

**Difuntorum, Randall**

RE: Rule 1.0.1  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.B.

**From:** Robert L. Kehr [rlkehr@ksclip.com]  
**Sent:** Friday, June 18, 2010 1:04 PM  
**To:** Difuntorum, Randall  
**Cc:** McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; pwwapnek@townsend.com; kemohr@charter.net; kevinm@wsulaw.edu; JoElla L. Julien; Jerome Sapiro Jr.  
**Subject:** RE: RRC\_Rule 1.0.1 June 25 & 26, 2010 Meeting agenda item B

Randy: This is hard to track. Part of my response to these comments was in my proposed addition to the commenter chart sent out originally on 6/14 in response to the Balin/Dilworth letter. Another part is found in my 6/15 email, one that seems not to have made it to you. I've copied below the meat of that message.

1. OCTC has new comments on this Rule. Rather than trying to put them into the commenter chart, I'm going to give you my comments here:
  - a. I disagree with OCTC about the impact of the Comments. They do not add obligations but they do explain them. The discussion of confidential information in the cited Rule 1.6 Comment does only that. I also don't think that we are defining a statue. Rather we are explaining it. The only change I would suggest we consider is altering (e-1) by changing "defined" to "described".
  - b. The issue of the scope of "tribunal" already is covered.
  - c. This largely is housekeeping. I've looked at each of the Comments OCTC says should be in a treatise or ethics opinion and recommend keeping each of them. Each serves a purpose. As the Zitrin letter emphasizes, one of the purposes of these rules is guidance.
2. The Zitrin letter also comments on Rule 1.0.1:
  - a. At p. 4 it suggests a revision of the informed consent language. I have no strong feelings on this as I think both versions work. Richard overlooks that Rule 1.4 explains the lawyer's duty to "communicate". On the other hand, I am a fan of the concept of "disclosure", but I've never thought that the "relevant circumstances" concept communicates much to the usual reader of the current rule. Any thoughts?
  - b. At p. 6 Richard hits the "tribunal" issue, which we've covered and I won't repeat.

I see that item 2.a. of my 6/15 message was written as a question to my co-drafters. Because of the lateness of the hour, I'll answer my own question: No, I don't recommend a change. While I think that the two-step language of disclosure and consent makes it easier to explain a lawyer's duties by allowing for independent focus on the disclosure element, using "disclosure" in Rule 1.0.1 would cause its own problems. For example, the key language about communication in Rule 1.4 does not use "disclose".

rlk

**From:** Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]  
**Sent:** Friday, June 18, 2010 11:49 AM

**To:** Robert L. Kehr

**Cc:** McCurdy, Lauren; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; pwwapnek@townsend.com; kemohr@charter.net; kevinm@wsulaw.edu; JoElla L. Julien; Jerome Sapiro Jr.

**Subject:** RRC\_Rule 1.0.1 June 25 & 26, 2010 Meeting agenda item B

Bob:

I apologize in advance if I am overlooking a message on this. There are so many.

OCTC and the Zitrin/Law Professor letter commented on Rule 1.0.1 (see below). Do you recommend any revisions to Rule 1.0.1 in response to these comments. Let me know. Thanks. -Randy D.

OCTC COMMENT:

**Rule 1.0.1. Terminology / Definitions.**

1. OCTC is concerned with the definition in proposed rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature's authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4<sup>th</sup> 40.) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.
2. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.
3. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

ZITRIN/LAW PROFESSORS COMMENT:

3. Rule 1.0.1(e) – Definition of informed consent

While the definition of "informed consent" contained in Rule 1.0.1(e) conforms to the ABA Model Rule, it is something of a retrenchment of the broader – and more client-protective – existing California definition currently contained in the conflicts of interest rule. At least in this one case, the Commission has chosen ABA congruence over better California language more protective of clients' interests.

The existing definition of informed consent in the case of conflicts of interest is embodied in current CRPC 3-310(A), which combines disclosure and consent:

- (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client; (Emphasis added.)
- (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure....

The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1(e), in the redlined language below:

'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained adequate information and explanation about the relevant circumstances and the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

This will provide a more clearly informed consent to clients not only as to conflicts of interest, as the current rule now stands, but in all informed-consent situations.

\*\*\*\*\*

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**From:** Robert L. Kehr [mailto:rlkehr@kscllp.com]  
**Sent:** Wednesday, June 16, 2010 5:06 PM  
**To:** McCurdy, Lauren  
**Cc:** Difuntorum, Randall; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvapnek@townsend.com; kevin\_e\_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu; JoElla L. Julien; Jerome Sapiro Jr.  
**Subject:** RRC\_Rule 1.0.1 June 25 & 26, 2010 Meeting agenda item B

Lauren and all: I previously responded to the Balin/Dilworth comment in an email late yesterday afternoon to JoElla and Jerry. Here is a copy of the substance of that message with the attachment ---

This letter repeats at some length arguments made previously, the only new one being that we did not explain why we varied from the MR. We explained that in the rule comparison chart, but I have taken a stab at further comments in the attached commenter chart. My additions are highlighted following Kevin's convention.

This letter repeats at some length arguments made previously, the only new one being that we did not explain why we varied from the MR. We explained that in the rule comparison chart, but I have taken a stab at further comments in the attached commenter chart. My additions are highlighted following Kevin's convention.

I responded to the Michael Judge comment a few moments ago. I think this completes this Rule.

RIk

**From:** McCurdy, Lauren  
**Sent:** Wednesday, June 16, 2010 3:57 PM  
**To:** rlkehr@kscllp.com  
**Cc:** Difuntorum, Randall; Lee, Mimi; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvapnek@townsend.com; kevin\_e\_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu  
**Subject:** RE: ADDITIONAL COMMENTS (1.0.1, 1.7, 1.8.7, 1.16 & 8.3) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

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.

Lauren

**McCurdy, Lauren**

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**From:** Jerome Sapiro Jr. [jsapiro@sapirolaw.com]  
**Sent:** Wednesday, June 16, 2010 6:08 PM  
**To:** 'Robert L. Kehr'; Difuntorum, Randall  
**Cc:** Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvapnek@townsend.com; kevin\_e\_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu; 'JoElla L. Julien'  
**Subject:** RE: RRC\_Rule 1.0.1 June 25 & 26, 2010 Meeting agenda item B

I agree with Bob.

Jerry

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**From:** Robert L. Kehr [mailto:rlkehr@kscllp.com]  
**Sent:** Wednesday, June 16, 2010 5:00 PM  
**To:** Difuntorum, Randall  
**Cc:** Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvapnek@townsend.com; kevin\_e\_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu; JoElla L. Julien; Jerome Sapiro Jr.  
**Subject:** RRC\_Rule 1.0.1 June 25 & 26, 2010 Meeting agenda item B

Randy and all: The Rule 1.5 reference to Rule 1.0.1(n) is to an earlier draft, which at one point read as follows:

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The Evid. C. section 250 definition is:

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or

symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

While we have conformed the definition to California law, we have dropped the definition of "signed" in doing so. I have searched through the Rules to see where "signed" or a variant is used. I located it only in Rule 1.5(e)(1) and (2) ("in a writing signed by the client"), Rule 4.3, Comment [3] ("prepare documents that require the person's signature"), and Rule 5.2, Comment [1] ("if a subordinate signs a frivolous pleading").

The only one of these that is important is the first one. If the Commission is going to create possible professional discipline unless certain fee provisions are "signed" by the client, the Commission should decide whether there is any risk that it will be argued that a writing was not "signed" within the meaning of Rule 1.5(e) because the signature is something other than the usual ink. My view is that we should add the MR definition of "signed", but I would revise it somewhat to say:

A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comments? Suggestions?

rlk

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**From:** Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]

**Sent:** Wednesday, June 16, 2010 1:05 PM

**To:** Robert L. Kehr

**Cc:** Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvapnek@townsend.com; kevin\_e\_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu

**Subject:** RE: ADDITIONAL COMMENTS (1.0.1, 1.8.5, 1.8.6, 1.9, 1.17 & 5.7) RRC Assignment Materials for Robert Kehr: June 25 & 26, 2010 Meeting - Due June, 16th

Bob:

As you probably realize, the Balin/Dilworth letter is the same comment letter that I sent you last night right after it arrived.

So, the only new 1.0.1 letter for you is the Michael Judge comment letter and I have pasted a relevant excerpt below. The only possible substantive issue from Mr. Judge on 1.0.1 is whether the Commission should reconsider a global terminology definition of "signed," as he found a defunct remnant cross reference to such a definition in the 1.5 comments. -Randy D.

**There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of "signed," but "signed" is not defined there or Evidence Code section 250.**

**Rule 10.1 Terminology**  
**[Sorted by Commenter]**

TOTAL =  
 Agree = \_\_\_\_  
 Disagree = \_\_\_\_  
 Modify = \_\_\_\_  
 NI = \_\_\_\_

No.	Commentator	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee	A	Yes		SDCBA expressed concern with the definition of a "tribunal," which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. SDCBA suggests a broader definition of "tribunal" so that a lawyer's duty of candor would extend beyond adjudicative bodies.	The Commission believes that an expansive definition of "tribunal" might be appropriate if used only as a reminder of best practices, but it believes that an expansive definition would not function properly as a disciplinary standard. If the Rule 3.3 duty of candor were extended to legislative and administrative activities, it would intrude on First Amendment requirements. In addition, there are concepts that are problematic outside of the court context. These include, e.g.: (i) the meaning of "legal authority in the controlling jurisdiction" in Rule 3.3(a)(2); and (ii) the application of the <i>ex parte</i> requirements of Rule 3.3(d). Moreover, California uniquely has a statutory duty of honesty under B&P C § 6106 that will supplement Rule 3.3 in egregious situations. The Commission sees no benefit to extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, <i>et seq.</i> The Commission believes it is important to retain the distinction between the special responsibilities that lawyers have under Rule 3.3 in courts of law and in an arbitration that is equivalent to a court of law, and the different but still important duties that lawyers have under Rule 3.9.

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

**Rule 10.1 Terminology  
[Sorted by Commenter]**

TOTAL = \_\_\_  
 Agree = \_\_\_  
 Disagree = \_\_\_  
 Modify = \_\_\_  
 NI = \_\_\_

No.	Commentator	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
	William Balin and Andrew Dilworth	M	No	(m)	<p>This comment expresses many of the same thoughts as those expressed by the S.D. County Bar, and in addition argues that there are important administrative decisions that would be outside the scope of the definition, citing <i>Clare v. State Board of Accountancy</i>, 10 Cal. App.4th 294 (1992) [upholding suspension of accountant's license] and arguing that a lawyer should not be permitted to lie in such a proceeding.</p>	<p>See the RRC Response to the S.D. County Bar's comment, and in particular the reference to California's unique disciplinary standard under B&amp;P C § 6106, which will have the effect of permitting discipline when a lawyer lies to an administrative body without the risks created by an over-inclusive definition of "tribunal". In addition, the Commission notes that the suspension in the <i>Clare</i> case was based on finding by an administrative law judge, which explicitly is within the proposed definition of "tribunal".</p>

**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 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):

**1.0.1** (Agenda Item III.B)

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

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](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 - 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 11, 2010 Kehr E-mail to KEM:**

I want to confirm with you that I'm playing with a full deck, so to speak. My last draft of the commenter chart for this rule is Draft 2.5, which is the one that has your and Jerry's interlineations on my earlier draft. Am I correct that there was no later draft until Lauren recently sent me the Xdraft dated 4-22-10?

Also, the posted comments include one from Bill Balin on behalf of the S.F. Bar ethics committee, but it seems to be missing a page. Have you seen anything more on it?

**June 11, 2010 KEM E-mail to Kehr, cc Difuntorum:**

The last public commenter draft for Rule 1.0.1 [1-100] was 4.1 (4/24/10)-ML-KEM. That was the public comment chart that was submitted to RAC and BOG for consideration at their May meeting. I've attached it to this e-mail for your records. The attached chart summarizes the public comment received for the initial public comment draft that was circulated as part of Batch 6 (Batch 6 was circulated in January 2010, with a March 12, 2010 deadline).

You don't need to do anything further with the XDFT1 (4/22/10) public comment chart. The public comment chart drafts that are denominated as "XDFT1" (or "XDFT2" where the drafters revised them) include only those public comments that have been received during the final public comment period that began in early March for Batches 1-5 (May for Batch 6), and which will end next Wednesday, June 16.

At least for now, we are keeping the public comment charts for the initial public comment and the public comment charts for the final public comment period separate. This is especially important when dealing with those rules that we've substantially changed following the initial public comment.

One more complication is the fact that the San Diego Ethics Committee has resubmitted all of its original comments. They haven't even changed the dates on the submissions. Therefore, in the XDFT1 for Rule 1.0.1, the Staff simply inserted the RRC response from the initial public comment chart, presumably because two can play that game.

Finally, as to Bill Balin's comment that shows up in the complete public comment at the web site, he states that he is commenting on behalf of BASF. It's possible that BASF will be submitting comments by the 6/16/10 deadline. I hope so because he doesn't tell us how they want it modified (perhaps it's an implied invitation to play twenty questions, a game that two can play but for which we don't have the time).

I've copied Randy to see if he can shed some light on the Balin/BASF comment.

Please let me know if you have any questions.

***Attached:***

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - DFT4.1 (04-24-10)-ML-KEM.doc

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

A follow up question: Can you see any reason why I should not combine Draft 2.5 with the Xdraft? So that we have on complete version?

**June 11, 2010 KEM E-mail to Kehr, cc Difuntorum:**

Yes, for now I would hold off. We made some changes to the paragraph lettering, etc., in 1.0.1 that will likely cause confusion if we combine the two charts. Even with those rules where we didn't make any changes, I would argue against combining the charts because then we'll end up w/ some rules that would have only one chart and some that would have two charts. Better to

explain up front in the overall report that there are two charts of public comments because there were two separate public comment periods and two separate drafts rather than have some rules w/ one chart and some with another.

We should considering providing the Court with two different charts, one for the initial public comment, and one for the final public comment, and explain to the court why we have done so.

**June 12, 2010 Kehr E-mail to KEM, cc Difuntorum, Sapiro & Julien:**

The bottom line seems to be that there are no new comments on this Rule, and that therefore there is nothing for us to do on it. I am copying my co-drafters so that they will know not to expect anything from me on this Rule unless a new comment comes in.

At least with this Rule, there seems to have been drafting on which I had not previously been copied, which caused me a good deal of confusion and wasted time. I will turn to other rules a bit later today, and only with trepidation.

**June 12, 2010 KEM E-mail to Kehr, cc Difuntorum, Sapiro & Julien:**

I've attached the e-mail compilation dated 6/21/10, including e-mails through our exchange of yesterday. Please refer to my 4/25/10 e-mail to Randy, Lauren & Mimi, which identifies any changes that we made to the documents that were submitted to RAC/BOG, all of which were non-substantive.

Please also refer to the section in that e-mail titled "FOOD FOR THOUGHT IN THE FUTURE," which identifies certain changes that might be required, depending on decisions made by RAC/BOG at its May meeting. I've inserted the comments below, with my further observations:

1. Comment [8] to proposed Rule 1.0.1 may have to be revised depending on what action RAC/BOG take w/ respect to Rules 1.10 and 1.18. Corresponding changes would have to be made to the Explanation column of the rule & comment comparison chart.

**KEM: No further revisions are required as screening is not part of either Rule 1.10 or 1.18.**

2. The defined term in (e-2) refers to "information protected by Business and Professions Code section 6068(e)". However, the term we have used in proposed Rule 1.6 is "information protected by ... section 6068(e)(1)". I don't think we should make any changes to this Rule now but we will need to resolve this disparity for the Final Report. Other rules that use similar terms (e.g., Rule 1.13, 1.14) will also have to be conformed to whatever term we agree upon.

**KEM: No change is required to this Rule. We are changing the reference in other rules to conform to the phrase used here ("information protected by Business and Professions Code section 6068(e)"). In particular, we've already implemented the change in 1.6 at the last meeting.**

3. There may also be an issue concerning "tribunal," depending upon RAC/Board decisions at the May meeting.

**KEM: No issue arose as RAC/BOG accepted our definition of tribunal.**

Please let me know if you have any questions. My apologies for any confusion our minor clean up revisions might have caused.

**June 12, 2010 Kehr E-mail to KEM, cc Difuntorum, Sapiro & Julien:**

I agree with your three comments below.

**June 12, 2010 Kehr E-mail to KEM, cc Difuntorum, Sapiro & Julien:**

I’ve started to look at the email compilation you sent out a few minutes ago, and I see in your 4/25/10 email to Lauren references a number of drafting changes made in 4/24 redrafts, none of which I appear to have. There might be some way of making an end run by going to Board agendas or some other source, but I think it would be nice, and it certainly would save the rest of us a good deal of time, if the drafting teams were given Word versions of the latest drafts of all these documents.

**June 14, 2010 Difuntorum E-mail to Kehr & KEM, cc McCurdy & Lee:**

See below for what Bill Balin has to say about comments from BASF.

***June 14, 2010 Bill Balin E-mail to Difuntorum:***

I thank you for your inquiry.

The Ethics Committee of BASF approved a letter comment on 1.0.1(m), as well on Rule 1.1, but we did not have time to get these proposed comments to the BASF Board in time for it to act on them. Thus, Drew Dilworth and I are submitting comments under our names only. The Board will consider the matter in July, and if it approves the comments, we will advise you.

Drew and I also are submitting other comments on different aspects of proposed Rule 1.5.

If you have any other questions, please call or e-mail me.

**June 14, 2010 Difuntorum E-mail to Kehr & KEM, cc McCurdy & Lee:**

Hot off the fax machine, attached is Bill Balin’s comment (also signed by Drew Dilworth) on Rule 1.0.1.

***Attached:***

RRC - 1-100 [1-0-1] - BASF (Balin, Dilworth) re Tribunal (06-14-10).pdf

**June 14, 2010 Balin/Dilworth Public Comment re Rule 1.0.1 (“Tribunal”):**

I and Drew Dilworth, are submitting this letter to comment on the proposed rule, 1.0.1, subdivision (m), the definition of "tribunal." We are, respectively, Chairperson and Vice-Chair of the Ethics Committee of the Bar Association of San Francisco, but we are sending this letter to you as individuals since the BASF Board of Governors has not yet had an opportunity to review and consider our comments. Should BASF adopt these letters, we will advise the Commission.

We are concerned that the present version of the proposed rule defines the term, too narrowly, thereby rendering the obligations embodied in other proposed rules, such as rule 3.3 (Candor Toward the Tribunal) inapplicable to conduct carried out by lawyers in proceedings in which such obligations should be imposed.

The Commission's proposed definition significantly deviates from ABA Model Rule 1.0(xn)'s definition of tribunal. ABA Model Rule 1.0(m) provides:

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.

The rule goes on to explain that "[a] legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral officer, after the presentation of evidence or legal argument by a party or parties, will tender a binding legal judgment directly affecting a party's interest in a particular matter."

**[Page 2]** In contrast, the Commission's proposed rule 1.0.1(m) states:

"Tribunal" means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

Accordingly, the Commission's proposed definition omits, and would not cover, adjudicative proceedings conducted by administrative agencies, legislative bodies or "other bodies." In contrast, the ABA definition applies to all proceedings that are adjudicative of a party's legal rights or interests regardless of the specific body that is entrusted with carrying out the adjudicative proceeding. The Commission's materials do not articulate any reason why an adjudicative proceeding that is not carried out by a court, arbitrator, administrative law judge or special master, but that nonetheless adjudicates a party's legal rights or interests, should not be included within the definition of "tribunal."

There are many bodies that are authorized to adjudicate the legal rights or interests of a party that do not fall within the Commission's proposed definition. These include, for example, the various medical boards that hear complaints of misconduct of licensed practitioners, from doctors and osteopaths to nurses, radiologists and dentists. Virtually all disciplinary proceedings conducted by these agencies are decided by members of the particular profession in issue, not by judges, arbitrators, administrative law judges or special masters. Yet they determine very significant issues, such as a professional's

ability to continue to practice. Most of the time the case against the respondent facing disciplinary action is presented by a deputy attorney general, and all respondents have the right to be represented by counsel at the hearings.

The impact of the Commission's proposed definition is significant when considered in the context of other proposed rules. Proposed Rule 3.3, for example, generally prohibits a lawyer from making false statements of fact or law to a tribunal, failing to correct a false statement of fact or law made by the lawyer to the tribunal, failing to disclose legal authority in the controlling jurisdiction known to be directly adverse to the lawyer's client and not disclosed by opposing counsel, offering evidence the lawyer knows to be false, and taking reasonably remedial measures with respect to criminal or fraudulent conduct (to the extent permitted by the duty of confidentiality). As it now stands, the proposed definition would not require the attorneys prosecuting and defending against disciplinary actions in the aforementioned professions to be truthful to the boards before whom they appear.

Candor to courts and tribunals is a fundamental precept of our legal jurisprudence. It fosters the procurement of just results and promotes confidence in the veracity of administrative proceedings. Furthermore, where a person's ability to practice in his or her chosen profession is at stake, the concept of fundamental fairness rises to the level of due process. (See, e.g., *Clare v. Board of Accountancy* (1992) 10 Cal. App. 4th 294, 300) Unfortunately, under the Commission's [Page 3] proposed definition of "tribunal", lawyers would be exempted from these important obligations if, and when, they advocate before bodies that are acting in an adjudicative manner but do not fall within the current proposed definition. Why, for example, should a lawyer not be precluded from making false statements of law or fact to the State Franchise Tax Board or to a licensing agency?

We understand that certain concerns have been raised about defining the term "tribunal" in a manner that would apply to adjudicative bodies before which both lawyers and non-lawyers appear, thus ostensibly placing lawyers at a disadvantage, since the non-lawyers would not be subject to the same limitations. This concern does not persuade us that the ABA definition should be so limited.

First, the fundamental principles at issue here, so core to our legal system, should not be displaced simply by the fact that a lawyer's opponent may not be limited by the ethical constraints that bind attorneys. The threat of disciplinary action does not always deter unscrupulous lawyers from acting dishonestly; this does not mean that no lawyers should be subject to a rule prohibiting such conduct. Simply because non-lawyers may feel free to act unscrupulously does not mean that lawyers should also be free to do so.

Second, the rule even as proposed, does not apply to non-lawyers in any venue. If the concern is that lawyers are therefore at a disadvantage when opposing lay people representing themselves, then we should not promulgate any rule at all. regarding candor to a tribunal.

Third, we are not convinced that a non-lawyer would get away with dishonesty before a tribunal where the lawyer opposing that person must conform to the rule. The lawyer can still question and challenge the non-lawyer's conduct and attempt to discredit it.

The bottom line is that lawyers are held to higher standards than other individuals. These standards apply even to acts that do not strictly constitute the practice of law. (See, e.g., *Crawford v. State Bar* (1960) 54 Ca1.2d 659) Being a lawyer carries both special privileges and special responsibilities. That an adversary may not be held to the same high standard does not mean that our ethical obligations must therefore be diminished. An attorney must be truthful even when his or her opponent is not.

We appreciate the opportunity to have presented our views to the Commission, and we hope the Commission will give further consideration to these matters.

**June 14, 2010 Kehr E-mail to Julien & Sapiro, cc KEM:**

I am forwarding Randy's message of this afternoon, which contains the only new Rule 1.0.1 comment, b/c it was not sent to you originally.

This letter repeats at some length arguments made previously, the only new one being that we did not explain why we varied from the MR. We explained that in the rule comparison chart, but I have taken a stab at further comments in the attached commenter chart. My additions are highlighted following Kevin's convention.

**Attached:**

RRC - 1-100 [1-0-1] - BASF (Balin, Dilworth) re Tribunal (06-14-10).pdf

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-14-10).doc

**June 15, 2010 Sapiro E-mail to Kehr, cc Julien & KEM:**

I agree with the substance of your approach.

There are other factors that we could mention. For example, applying 3.3 standards to arguments before administrative or legislative bodies would invite retaliatory complaints against lawyers by opponents or their clients to discourage political discourse, but on balance I think we need not get into that type of detail.

I think Stan was the most eloquent spokesperson for the majority view, and you might invite him to add his two cents' worth.

I am on the fence about this issue. I think the rules should apply in some non-adjudicatory contexts. For example, I think the standards in 3.3 should apply to representations to the SEC, Department of Corporations and Secretary of State, such as in registrations or permit applications. But I know the majority do not agree with me.

**June 15, 2010 Kehr E-mail to Sapiro, cc Julien & KEM:**

When I drafted the tribunal definition and recommended to the drafting team and then to the Commission that we take a narrow approach, I spent considerable time attempting to identify those situations in which the MR and other broad definitions of the term might be applied, and I looked carefully at the changes in the MR definition made by something on the order of 11 states. I reached a number of conclusions in the process about the lack of specificity of the MR

language, the unpredictability of how the MR language would be applied, the impossibility of applying portions of Rule 3.3 outside of the context of courts and their equivalents, and the MR’s blurring of best practices and disciplinary standards. Along the way, I came to believe that Rule 3.3 describes requirements that are peculiar to courts, and that the kind of dishonesty that most troubles commenters already is covered in California by 6106. If, for example, a lawyer were to lie to the SEC, both the SEC and the Bar would have disciplinary authority without expanding the duties that lawyers now have to courts under rule 5-200 (and I’m not aware that anyone has criticized 5-200 as having limitations that have permitted lawyers to act badly with impunity). I think that any expansion of the definition would cause no end of trouble.

**June 15, 2010 Sapiro E-mail to Kehr, cc Julien & KEM:**

I don’t disagree with what you have said, and I did not mean to suggest that we change the definition we have proposed. I was merely venting about my misgivings.

Don’t change what you proposed because of my comments unless you agree with letting Stan chime in.

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

1. OCTC has new comments on this Rule. Rather than trying to put them into the commenter chart, I’m going to give you my comments here:
  - a. I disagree with OCTC about the impact of the Comments. They do not add obligations but they do explain them. The discussion of confidential information in the cited Rule 1.6 Comment does only that. I also don’t think that we are defining a statue. Rather we are explaining it. The only change I would suggest we consider is altering (e-1) by changing “defined” to “described”.
  - b. The issue of the scope of “tribunal” already is covered.
  - c. This largely is housekeeping. I’ve looked at each of the Comments OCTC says should be in a treatise or ethics opinion and recommend keeping each of them. Each serves a purpose. As the Zitrin letter emphasizes, one of the purposes of these rules is guidance.
2. The Zitrin letter also comments on Rule 1.0.1:
  - a. At p. 4 it suggests a revision of the informed consent language. I have no strong feelings on this as I think both versions work. Richard overlooks that Rule 1.4 explains the lawyer’s duty to “communicate”. On the other hand, I am a fan of the concept of “disclosure”, but I’ve never thought that the “relevant circumstances” concept communicates much to the usual reader of the current rule. Any thoughts?
  - b. At p. 6 Richard hits the “tribunal” issue, which we’ve covered and I won’t repeat.

Unless I am overlooking something, which seems likely at this point, that covers all of the Rule 1.0.1 comments.

**June 15, 2010 Sapiro E-mail to Kehr, cc Julien & KEM:**

With one exception, I agree with your thoughts regarding OCTC comments. The exception is that I can't link your suggestion with (e-1) with my copy of the draft rule. My copy does not use “defined.” Can you direct me to what you would change?

I agree with Richard Zitrin that informed consent should include the relevant circumstances. Even if the concept is discussed elsewhere, I think we should carry forward the current concept in 3-310 into the “informed consent” definition explicitly. That way, we avoid implying a change.

**June 16, 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, and those **comments not previously sent to you** are attached here for your review. The Google site should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule> ).

**1.0.1** (Agenda Item III.B) – **2 Comments: Balin/Dilworth; and, LA Public Defender-Michael Judge (attached)**

**1.8.5** (Agenda Item III.Q) – OCTC (comment sent by Randy's 6/15/10 e-mail)

**1.8.6** (Agenda Item III.R) – OCTC (comment sent by Randy's 6/15/10 e-mail)

**1.9** (Agenda Item III.W) – OCTC (comment sent by Randy's 6/15/10 e-mail)

**1.17** (Agenda Item III.EE) Co-Lead w/Sapiro – OCTC (comment sent by Randy's 6/15/10 e-mail)

**5.7** (Agenda Item III.GGG) – Zitrin/Law Professors (comment sent by 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 - 1-100 [1-0-1] - BASF (Balin, Dilworth) re Tribunal (06-14-10).pdf  
RRC - 1-100 [1-0-1] - 06-14-10 LAPD (Judge) Comment.pdf

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

As you probably realize, the Balin/Dilworth letter is the same comment letter that I sent you last night right after it arrived.

So, the only new 1.0.1 letter for you is the Michael Judge comment letter and I have pasted a relevant excerpt below. The only possible substantive issue from Mr. Judge on 1.0.1 is whether the Commission should reconsider a global terminology definition of “signed,” as he found a defunct remnant cross reference to such a definition in the 1.5 comments.

**There are a few proofreading errors. Rule 1.5 Comment [9] refers to paragraph (f)(2) which does not exist. Probably it means (e)(2), because (f) is not subdivided. Comment (10) refers to Rule 1.01(n) for a definition of “signed,” but “signed” is not defined there or Evidence Code section 250.**

**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.

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

Randy and all: The Rule 1.5 reference to Rule 1.0.1(n) is to an earlier draft, which at one point read as follows:

“Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A “signed” writing includes an electronic sound,

symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

The Evid. C. section 250 definition is:

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

While we have conformed the definition to California law, we have dropped the definition of “signed” in doing so. I have searched through the Rules to see where “signed” or a variant is used. I located it only in Rule 1.5(e)(1) and (2) (“in a writing signed by the client”), Rule 4.3, Comment [3] (“prepare documents that require the person’s signature”), and Rule 5.2, Comment [1] (“if a subordinate signs a frivolous pleading”).

The only one of these that is important is the first one. If the Commission is going to create possible professional discipline unless certain fee provisions are “signed” by the client, the Commission should decide whether there is any risk that it will be argued that a writing was not “signed” within the meaning of Rule 1.5(e) because the signature is something other than the usual ink. My view is that we should add the MR definition of “signed”, but I would revise it somewhat to say:

A “signed” writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person with the intent to sign the writing.

Comments? Suggestions?

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

Lauren and all: I previously responded to the Balin/Dilworth comment in an email late yesterday afternoon to JoElla and Jerry. Here is a copy of the substance of that message with the attachment ---

This letter repeats at some length arguments made previously, the only new one being that we did not explain why we varied from the MR. We explained that in the rule comparison chart, but I have taken a stab at further comments in the attached commenter chart. My additions are highlighted following Kevin's convention.

I responded to the Michael Judge comment a few moments ago. I think this completes this Rule.

**Attached:**

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1.3 (06-16-10).doc

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

I agree with Bob.

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

I do as well.

**June 18, 2010 Difuntorum E-mail to Kehr, cc Drafters, Chair, Vice-Chairs & Staff:**

I apologize in advance if I am overlooking a message on this. There are so many.

OCTC and the Zitrin/Law Professor letter commented on Rule 1.0.1 (see below). Do you recommend any revisions to Rule 1.0.1 in response to these comments. Let me know.

**OCTC COMMENT:**

**Rule 1.0.1. Terminology / Definitions.**

1. OCTC is concerned with the definition in proposed rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed rule 1.0.1(e)(2) states that information protected by Business & Professions Code section 6068(e) is defined in Rule 1.6, comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the Business & Professions Code. That would be interfering with the Legislature’s authority to impose some regulation on the legal profession. (See *Obrien v. Jones* (2000) 23 Cal.4<sup>th</sup> 40.) Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see proposed rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.
2. OCTC remains concerned that proposed rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from the definition. Like the ABA, OCTC believes that legislative bodies *acting in an adjudicative capacity* should be included in the definition of tribunal.
3. Comments 1, 3, 4, 5, 11 and 12 are more appropriate for treatises, law review articles, and ethics opinions. Comments 6-10 belong in the rules involving conflicts, not this rule.

**ZITRIN/LAW PROFESSORS COMMENT:**

3. Rule 1.0.1(e) – Definition of informed consent

While the definition of “informed consent” contained in Rule 1.0.1(e) conforms to the ABA Model Rule, it is something of a retrenchment of the broader – and more client-protective – existing California definition currently contained in the conflicts of interest rule. At least in this one case, the Commission has chosen ABA congruence over better California language more protective of clients’ interests.

The existing definition of informed consent in the case of conflicts of interest is embodied in current CRPC 3-310(A), which combines disclosure and consent:

- (1) “Disclosure” means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client; (Emphasis added.)
- (2) “Informed written consent” means the client’s or former client’s written agreement to the representation following written disclosure....

The proposed Commission definition says nothing about “relevant circumstances” and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1(e), in the redlined language below:

‘Informed consent’ means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained ~~adequate information and explanation about~~ the relevant circumstances and the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

This will provide a more clearly informed consent to clients not only as to conflicts of interest, as the current rule now stands, but in all informed-consent situations.

**June 18, 2010 Kehr E-mail to Difuntorum, cc Drafters, Chair, Vice-Chairs & Staff:**

This is hard to track. Part of my response to these comments was in my proposed addition to the commenter chart sent out originally on 6/14 in response to the Balin/Dilworth letter. Another part is found in my 6/15 email, one that seems not to have made it to you. I’ve copied below the meat of that message.

1. OCTC has new comments on this Rule. Rather than trying to put them into the commenter chart, I’m going to give you my comments here:
  - a. I disagree with OCTC about the impact of the Comments. They do not add obligations but they do explain them. The discussion of confidential information in the cited Rule 1.6 Comment does only that. I also don’t think that we are defining a statue. Rather we are explaining it. The only change I would suggest we consider is altering (e-1) by changing “defined” to “described”.
  - b. The issue of the scope of “tribunal” already is covered.
  - c. This largely is housekeeping. I’ve looked at each of the Comments OCTC says should be in a treatise or ethics opinion and recommend keeping each of them. Each serves a purpose. As the Zitrin letter emphasizes, one of the purposes of these rules is guidance.

2. The Zitrin letter also comments on Rule 1.0.1:
  - a. At p. 4 it suggests a revision of the informed consent language. I have no strong feelings on this as I think both versions work. Richard overlooks that Rule 1.4 explains the lawyer’s duty to “communicate”. On the other hand, I am a fan of the concept of “disclosure”, but I’ve never thought that the “relevant circumstances” concept communicates much to the usual reader of the current rule. Any thoughts?
  - b. At p. 6 Richard hits the “tribunal” issue, which we’ve covered and I won’t repeat.

I see that item 2.a. of my 6/15 message was written as a question to my co-drafters. Because of the lateness of the hour, I’ll answer my own question: No, I don’t recommend a change. While I think that the two-step language of disclosure and consent makes it easier to explain a lawyer’s duties by allowing for independent focus on the disclosure element, using “disclosure” in Rule 1.0.1 would cause its own problems. For example, the key language about communication in Rule 1.4 does not use “disclose”.

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

***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 Sapiro E-mail to RRC List:**

I agree with the Zitrin recommendation that informed consent should include informing the client about the relevant circumstances. Even if the concept is discussed elsewhere, I think we should carry forward the concept in current 3-310 into the definition of “informed consent” explicitly. That way, we will avoid implying a change.

**June 22, 2010 Julien E-mail to Kehr, Sondheim, Difuntorum & KEM:**

I am calling this a hallelujah rule as there is nothing to do on it.

**June 22, 2010 Kehr E-mail to Julien, Sondheim, Difuntorum & KEM:**

I’m nervous to report to you that there were public comments after I sent my 6/12 message.

**June 22, 2010 Difuntorum E-mail to Julien, cc Sondheim, Kehr & KEM:**

Attached is the Rule 1.0.1 commenter chart. The full text of comments are online at:  
<http://sites.google.com/site/commentsrrc/>

***Attached:***

RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc

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

In view of Richard’s letter and Jerry’s agreement with it (and I apologize if I am overlooking anyone else’s comments on this, but I cannot keep track), I have prepared the enclosed commenter chart in recognition of the possibility that the Commission will decide to change the paragraph (e) definition. I do not favor this change. I never have thought that the phrase “relevant circumstances” communicates much. I prefer to adhere more closely to the MR definition, although I would not object to changing “a person’s agreement” to “a person’s informed agreement”. Here is a suggestion much along the lines of Richard’s suggestion:

“Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained ~~adequate information and explanation~~ about the relevant circumstances and the reasonably foreseeable materials risks of the proposed conduct, and of the ~~reasonably available alternatives to, the proposed course of conduct.~~”

If the Commission makes this change, I don’t believe that any change in the Comment would be needed.

I hope that everything else in the commenter chart is self-explanatory.

**Sapiro E-mail to Kehr, cc Drafters, Chair, Vice-Chairs & Staff:**

I found your suggested language a bit awkward. I tried to smooth it out, but I fear my rewrite is not an improvement. I attach it so you can pick it apart.

**Attached:**

RRC - 1-100 [1-0-1] - Informed Consent Definition - DFT2 (06-22-10)JS.doc

**Sapiro’s Proposed Definition:**

“Informed consent” means a person’s agreement to a proposed course of conduct after the lawyer has communicated and explained ~~adequate information and explanation~~ about (i) the relevant circumstances ~~and~~ (ii) the reasonably foreseeable material risks of and (iii) the reasonably available alternatives to, the proposed conduct, ~~and of the reasonably available alternatives to~~, the proposed course of conduct.

**KEM E-mail to Drafters, Chair, Vice-Chairs & Staff:**

Greetings:

So everyone has it for this discussion, I've inserted relevant excerpts from my meeting notes for 1.0.1. This will be part of the e-mail compilation excerpt that will be circulated later today.

Kevin

**August 27-28, 2009 KEM Meeting Notes:**

10. Paragraph (e). Informed consent.

(e) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure. denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

a. Bob: Would like two definitions of “informed consent”. See 8/15/09 Kehr E-mail to KEM, cc Drafters, etc.

b. KEM: Should not have two definitions. Instead, use the MR definition globally and instead address the more robust disclosures rule-by-rule. See 8/15/09 KEM E-mail to Kehr, cc Drafters, etc.

(1) Bob: Would be fine with that.

c. Mark: Thinks that disclosure as we have defined it in paragraph (b) means one thing, the ABA definition means another thing.

d. KEM: Asks why the ABA definition means something different from what is covered in “disclosure”.

- e. Harry: Put off discussion of this paragraph until the drafters have had an opportunity to resolve.
  - (1) Bob, KEM and Mark to exchange e-mails.

**November 6-7, 2009 KEM Meeting Notes:**

2. Paragraph (e), first sentence. Informed Consent.

(e) “Informed consent” means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. “Informed written consent” means that the lawyer must communicate the information and explanation in writing and obtain the person's consent in writing.

- a. Jerry Point #3: Makes a number of observations:
  - (1) Believes we need to mention the “surrounding circumstances” as part of disclosure.
  - (2) Risks should be “reasonably foreseeable.”
- b. Stan: Does not like the “reasonably available alternatives” clause; it is a substantive change to California law.

2A. MOTION: Substitute “reasonably foreseeable material risks” for “material risk” at line 24.

“Informed consent” means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.

YES: 10 NO: 0 ABSTAIN: 0

- a. See discussion of this issue in ¶. 2B, below.
  - b. Harry: Need to add commas on line 24 after “of” and “to”.
- 2B. Issue of adding reference to explain what is meant by “information,” i.e., revising clause to state: “including disclosure of surrounding circumstances” (See Jerry Point in ¶. 2.a.(1), above).
- a. Stan: We have a workable standard. Concerned that we will foment a lot of discussion as to whether we intended a substantive change.
  - b. Bob: Thinks our current formulation in 3-310(A) is awkward.
  - c. Stan: Relevant circumstances are those circumstances that compel disclosure and the foreseeable risks are those that will affect your ability to represent the client.
    - (1) Bob: Does not think that the ABA configuration changes our definition.
    - (2) Stan: Doesn't the addition of “reasonable available alternatives” add an extra substantive requirement.
    - (3) Bob: You will not be required to do anything more than you already do.
  - d. Kurt: This point is worth consideration. Must I conform my continuing duties to the new rule and obtain a further waiver?
    - (1) Harry: No, they are not retroactively applied.
    - (2) Kurt: That's not really the question I'm asking. Rather, I'm asking whether we have to update our compliance with a rule based on the new rule? Not exactly an issue of retroactivity.

e. KEM: Raises anew the issue of whether we should have a section as part of each new Rule that explains the difference between our Rule and the Model Rule, and our Rule and the current California counterpart, if any. Would like a straw vote on that.

f. Randy:

(1) We should have a note in the Final Report to the effect of the issue that Kurt has raised.

(2) As to KEM’s question, it should be drafter’s notes, part of the Gray Book. KEM can do this.

(3) On the actual language of (e), re that this is not a substantive change, we should use some of the same buzz words that we have in our current 3-310(A).

2C. MOTION: Include in comment to the rule an explanation that “surrounding circumstances” is an example of “adequate information”.

Move paragraph (b) re “disclosure” into the comment to explain what is required as to “adequate information” in paragraph (e).

YES: 7 NO: 0 ABSTAIN: 3

a. Stan: It’s already in paragraph (b).

b. Jerry: Wants to at least include it in the comment because then it will tie (b) and (e) together.

c. Bob: The definition of “disclosure” should come out in light of the Commission’s vote on 1.7(d) at the last meeting.

(1) We can put (b) into the Comment to explain what we mean in paragraph (e).

d. Ellen: Agrees that this is the way to go.

2D. Kurt: Wants to discuss something that Randy said a few moments ago about getting closer to the Model Rules.

a. One of the most appalling things of his participation in this is that we must get our rules closer to the Model Rule language; what we have done is jettisoned a perfectly fine definition just to come close to the Model Rule.

3. STRAW VOTE: KEM’s Explanatory Comment after the Rules.

YES: NO: ABSTAIN:

a. Bob H: After you have drafted the rules, you are done. Then it is up to Staff and KEM to state your intent in the explanation.

b. Harry: KEM to proceed as he deems necessary.

4. Paragraph (e), second sentence. Informed written consent.

“Informed written consent” means that the lawyer must communicate the information and explanation in writing and obtain the person’s consent in writing.

a. Jerry: Should be a separate paragraph.

b. KEM: Also we need to switch the second sentence around. As Dom noted, the perspective is in the wrong place; it should be on the client giving informed consent.

4A. MOTION: Informed consent in (e) and informed written consent in a separate paragraph, (e1), and [CONCEPT] revise order of components in the sentence.

YES: 5 NO: 4 ABSTAIN: 1

a. 11/8/09 KEM Note: This is one possibility:

“Informed written consent” means a person’s informed consent given in writing that following the lawyer’s must communicate the information and explanation

communication in writing of the information required by paragraph (e) and obtain the person's consent in writing.

4B. MOTION: Revise second sentence, now (e1), as per Kurt, to explain what “information” we are referring to.

YES: NO: ABSTAIN:  
NO SECOND.

4C. MOTION: Delete reference to “reasonably available alternatives”.

YES: 1 NO: 9 ABSTAIN: 0

a. See Stan’s position at ¶. 2.b., above.

b. KEM: Staff will add to editorial section that no substantive change to current Cal. law was intended.

5. Raul: There is an inconsistency in the Rule. Rule 1.0.1(f) refers to “fact” but paragraphs (i) and (j) refer to “matter”:

(f) “Knowingly,” “known,” or “knows” means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

a. Bob: Will look into this.

**Rule 1.0.1 Terminology  
[Sorted by Commenter]**

TOTAL = 5    Agree = 2  
 Disagree = 1  
 Modify = 2  
 NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee	A	Yes		SDCBA expressed concern with the definition of a "tribunal," which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. SDCBA suggests a broader definition of "tribunal" so that a lawyer's duty of candor would extend beyond adjudicative bodies.	The Commission believes that an expansive definition of "tribunal" might be appropriate if used only as a reminder of best practices, but it believes that an expansive definition would not function properly as a disciplinary standard. If the Rule 3.3 duty of candor were extended to legislative and administrative activities, it would intrude on First Amendment requirements. In addition, there are concepts that are problematic outside of the court context. These include, e.g.: (i) the meaning of "legal authority in the controlling jurisdiction" in Rule 3.3(a)(2); and (ii) the application of the <i>ex parte</i> requirements of Rule 3.3(d). Moreover, California uniquely has a statutory duty of honesty under B&P C § 6106 that will supplement Rule 3.3 in egregious situations. The Commission sees no benefit to extending Rule 3.3 to mediation because of California's strict statutory mediation confidentiality under Evid. C. § 1115, <i>et seq.</i> The Commission believes it is important to retain the distinction between the special responsibilities that lawyers have under Rule 3.3 in courts of law and in an arbitration that is equivalent to a court of law, and the different but still important duties that lawyers have under Rule 3.9.

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

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.0.1 Terminology  
[Sorted by Commenter]**

TOTAL = 5 Agree = 2  
Disagree = 1  
Modify = 2  
NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	William Balin and Andrew Dilworth	M	No	(m)	This comment expresses many of the same thoughts as those expressed by the S.D. County Bar, and in addition argues that there are important administrative decisions that would be outside the scope of the definition, citing <i>Clare v. State Board of Accountancy</i> , 10 Cal. App.4th 294 (1992) [upholding suspension of accountant's license] and arguing that a lawyer should not be permitted to lie in such a proceeding.	See the RRC Response to the S.D. County Bar's comment, and in particular the reference to California's unique disciplinary standard under B&P C § 6106, which will have the effect of permitting discipline when a lawyer lies to an administrative body without the risks created by an over-inclusive definition of "tribunal". In addition, the Commission notes that the suspension in the <i>Clare</i> case was based on finding by an administrative law judge, which explicitly is within the proposed definition of "tribunal".
3	Zitrin, Richard (law professors group)	m	Yes	(e)	<p>The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1 (e), in the redlined language below: The proposed Commission definition says nothing about "relevant circumstances" and thus narrows the information provided. This can be easily remedied. We suggest the following relatively simple changes to Rule 1.0.1 (e), in the redlined language below:</p> <p>'Informed consent' means a person's agreement to a proposed course of conduct after the lawyer has communicated <u>and explained adequate information and explanation about the relevant circumstances and the reasonably foreseeable material risks</u></p>	

**Rule 1.0.1 Terminology  
[Sorted by Commenter]**

TOTAL = 5    Agree = 2  
 Disagree = 1  
 Modify = 2  
 NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					of, and reasonably available alternatives to, the proposed course of conduct	
4	Office of Chief Trial Counsel	D	Yes	1.0.1(e)(2)	<p>OCTC is concerned with the definition in Proposed Rule 1.0.1(e)(2). We recognize that this rule was changed in response to various comments. However, we believe the change has not solved the problem. Proposed Rule 1.0.1(e)(2) states that information protected by B&amp;P Code section 6068(e) is defined in Rule 1.6, Comments [3] – [6]. OCTC does not believe the Rules of Professional Conduct can define provisions in the B&amp;P Code. That would be interfering with the Legislature's authority to impose some regulation on the legal profession. (See <i>O'Brien v. Jones</i>.)</p> <p>Further, this definition is confusing and ambiguous. Instead of a specific definition, it refers to several Comments in Rule 1.6, contrary to the purpose of this section, which is to have an unambiguous definition in one location. Moreover, the Comments are not intended to be binding (see Proposed Rule 1.0(c)) and, therefore, it is confusing to use them for a binding definition.</p>	
				1.0.1(m)	OCTC remains concerned that Proposed Rule 1.0.1(m) significantly deviates from the ABA rule defining tribunal by eliminating legislative bodies acting in an adjudicative capacity from	

**Rule 1.0.1 Terminology  
[Sorted by Commenter]**

TOTAL = 5    Agree = 2  
 Disagree = 1  
 Modify = 2  
 NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				<p>Comments [1], [3], [4], [5], [11], [12]</p> <p>Comments [6] – [10]</p>	<p>the definition. Like the ABA, OCTC believes the legislative bodies <i>acting in an adjudicative capacity</i> should be included in the definition of tribunal.</p> <p>Comments [1], [3], [4], [5], [11] and [12] are more appropriate for treatises, law review articles, and ethics opinions.</p> <p>Comment [6] – [10] belong in the rules involving conflicts, not this rule.</p>	
5	Los Angeles County Public Defender	A	Yes	1.0.1(n)	Comment [10] of Proposed Rule 1.5 refers to Rule 1.0.1(n) for a definition of “signed,” however, “signed” is not defined in 1.0.1(n) or Evidence Code 250.	

## Rule 1.0.1: Terminology

(Commission's Proposed Rule – Clean Version)

- (a) "Belief" or "believes" means that the person involved actually supposes the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) [reserved]
- (c) "Firm" or "law firm" means a law partnership; a professional law corporation; a sole proprietorship or an association engaged in the practice of law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.
- (d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.
- (e) "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the reasonably foreseeable material risks of, and reasonably available alternatives to, the proposed course of conduct.
- (e-1) "Informed written consent" means that both the communication and consent required by paragraph (e) must be in writing.
- (e-2) "Information protected by Business & Professions Code section 6068(e)" is defined in Rule 1.6, Comments [3] – [6].
- (f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Partner" means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (g-1) "Person" means a natural person or an organization.
- (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.
- (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these Rules or other law; and (ii) to protect against other law firm lawyers and non-lawyer personnel communicating with the lawyer with respect to the matter.

- (l) “Substantial” when used in reference to degree or extent means a material matter of clear and weighty importance.
- (m) “Tribunal” means: (i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.
- (n) “Writing” or “written” has the meaning stated in Evidence Code section 250.

## COMMENT

### *Firm or Law Firm*

- [1] Whether two or more lawyers constitute a law firm can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm. However, if they present themselves to the public in a way that suggests that they are a law firm or conduct themselves as a law firm, they may be regarded as a law firm for purposes of these Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

- [2] Whether a lawyer who is denominated as “of counsel” should be deemed a member of a law firm will also depend on the specific facts. The term “of counsel” implies that the lawyer so designated has a relationship with the law firm, other than as a partner or associate, or officer or shareholder, that is close, personal, continuous, and regular. Thus, to the extent the relationship between a law firm and a lawyer is sufficiently “close, personal, regular and continuous,” such that the lawyer is held out to the public as “of counsel” for the law firm, the relationship of the law firm and “of counsel” lawyer will be considered a single firm for purposes of disqualification. See, e.g., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816]. On the other hand, even when a lawyer has associated as “of counsel” with another lawyer and is providing extensive legal services on a matter, they will not necessarily be considered the same law firm for purposes of dividing fees under Rule 1.5.1 where, for example, they both continue to maintain independent law practices with separate identities, separate addresses of record with the State Bar, and separate clients, expenses, and liabilities. See, e.g., *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536]. Whether a lawyer should be deemed a member of a law firm when denominated as “special counsel”, or by another term having no commonly understood definition, also will depend on the specific facts.

- [3] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

- [4] This Rule does not authorize any person or entity to engage in the practice of law in this state except as otherwise permitted by law.

*Fraud*

- [5] When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

*Informed Consent and Informed Written Consent*

- [6] Many of the rules require a lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. Other rules require a lawyer to obtain informed written consent. See, e.g., Rules 1.2(c), 1.6(a), and 1.7. The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. In any event, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client’s or other person’s reasonably available options and alternatives. In determining whether the information and

explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

- [7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. However, except where the standard is one of informed *written* consent, consent may be inferred from the conduct of a client or other person who has reasonably adequate information about the matter. See paragraph (n) for the definition of “writing” and “written”.

*Screened*

- [8] This definition applies to situations where screening of a personally prohibited lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11 or 1.12.
- [9] The purpose of screening is to assure the affected client, former client, or prospective client that confidential information known by the personally prohibited lawyer is neither disclosed to other law firm lawyers or non-lawyer personnel nor used to the detriment of the person to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and non-lawyer personnel in the law firm with respect to the matter. Similarly, other lawyers and non-lawyer personnel in the law firm who are working on the matter promptly shall be informed that the screening is in place and that they may not communicate with the personally prohibited lawyer with respect to the

matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm personnel of the presence of the screening, it may be appropriate for the law firm to undertake such procedures as a written undertaking by the personally prohibited lawyer to avoid any communication with other law firm personnel and any contact with any law firm files or other materials relating to the matter, written notice and instructions to all other law firm personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm files or other materials relating to the matter, and periodic reminders of the screen to the personally prohibited lawyer and all other law firm personnel.

- [10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

*Tribunal*

- [11] This definition is limited to courts and their equivalent in order to distinguish the special and heightened duties that lawyers owe to courts from the important but more limited duties of honesty and integrity that a lawyer owes when acting as an advocate before a legislative body or administrative agency. Compare Rule 3.3 to Rule 3.9.

*Writing and Written*

- [12] These Rules utilize California's statutory definition to avoid confusion by California lawyers familiar with it. It is substantially the same as the definitions in the ABA Model Rules and most other jurisdictions.