

Difuntorum, Randall

RE: Rule 1.8.6
6/25&26/10 Commission Meeting
Open Session Agenda Item III.P.

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Wednesday, June 16, 2010 3:40 PM
To: Melchior, Kurt W; Kevin Mohr; Kevin Mohr G
Cc: hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; pwvapnek@townsend.com; Mark Tuft
Subject: RE: RRC_Rule 1.8.6 June 25-26, 2010 agenda item R

Kurt: Your suggestion on the additional comment works for me, but I think the Commission needs to decide whether to add anything of the sort. As I said below, the proposed addition doesn't actually address the OCTC letter.

rlk

From: Melchior, Kurt W [mailto:kmelchior@nossaman.com]
Sent: Wednesday, June 16, 2010 3:44 PM
To: Robert L. Kehr; Kevin Mohr; Kevin Mohr G
Cc: hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; pwvapnek@townsend.com; Mark Tuft
Subject: RE: RRC_Rule 1.8.6 June 25-26, 2010 agenda item R

1. I can live with your comment but would make it clearer by ending it "if the client so directs"
2. I agree that comment 1, like so much of our prose, could be tightened -- or better, dropped! But I've lost those skirmishes all the time. I like your changes to 2.
3. I don't know where the line is between what should and what should not be in the rule (vs. in the comment). I see no great reason here for complicating the rule with what is essentially an aside.

From: Robert L. Kehr [mailto:rlkehr@kscllp.com]
Sent: Wednesday, June 16, 2010 1:58 PM
To: Melchior, Kurt W; Kevin Mohr; Kevin Mohr G
Cc: hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; pwvapnek@townsend.com; Mark Tuft
Subject: RRC_Rule 1.8.6 June 25-26, 2010 agenda item R

Kurt and Kevin: OCTC weighed in yesterday, at p. 12 of its letter, with new comments on this rule. They are:

1. OCTC asks that we add a Comment suggesting to lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty of communication is to the client only unless the client agrees to the contrary. OCTC advises that paying non-clients often complain about the lawyer's failure to communicate with them. OCTC seems to me to be asking that we include what only can be described as practice guidance b/c it would be a Comment that does not explain something in the Rule (yes, I am aware that OCTC has criticized our Comments repeatedly for including materials that should be in an advisory ethics opinion). The closest I can come is to suggest consideration of an additional Comment saying: "A lawyer does not violate paragraph (b) or (c) by providing information to a payor in compliance with the client's directions." (but that doesn't directly hit OCTC's point)

2. OCTC suggests that Comments [1] and [2] could be tightened but offers no advice on how to do so. I don't see how to tighten Comment [1], but I can offer a suggestion on [2] that removes 16 words.

~~Despite the risks described in Comment [1], The paragraph (a) contains two exemptions from compliance with its requirements. These exemptions reflect policy decisions A lawyer who is exempt from compliance with under paragraph (a) nevertheless must comply with paragraphs (b) and (c).~~

3. OCTC says that Comment [3] should be in the Rule. This is the Comment that exempts from the Rule any payment made pursuant to a settlement agreement, court order, or law. I don't have the time to search this out, but I think we discussed this point earlier and concluded that exemptions from the Rule don't need to be in the Rule b/c they are not the basis for discipline, but it is hard to see why we have two exemptions in paragraph (a) and three in Comment [3]. I would have no objection to moving Comment [3] into the Rule

Suggestions? Comments?

P.S. I notice that the Comment [1] references to Rule 1.7 are not up to date.

Robert L. Kehr
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Rule 1.8.6 Payments Not From Client
(Commission's Proposed Rule – Clean Version)

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

- (a) the client gives informed written consent at or before the time the lawyer has entered into the agreement for, charged, or accepted compensation from one other than the client, or as soon thereafter as is reasonably practicable, provided that no disclosure or consent is required if the lawyer: (i) is rendering legal services on behalf of a public agency that provides legal services to other public agencies or the public; or (ii) is rendering services through a non-profit organization;
- (b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (c) information relating to representation of a client is protected as required by Rule 1.6 and by Business and Professions Code section 6068(e).

Comment

- [1] A lawyer might be asked to represent a client when another client or other person will pay the lawyer's fees, in whole or in part. This Rule recognizes that any such agreement, charge, or payment creates risks to the lawyer's performance of his or her duties to the client, including the duties of undivided loyalty, independent

professional judgment, competence, and confidentiality. A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see Rule 1.7(b) and Rule 1.7, comments [12] and [13], regarding joint representations. The lawyer also must comply with Rule 1.7(d) when the lawyer has a potential conflict of interest because the lawyer has another relationship with the payor, such as when the lawyer represents the payor in a different matter. In accepting payment from someone other than the client, the lawyer also must comply with Rule 1.6 and Business and Professions Code section 6068(e)(1) (concerning confidentiality) and Rule 5.4(c) (concerning interference with a lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

- [2] Despite the risks described in Comment [1], paragraph (a) contains two exemptions from compliance with its requirements. These exemptions reflect policy decisions to not interfere with the functioning of (1) public agencies that provide legal services to other public agencies or the public, or (2) non-profit organizations that provide legal services to the indigent and to others. A lawyer who is exempt from compliance with paragraph (a) nevertheless must comply with paragraphs (b) and (c).

[3] This Rule does not apply to payment of a lawyer's fees by a third party pursuant to a settlement agreement or as ordered by a court or otherwise provided by law.

[4] This Rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].) Thus, a lawyer is not obligated to obtain the client's consent under paragraph (a) when appointed and paid by an insurer to represent an insured pursuant to the insurer's contractual right to do so. However, the lawyer nevertheless must comply with Rule 1.7 whenever the lawyer has a potential or actual conflict of interest. See Rule 1.7, Comment [35].

[5] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this Rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client. This also might happen in certain commercial settings, such as when a lawyer is retained by creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. When this

occurs, paragraph (a) permits the lawyer to comply with this Rule as soon thereafter as is reasonably practicable.

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

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

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

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

1.0.1 (Agenda Item III.B)

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

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

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

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

www.calbar.org/proposedrules

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

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

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

Attached:

RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - KEHR - DFT1 (06-09-10).pdf
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).pdf
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).doc
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.pdf
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.doc
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.pdf
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.doc
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).pdf
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).doc

June 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)

**RRC – Rule 1.8.6 [3-310(F)]
E-mails, etc. – Revised (6/21/2010)**

- 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 Kehr E-mail to Melchior & KEM, cc Chair, Vice-Chairs & Staff:

Kurt and Kevin: OCTC weighed in yesterday, at p. 12 of its letter, with new comments on this rule. They are:

1. OCTC asks that we add a Comment suggesting to lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty of communication is to the client only unless the client agrees to the contrary. OCTC advises that paying non-clients often complain about the lawyer's failure to communicate with them. OCTC seems to me to be asking that we include what only can be described as practice guidance b/c it would be a Comment that does not explain something in the Rule (yes, I am aware that OCTC has criticized our Comments repeatedly for including materials that should be in an advisory ethics opinion). The closest I can come is to suggest consideration of an additional Comment saying: "A lawyer does not violate paragraph (b) or (c) by providing information to a payor in compliance with the client's directions." (but that doesn't directly hit OCTC's point)
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Suggestions? Comments?

P.S. I notice that the Comment [1] references to Rule 1.7 are not up to date.

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

1. I can live with your comment but would make it clearer by ending it "if the client so directs"
2. I agree that comment 1, like so much of our prose, could be tightened -- or better, dropped! But I've lost those skirmishes all the time. I like your changes to 2.
3. I don't know where the line is between what should and what should not be in the rule (vs. in the comment). I see no great reason here for complicating the rule with what is essentially an aside.

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

Your suggestion on the additional comment works for me, but I think the Commission needs to decide whether to add anything of the sort. As I said below, the proposed addition doesn't actually address the OCTC letter.

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

Bob,

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

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

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

Attached:

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

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

1. Although I appreciate Bob's attempt to develop a new comment in response to OCTC, in this case I think the Comment would merely state the obvious. I would not add it.
2. I would not move Comment [3] into the black letter rule.
3. Otherwise, I agree with Bob's remarks.

June 22, 2010 KEM E-mail to RRC:

I'll renew my request that the Commission reconsider retitling the Rule: "Third Party Payments".

It is a more accessible and meaningful title to the majority of lawyers. Further, from the point of view of a client, even when a payment comes from a co-defendant (e.g., employer), the employer is a third party who is paying the fees of the employee.

**Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]**

TOTAL = 4 Agree = 2
Disagree =
Modify = 2
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	San Diego County Bar Association Legal Ethics Committee	A	Yes		Support as drafted.	No response required.
3	Bradley Paulson	M	No		<p>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.</p> <p>Comment [1] Commenter is aware of a situation in which a home had suffered a severe mold problem that, on average, would cost \$10,000 to repair. Commenter was told by a homeowner in the neighborhood that the case settled for approximately \$500 per home to the homeowners. This owner was left with a defective home, potential health hazard, no builder warranty, and no recourse. The system failed this family by allowing the Soliciting Attorney Groups to solicit this homeowner into a mass action lawsuit and then allowing the Soliciting Attorney Group to deceive the homeowner with a small settlement amount. The catalyst for the claim</p>	

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.8.6 Third Party Payors.
[Sorted by Commenter]**

TOTAL = 4 Agree = 2
Disagree =
Modify = 2
NI =

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					was the fees the Soliciting Attorney Group stood to gain.	
4	Office of Chief Trial Counsel	M	Yes		<p>OCTC believes that a Comment should be added suggesting to the lawyers that they advise in writing both the client and the paying non-client that the lawyer's duty only requires him or her to communicate with the client and that, unless the client designates the non-client to receive communications for the client, the lawyer cannot communicate about the case to a non-client and even with such designation the lawyer must preserve the client's confidences and secrets. OCTC finds that often the paying non-client complains to us because they do not understand that the lawyer cannot communicate with them.</p> <p>Comments [1] and [2] should be tightened.</p> <p>Comment [3] should be in the Proposed Rule.</p>	