

E-mails, et

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

Nace,

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

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

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

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

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

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

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

- 1.4 (Agenda Item III.E)
- 1.8.3 (Agenda Item III.M)
- 1.8.10 (Agenda Item III.U)
- 1.12 (Agenda Item III.Z)

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 - RUVOLO - DFT1 (06-09-10).pdf
- RRC - 3-500 [1-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-12] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 3-310 [1-12] - Rule - PCD [6] (02-17-10) - CLEAN-LAND.pdf
- RRC - 3-310 [1-12] - Rule - PCD [6] (02-17-10) - CLEAN-LAND.doc
- RRC - 3-500 [1-4] - Rule - PCD [8] (09-14-10) - CLEAN-LAND.pdf
- RRC - 3-500 [1-4] - Rule - PCD [8] (09-14-10) - CLEAN-LAND.doc
- RRC - 4-400 [1-8-3] - Rule - PCD [5.1] (10-18-09) - CLEAN-LAND.pdf
- RRC - 4-400 [1-8-3] - Rule - PCD [5.1] (10-18-09) - CLEAN-LAND.doc
- RRC - 3-120 [1-8-10] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf
- RRC - 3-120 [1-8-10] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc

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

Nace,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

- 1.4 (Agenda Item III.E) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.3 (Agenda Item III.M) – OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.10 (Agenda Item III.U) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.12 (Agenda Item III.Z) - OCTC (sent with Randy's 6/15/10 e-mail)
- 2.4 (Agenda Item III.II) - OCTC (sent with Randy's 6/15/10 e-mail)

**RRC – Rule 1.12 [3-310]
E-mails, etc. – Revised (6/21/2010)**

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

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

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

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

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

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

Attached:

RRC - 3-500 [1-4] - 06-11-10 COPRAC Comment.pdf

June 17, 2010 Difuntorum E-mail to Peck, Vapnek & KEM, cc Chair, Vice-Chairs & Staff:

If possible, please review the comments on Rule 1.12 (attached) and let me know if you recommend any revisions.

Attached:

RRC – 3-310 [1-12] – Public Comment Complete – REV (06-17-10).pdf

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

1. Here is the Commission's previous response to the SDCBA (they have simply resubmitted their previous comment):

Comment [1] states that “personally and substantially” is not limited to the acquisition of confidential information but also includes the judge’s personal participation in a matter. Whether a judge personally participated in a matter might be more easily determined than whether the judge received confidential information, and both aspects therefore should be preserved in the Comment.

I think that comment is fine and would leave it as is.

2. As to OCTC's comments, they have simply submitted their stock statement concerning the comments to the Rule, for which we have a stock answer (i.e., "As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the

ABA Model Rules, providing clarification of the black letter and guidance to lawyers on how to be in compliance with their professional obligations.") That should suffice.

3. In sum, I don't think we need to revise the Rule.

P.S. I can prep a public comment chart a little later.

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

As much as I love my local bar ethics committee, I do not agree with the comments for change of 1.12. I do not think that a former bench officer is precluded from representation of a party based upon public facts learned while serving as a bench officer any more than a lawyer is not so conflicted. I think the rule is correct as drafted.

While we all would like to shorten the comments, as suggested by OCTC, I think they are helpful for guidance. In the absence of a specific suggestion, I think we should stay with our comments as drafted.

If others think otherwise, I will be happy to reconsider.

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

I agree that no revision is necessary.

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

Nace,

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.

p.s. We realize you are not able to be present at the meeting, but we're hoping you can give us your final additions and/or edits to these charts for consideration at this meeting.

Attached:

RRC - 1-710 [2-4-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-700 [8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [3-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [1-12] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**RRC – Rule 1.12 [3-310]
E-mails, etc. – Revised (6/21/2010)**

RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-500 [1-4] - Public Comment Chart - By Commenter - XDFT1 (06-21-10)ML.doc
RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc
RRC - 1-720 [2-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

**Rule 1.12 Former Judge, Arbitrator, Mediator.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee	M	Yes		<p>It is unclear whether “personally and substantially” is intended to include anything beside “confidential information that is material to the matter.” If not, then the sentence should read: “Personally and substantially is intended to be limited to the receipt or acquisition of confidential information that is material to the matter.” If so, then the sentence should read: “Personally and substantially is intended to include, without limitation, the receipt or acquisition of confidential information that is material to the matter.”</p> <p>Since the rule is intended to foster confidence in the legal system and clients most likely would be shocked to find a former Judge, Arbitrator, Mediator representing an adversary, client’s should not have the burden of proving that a former judge’s, etc. participation actually entailed the receipt of material confidential information. Rather, if a former judge, etc., has heard facts about the substantive claims involved in the former or pending matter, the former judge, etc., should be required to obtain written consent from the parties before undertaking any representation.</p>	<p>Comment [1] states that “personally and substantially” is not limited to the acquisition of confidential information but also includes the judge’s personal participation in a matter. Whether a judge personally participated in a matter might be more easily determined than whether the judge received confidential information, and both aspects therefore should be preserved in the Comment.</p>

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.12 Former Judge, Arbitrator, Mediator.
[Sorted by Commenter]**

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

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>If this recommendation is adopted, the modified language should read:</p> <p>“‘Personally and substantially’ is intended to include, <u>without limitation</u>, the receipt or acquisition of confidential information that is material to the matter <u>or participation in a matter that included knowledge of facts related to the substantive claims in that matter.</u>”</p>	
2	Office of Chief Trial Counsel	A	Yes		The Comments are too many and too long. Most of them seem more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (e), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed written consent.
- (b) A lawyer shall not participate in discussions regarding prospective employment with any person who is involved as a party, or as a lawyer for a party, or with a law firm for a party, in a matter in which the lawyer is participating, personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may participate in discussions regarding prospective employment with a party, or with a lawyer or a law firm for a party in a matter in which the clerk is participating personally and substantially, but only with the approval of the judge or other adjudicative officer.
- (c) Except as provided in paragraph (d), if a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter.
- (d) If a lawyer is disqualified by paragraph (a) because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal, no lawyer in a law firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely and effectively screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.
- (e) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

[1] This Rule generally parallels Rule 1.11. "Personally and substantially" includes the receipt or acquisition of confidential information that is material to the matter. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire confidential information. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. Compare the comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in

which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed written consent. See Rule 1.0.1(e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6 and Business and Professions Code section 6068(e), they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm.

[4] Paragraph (d) provides that conflicts of a lawyer personally disqualified because of the lawyer's previous service as a law clerk to a judge, adjudicative officer or a tribunal will be imputed to other lawyers in a law firm unless the conditions of paragraph (d) are met. Requirements for screening procedures are stated in Rule 1.0.1(k). Paragraph (d)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.