated draft of the commenter chart implementing the Commission action taken at the June 4th meeting (see highlighted text). Please use this commenter chart as your base document for any possible further edits, rather than any of the prior versions.

At the June 4th meeting, Jerry recommended changing the rule itself in response to the San Diego suggestions but the Commission voted against making any of Jerry's changes. The Commission asked that the RRC response to San Diego and to the Rozner comment be modified to use some of Bob Kehr's suggested language in his 5/31/10 email and these changes have been implemented in the attached commenter chart.

**Attached:**

RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3 (06-11-10).doc

**June 11, 2010 Tuft E-mail to Difuntorum, cc Chair, Vice-Chairs & Staff:**

Thank you. Will we be receiving Kevin's minutes of the June 4 meeting in advance of of the June 16 deadline?

**June 11, 2010 KEM E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Here are my meeting notes for the June 4 meeting, in PDF. Please let me know if you need them in Word.

**Attached:**

RRC - 06-04-10 KEM Meeting Notes - DFT2.pdf

**June 15, 2010 Tuft E-mail to Drafters, cc Staff:**

I have nothing to add to Kevin's revisions to the public comment chart for Rule 1.0. Unless you have something to add, the chart is considered completed.

**June 15, 2010 Ruvolo E-mail to Drafters, cc Staff:**

I agree.

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

Mark,

Additional comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date  
<http://sites.google.com/site/commentsrrc/byrule> .

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK)- OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)
- 4.4 (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- MR 4.4(a)** (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 5.1 (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
- 5.2 (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 5.3 (Agenda Item III.BBB) - 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.**

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

OCTC commented on Rule 1.0 (Purpose of the Rules) as set forth below. Do you recommend any revisions in response to OCTC's comment?

**Rule 1.0. Purpose and Scope of The Rules of Professional Conduct.**

Proposed Rule 1.0 sets forth four purposes of the rules. However, it appears that there is one more purpose to the rules not explicitly mentioned in proposed rule 1.0: maintaining high professional standards.

The Supreme Court has held that the primary purposes of imposing discipline includes maintaining the highest possible professional standards for attorneys. (See e.g. *Berry v. State Bar* (1987) 43 Cal.3d 802, 815; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 514; see also Standard 1.3 of the Standards for Attorney Sanctions for professional Misconduct.) The Supreme Court has also stated that “[t]he rules are designed to establish ethical standards for the bar and to prohibit unprofessional conduct.” (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 793; see also *Higgins v. State Bar* (1956) 46 Cal.2d 241, 246; *Millsberg v. State Bar* (1971) 6 Cal.3d 65, 75. See also *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4<sup>th</sup> 419, 431.) OCTC believes that maintaining high professional standards should be stated as an explicit purpose of the rules.

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

No. I submitted an email last night saying I recommended no changes to Rule 1.0 in response to OCTC's comments.

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

Mark,

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

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

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

***Attached:***

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)MLT-KEM.doc  
RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3.1 (06-12-10)KEM.doc  
RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-19-10).doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc  
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc  
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT2.4 (06-19-10)MLT-RM-RD-KEM.doc

**June 22, 2010 Julien E-mail to Drafters, cc Chair & Staff:**

I have nothing further to add except to say that the "guidance" aspect to the rules is found in the (all too) lengthy comments we have made. The rule does not talk about "guidance". The comments do. Thinking of the "trees in Oregon", I like and concur with what the **rule** says.



**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.  
[Sorted by Commenter]**

TOTAL = 6    Agree = 1  
Disagree = 2  
Modify = 3  
NI = 0

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Conduct ("COPRAC")	A	Yes		COPRAC supports the adoption of Proposed Rule 1.0 and the Comments to the Rule.	No response necessary
6	Office of Chief Trial Counsel ("OCTC")	M	Yes		Proposed Rule 1.0 sets forth four purposes of the rules. However, it appears that there is one more purpose to the rules not explicitly mentioned in Proposed Rule 1.0: maintaining high professional standards. OCTC believes that maintaining high professional standards should be stated as an explicit purpose of the rules. The Supreme Court has held that the primary purpose of imposing discipline includes maintaining the highest possible professional standards for attorneys. (See e.g. <i>Berry v. State Bar</i> ; <i>Jackson v. State Bar</i> )  The Supreme Court has also stated that "[t]he rules are designed to establish ethical standards for the bar and to prohibit unprofessional conduct." ( <i>Zitny v. State Bar</i> .)	[TO BE REVISED FOLLOWING 6/25-26/10 MEETING]
5	Paulson, Bradley	D	No	1.0(a)(1) &	Commenter, in general, is concerned with attorney conduct in regard to soliciting clients in the area of Homeowner's Notice of Claim of Violation of Functionality Standards, per Civil Code section 910 and Senate Bill 800.  Soliciting Attorney Groups, working in this	The Commission has considered the commenter's submission and determined that his concerns lie not with the substance of the Rules, but rather with their enforcement, which is beyond the purview of the Commission's charge.

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

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct.  
[Sorted by Commenter]**

**TOTAL = 6**    **Agree = 1**  
**Disagree = 2**  
**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				(2)	area of law, are not disclosing issues that will affect the public, but rather adversely affect the client. Note that the California State Contractor's License Board posts quarterly the names of contractors that are disciplined or have had their license revoked or suspended. There should be a public listing for attorney conduct and discipline matters. The public needs to stay involved with the State Bar process and proceedings, etc.	
				1.0(a)(4)	Soliciting Attorney Groups do not promote respect, but set the stage for their monetary gain by enticing the homeowner with a check of unknown amount. Since the homeowner's homes are warranted and builders honor their warranties, the Soliciting Attorney Groups use the homeowner and their home with the upfront propaganda and unproven solicited flyers/statements as a pawn to confuse and add the homeowner to the Claimant lists.	
				1.0(b)(2)	See the attached flyers that are distributed by Soliciting Attorney Groups and note the extrapolation tactic utilized to draw in litigants/clients. Many pictures are not from the owners' communities. Senate Bill 800 gives the builder the right to repair, but the homeowner needs to let the builder know if they have a problem. The builders do respond	

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**Modify = 3**  
**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>when given the chance or opportunity.</p> <p>The general public very rarely reads or hears of discipline issues for attorneys. From what I see, all attorney groups refrain from notifying the California State Bar when they see violations taking place, as to not draw the Bars' attention to them. This is used to the benefit of the Soliciting Attorney Groups.</p>	
1	Rozner, Maurice	D	No		<p>Why would a sole practitioner bother? The rules are made for and by the large firms. The sole practitioner is ignored and at his detriment.</p>	<p>To the extent that the commenter implies that the Commission's statement of the purpose and scope of the rules includes a large firm bias, the Commission disagrees. The Commission's proposed rule states expressly that the rules "are binding upon all members of the State Bar and all other lawyers practicing law in this state."</p> <p>Because of this, the Commission has been mindful of - and has received public comment reflecting - the wide variety of situations in which rules of professional conduct must be appropriate. These include application to private and to governmental lawyers, to lawyers who work in for profit and in not for profit organizations, and to lawyers who work in large and in small law firms and as sole practitioners. The Commission is unable to see any way in which the proposed rules ignore the circumstances of sole practitioners.</p> <p>In addition, when the issue of bias in the discipline system was last studied in response to a legislative</p>

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**NI = 0**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>mandate, the study concluded that although there may be evidence of more frequent investigations of small-firm lawyers, the frequency of those investigations were commensurate with the larger number of complaints lodged against them compared to large-firm attorneys, and therefore there was no institutional bias. (See State Bar Senate Bill No. 143 Report posted at:  <a href="http://www.calbar.ca.gov/calbar/pdfs/reports/2001_S B143-Report.pdf">http://www.calbar.ca.gov/calbar/pdfs/reports/2001_S B143-Report.pdf</a> )</p>
4	San Diego County Bar Association	M	Yes		<p>Delete Rule 1.0(b)                       Add new subsections (a)(5) and (a)(6) as follows:                      “(5) To provide guidance to lawyers; and                      (6) To provide a basis for the discipline of lawyers “</p>	<p>Commission disagreed and did not make the requested revisions. First, client protection is a core principle in California. Second, providing guidance to lawyers is a means to achieve the four listed purposes. Third, paragraph (b)(2) provides that a willful violation of the Rules is a basis for discipline which accurately states current law.</p>
2	Sillas, Manuel	M	No		<p>By way of example, Commenter explains an unpleasant encounter with three attorneys against whom he is planning to file criminal charges. Commenter may be trying to convey that the scope and purpose of the Rules are not achieving the desired result.</p>	<p>No response necessary</p>

**Rule 1.0 Purpose and Scope of the Rules of Professional Conduct**  
(Commission’s Proposed Rule – Clean Version)

- (a) Purpose: The purposes of the following Rules are:
  - (1) To protect the public;
  - (2) To protect the interests of clients;
  - (3) To protect the integrity of the legal system and to promote the administration of justice; and
  - (4) To promote respect for, and confidence in, the legal profession.
- (b) Scope of the Rules:
  - (1) These Rules, together with any standards adopted by the Board of Governors of the State Bar of California pursuant to these Rules, regulate the conduct of lawyers and are binding upon all members of the State Bar and all other lawyers practicing law in this state.
  - (2) A willful violation of these Rules is a basis for discipline.
  - (3) Nothing in these Rules or the comments to the Rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.
- (c) Comments: The comments following the Rules do not add obligations to the Rules but provide guidance for their interpretation and for acting in compliance with the Rules.
- (d) Title: These Rules are the “California Rules of Professional Conduct.”

**COMMENT**

- [1] The Rules of Professional Conduct are Rules of the Supreme Court of California regulating lawyer conduct in this state. (See *In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 593-597 [79 Cal Rptr.2d 836]; *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418 [25 Cal Rptr.2d 80].) The Rules have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court pursuant to Business and Professions Code sections 6076 and 6077. The Supreme Court of California has inherent power to regulate the practice of law in California, including the power to admit and discipline lawyers practicing in this jurisdiction. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801]; *Santa Clara County Counsel Attorneys Association v. Woodside* (1994) 7 Cal.4th 525, 542-543 [28 Cal.Rptr.2d 617] and see Business and Professions Code section 6100.)
- [2] The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910 [106 Cal.Rptr. 489].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the Rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768]; *Noble v. Sears Roebuck & Co.* (1973) 33 Cal.App.3d 654, 658 [109 Cal.Rptr. 269]; *Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1333 [231 Cal.Rptr. 355].) Nevertheless, a lawyer's

violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. (See, *Stanley v. Richmond*, *supra*, 35 Cal.App.4th 1070, 1086 [41 Cal.Rptr.2d 768]; *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of the rule may have other non-disciplinary consequences. (See e.g., *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509] (disqualification); *Academy of California Optometrists, Inc. v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668] (duty to return client files); *Fletcher v. Davis* (2004) 33 Cal.4th 61 [14 Cal.Rptr.3d 58] (enforcement of attorney's lien); *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536] (enforcement of fee sharing agreement); *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [168 Cal.Rptr. 196] (communication with represented party).)

[3] These Rules are not the sole basis of lawyer regulation. Lawyers authorized to practice law in California are also bound by applicable law including the State Bar Act (Business and Professions Code section 6000 et. seq.), other statutes, rules of court, and the opinions of California courts. Although not binding, issued opinions of ethics committees in California should be consulted for guidance on proper professional conduct. Ethics opinions of other bar associations may also be considered to the extent they relate to rules and laws that are consistent with the rules and laws of this state.

[4] Under paragraph (b)(2), a willful violation of a rule does not require that the lawyer intend to violate the rule. (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Business and Professions Code section 6077.)

[5] For the disciplinary authority of this state and choice of law, see Rule 8.5.