

McCurdy, Lauren

RE: Rule 1.16
6/25&26/10 Commission Meeting
Open Session Agenda Item III.DD.

From: Robert L. Kehr [rlkehr@kscllp.com]
Sent: Wednesday, June 16, 2010 9:17 AM
To: Linda Foy; Kurt Melchior (E-mail)
Cc: hbsondheim@verizon.net; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr; Kevin Mohr G; pwvapnek@townsend.com; Mark Tuft
Subject: RRC_Rule 1.16 June 25-26, 2010 agenda item DD

Linda and Kurt: As far as I can tell, there have been two new public comments on Rule 1.16. Here they are with my thoughts ---

The first is from William Hoffman, writing for the Law Practice Management & Technology Section of the State Bar, says that Rule 1.16(e)(2) should be harmonized with Rule 1.5 by including a cross-reference to 1.5. Their proposal is that we change the first sentence to say (with their suggested language underlined): "The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred consistent with Rule 1.5."

They are correct that Rule 1.5 is not cited either in Rule 1.16 or in its Comment, but I don't think their suggestion is quite right. Their language suggests that the only measure of whether a lawyer has earned a fee is found in Rule 1.5, but of course there are other measures such as what the fee agreement says and what the lawyer is permitted to collect under B&P C section 6147 and 6148. It might be that their error was caused by focusing on the non-refundable fee issue. In any event, I think that a reference to Rule 1.5 is appropriate, but I would place it in a Comment. My suggestion is that we add the following underlined language to Rule 1.16, Comment [9], and in the process correct a minor inconsistency between it and paragraph (e)(2): "Paragraph (e) also requires the lawyer to "promptly" return ~~unearned fees and expenses~~ paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5."

The second new comment on Rule 1.16 is from OCTC and begins at p.20 of its letter. It argues that paragraphs (b)(1) and (3) should be mandatory rather than permissive withdrawal situations. These are the two "client insists" categories - the client insists that the lawyer pursue a frivolous claim or defense or that the lawyer pursue a course of conduct that is criminal or fraudulent. I disagree with OCTC. What it misses is that a client's demand does not necessarily mean that the lawyer has acceded, and that no client demand should be treated by the lawyer as an escape hatch. The lawyer's initial response to an improper client demand is not to resign but to fulfill the duty to competently represent the client, including the duty to consult with the client as described in Rule 1.4. I also would note that the two paragraphs to which it points are found in the current rule as paragraphs (C)(1)(a) and (c), and it does not suggest that they have caused any problem (nor am I otherwise aware of any such problem with the current rule).

Comments? Suggestions?

Robert L. Kehr
Kehr, Schiff & Crane, LLP
12400 Wilshire Blvd. 13th Fl.
Los Angeles, CA 90025
310/820-3455 (tele)
310/820-4414 (fax)
rlkehr@kscllp.com

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Rule 1.16 Declining Or Terminating Representation
(Commission's Proposed Rule – Clean Version)

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client competently; or
 - (3) the client discharges the lawyer.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud;
 - (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;
 - (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the employment effectively;
 - (5) the client breaches a material term of an agreement with or obligation to the lawyer relating to the representation, and the lawyer has given the client a reasonable warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;
 - (6) the client knowingly and freely assents to termination of the representation;
 - (7) the lawyer believes in good faith that the inability to work with co-counsel makes it in the best interests of the client to withdraw from the representation;
 - (8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;
 - (9) a continuation of the representation is likely to result in a violation of these Rules or the State Bar Act; or

(10) the lawyer believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

- (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission.
- (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).
- (e) Upon the termination of a representation for any reason:
 - (1) Subject to any applicable protective order, non-disclosure agreement or statutory limitation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not; and
 - (2) The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

COMMENT

- [1] A lawyer should not accept a representation unless the lawyer reasonably believes the lawyer can complete the representation in compliance with these Rules and the State Bar Act. A lawyer has the obligation or option to withdraw only in the circumstances and only in the manner described in this Rule. This requirement applies, without limitation, to any sale under Rule 1.17. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. (See Rules [1.2(c)] and [6.5].) A lawyer can be subject to discipline for improperly threatening to terminate a representation. See *Matter of Shalant*, 4 Cal. State Bar Ct. Rptr. 829 (2005).

Mandatory Withdrawal

- [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that would violate these Rules or the State Bar Act. The references to these Rules and to the State Bar Act in paragraphs (a)(1) and (b)(3) reflect the primacy of the lawyer's duties, for example, under Business and Professions Code sections 6067, 6068, 6103, and 6106. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client might make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Depending on the circumstances, when the client's conduct permits the lawyer to withdraw, or to seek permission to withdraw where that is required, the lawyer might consider counseling the client regarding the client's conduct, limiting the scope of the representation, or aiding the client in rectifying the client's prior conduct. (See Rules 1.2(c) and 1.4.)

- [3] [When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. (See also Rule 6.2.)]
- [4] A lawyer is not subject to discipline for withdrawing under paragraph (a)(1) or (2) if the lawyer has acted reasonably under the facts and circumstances known to the lawyer, even if that belief later is shown to have been wrong.

Optional Withdrawal

- [5] Paragraph (b)(2) permits a lawyer to withdraw from a representation even if the lawyer is not asked to participate in or further a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct. Even when a withdrawal is in these circumstances, the lawyer must comply with his or her duties under Business and Professions Code, section 6068(e)(1) and [Rule 1.6].
- [6] Paragraph (b)(5) allows a lawyer to withdraw from a representation if the client refuses to abide by a material term of an agreement relating to the representation, such as an agreement concerning fees, court costs or other expenses, or an agreement limiting the objectives of the representation.

Permission to Withdraw

- [7] Lawyers must comply with their obligations to their clients under [Rule 1.6] and to the courts under [Rule 3.3] when seeking permission to withdraw under paragraph (c). If a tribunal denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's order.

(See Business and Professions Code sections 6068(b), and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with Rules 3.36 and 5.71 of the California Rules of Court satisfies paragraph (c).

Assisting the Client upon Withdrawal

- [8] Paragraph (d) requires the lawyer to take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client." These steps will vary according to the circumstances. Absent special circumstances, "reasonable steps" do not include providing additional services to the client once the successor counsel has been employed and the lawyer has satisfied paragraph (e). The lawyer must satisfy paragraph (d) even if the lawyer has been unfairly discharged by the client.
- [9] Paragraph (e) states a lawyer's duties when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies to client papers and property held by a lawyer in any form or format and codifies existing case law. (See *Academy of California Optometrists v. Superior Court* (1975) 51 Cal.App.3d 999 [124 Cal.Rptr. 668]; *Weiss v. Marcus* (1975) 51 Cal.App.3d 590 [124 Cal.Rptr. 297].) See Penal Code sections 1054.2 and 1054.10 for examples of statutory restrictions on whether a lawyer may release client papers. Other statutory provisions might require the lawyer to provide client papers to someone other than the client, and in those situations paragraph (e) is intended to apply equally to the duty to provide papers to that other person. (See Penal Code section 1054.2(b).) Paragraph (e) also requires the lawyer to "promptly" return

uneamed fees paid in advance. If a client disputes the amount to be returned, the lawyer shall comply with [Rule 1.15].

- [10] A lawyer's duty under paragraph (e)(1) to release "writings" to the client includes all writings as defined in Evidence Code section 250. A lawyer must comply with paragraph (e)(1) without regard to whether the client has complied with an obligation to pay the lawyer's fees and costs. Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding. Paragraph (e)(1) also does not affirmatively grant to the lawyer a right to retain copies of client papers or to recover the cost of copying them; these are issues that might be determined by contract, court order, or rule of law.

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 11, 2010 Difuntorum E-mail to Kehr, cc Chair, Vice-Chairs & Staff:

Regarding Rule 1.16, the comment letter from Alex C. Glenn, you might consider including in the RRC response that at least one ethics opinion presently construes RPC 3-700, in the context of an ongoing representation of a client organization, to recognize a distinction between withdrawal from a particular matter and total termination of the lawyer's representation (see State Bar Formal Op. no. 2003-163, go to:

[http://www.calbar.ca.gov/calbar/pdfs/ethics/2003-163%20\(95-0005\).pdf](http://www.calbar.ca.gov/calbar/pdfs/ethics/2003-163%20(95-0005).pdf)).

June 12, 2010 Kehr E-mail to Drafters (Foy & Melchior), cc Difuntorum, McCurdy, Lee & KEM:

There are two comments on this proposed rule. One is a resubmission by S.D. of its earlier approval and the other is a new comment by Glen Alex. The Alex letter makes an interesting observation about the proposed rule. Although written from the standpoint of an in-house governmental lawyer, his point applies to all in-house lawyers, and by extension to any lawyer who represents a client in multiple matters. This is that a lawyer who terminates a representation under proposed paragraph (a) or (b) does not necessarily have to terminate the entire representation – in the case of an in-house lawyer, the lawyer does not necessarily have to resign.

Randy has pointed out to me that COPRAC's Opn. 2003-163 makes this distinction (the Bar's web site seems to be down at the moment, so I have attached a copy. Linda and I were on COPRAC when this opinion was in the works.

Mr. Alex uses paragraph (b)(1) as his example. It might not be the best example b/c a lawyer-client dispute under paragraph (b)(1) might undercut the entire relationship. A cleaner example might be withdrawal b/c of a conflict of interest that applies to representation in one matter but not another.

After looking at the Alex comment, I can see how a reader might be confused, and I would like to consider adding an additional comment along the following lines (placement to be determined):

Scope of Withdrawal

[x] When a lawyer withdraws from the representation of a client under paragraph (a) or (b), the lawyer might not be obligated to withdraw from representations of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under Rule 1.7(a), but that conflict might not arise in other representations of the client.

Any comments or suggestions?

June 15, 2010 Difuntorum E-mail to RRC:

Commission Members:

More public comments keep arriving. Here's another one that you can begin addressing. It is from the State Bar Law Practice Management and Technology Section. The 9 rules addressed in the letter and the responsible lead drafters and codrafters are listed below. As previously emphasized, the question we need you to answer by the assignment deadline is whether the codrafters will be recommending rule revisions in response to the public comments received. Rules for which there are no recommended revisions will be placed on consent. –Randy D.

1.1 = VAPNEK (Peck, Ruvolo)

1.5 = VAPNEK (Ruvolo)

1.16 = KEHR (Foy, Melchior)
5.1 = TUFT (Martinez, Peck)
4.4 = MARTINEZ/TUFT
7.3 = MOHR (Julien, Ruvolo)
8.3 = KEHR (Peck, Tuft, Vapnek)
8.4.1 = PECK (Martinez)
8.5 = MELCHIOR (Lampert, Peck)

Attached:

RRC - 1-400 [7-3] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - [4-4] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-310X [5-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-700 [1-16] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 3-110 [1-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 4-200 [1-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-100 [8-5] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 2-400 [8-4-1] - 06-15-10 LPMT [Hoffman] Comment.pdf
RRC - 1-120 [8-3] - 06-15-10 LPMT [Hoffman] Comment.pdf

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

Linda and Kurt: As far as I can tell, there have been two new public comments on Rule 1.16. Here they are with my thoughts ---

The first is from William Hoffman, writing for the Law Practice Management & Technology Section of the State Bar, says that Rule 1.16(e)(2) should be harmonized with Rule 1.5 by including a cross-reference to 1.5. Their proposal is that we change the first sentence to say (with their suggested language underlined): “The lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred consistent with Rule 1.5.”

They are correct that Rule 1.5 is not cited either in Rule 1.16 or in its Comment, but I don't think their suggestion is quite right. Their language suggests that the only measure of whether a lawyer has earned a fee is found in Rule 1.5, but of course there are other measures such as what the fee agreement says and what the lawyer is permitted to collect under B&P C section 6147 and 6148. It might be that their error was caused by focusing on the non-refundable fee issue. In any event, I think that a reference to Rule 1.5 is appropriate, but I would place it in a Comment. My suggestion is that we add the following underlined language to Rule 1.16, Comment [9], and in the process correct a minor inconsistency between it and paragraph (e)(2): “Paragraph (e) also requires the lawyer to “promptly” return unearned fees and expenses paid in advance that have not been earned or incurred; the question of what fees and expenses have been earned or incurred is governed in part by Rule 1.5.”

The second new comment on Rule 1.16 is from OCTC and begins at p.20 of its letter. It argues that paragraphs (b)(1) and (3) should be mandatory rather than permissive withdrawal situations. These are the two “client insists” categories – the client insists that the lawyer pursue a frivolous claim or defense or that the lawyer pursue a course of conduct that is criminal or fraudulent. I disagree with OCTC. What it misses is that a client's demand does not necessarily mean that the lawyer has acceded, and that no client demand should be treated by the lawyer as an escape hatch. The lawyer's initial response to an improper client demand is

not to resign but to fulfill the duty to competently represent the client, including the duty to consult with the client as described in Rule 1.4. I also would note that the two paragraphs to which it points are found in the current rule as paragraphs (C)(1)(a) and (c), and it does not suggest that they have caused any problem (nor am I otherwise aware of any such problem with the current rule).

Comments? Suggestions?

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 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 – Rule 1.16 [3-700]
E-mails, etc. – Revised (6/21/2010)**

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

Randy and Lauren: I just noticed that the agenda materials include my 6/16/10 email to my co-drafters but not my earlier message to them, below, on the comment received as a first comment installment from Glenn Alex. Unless someone objects, I ask that this be circulated to the entire Commission and added to the agenda package, as I have suggested the addition of a new Rule 1.16 Comment paragraph.

In addition to the suggestion, below, regarding the Alex comment, I seem to have overlooked the comment letter from Toby Rothschild. Toby has pointed out that paragraph (e)(1) says the lawyer must release the client file “to the client” while Comment [9] says that the paragraph (e)(1) duty applies when “new counsel seeks to obtain client files from the lawyer”. These two statements obviously conflict. Because I don’t think that the “release to the client” language in the Rule is likely to cause any confusion as to whether the client may have someone else pick up the file, my proposal is to leave the Rule as is and change the first two sentences of Comment [9] as follows:

~~Paragraph (e) states a~~ A lawyer’s duties under paragraph (e)(1) arise when, after termination of a representation for any reason, new counsel seeks to obtain client files from the lawyer. It applies and include to client papers and property held by a lawyer in any form or format. This obligation ~~and~~ codifies existing case law.

A proposed public commenter chart is attached for any suggestions from my co-drafters or anyone else.

Attached:

RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10)ML-RLK.doc
RRC - 3-700 [1-16] - Cal Ethics Op. 2003-163 (95-0005).pdf

June 12, 2010 Kehr E-mail to Drafters (Foy & Melchior), cc Difuntorum, McCurdy, Lee & KEM:

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Any comments or suggestions?

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

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Alex, Glenn C.	M	No		<p>The Proposed Rule should be clarified as to the meaning of the term “a representation.”</p> <p>In-house governmental attorneys are sometimes pushed, by their own entities or by “control agencies” into rendering or withholding advice in substance contrary to their professional judgment, or aiding an activity of questionable propriety in a particular matter, or otherwise acting in an inappropriate manner. These circumstances can arise with respect to transactional as well as with litigation attorney positions. (See Rule 1.16(b)(1), in relevant part: “making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument.”) The Rule should make clear that the in-house governmental attorney may or must (depending on the circumstances) withdraw from “a representation” in the <u>particular matter</u>, but would not be expected (except under the most extreme circumstances) to terminate the attorney’s full-time career employment with his or her agency. In other words, the term “a representation” should be clarified to refer, in most cases, to a particular matter, and not to</p>	<p>This comment observes that a lawyer who terminates a representation under proposed paragraph (a) or (b) does not necessarily have to terminate the entire representation. The letter is written from the standpoint of an in-house governmental lawyer, but the commenter’s point applies not only to all in-house lawyers but also to any lawyer who represents a client in multiple matters. The Commission agrees with the commenter’s observation and has added new Comment [6A] under a new heading: “Scope of Withdrawal”.</p>

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

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

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					the overall relationship between an in-house public counsel and his or her employer.	
6	Committee on Professional Responsibility and Conduct ("COPRAC")	A	Yes		COPRAC supports the adoption of Proposed Rule 1.16 and the Comments to the Rule.	No response required.
4	Law Practice Management & Technology Section of California State Bar ("LPMT")	3	Yes	(e)(2)	LPMT believes that Proposed rule 1.16(e)(2) should be revised to clarify that, when a lawyer terminates a representation, the lawyer's obligation to return unearned fees to the client would be subject to Rule 1.5 (which requires flat fee agreement to state that a client may be entitled to a refund of fees if services have not been completed. LPTM suggests that the following language be added to the end of the first sentence of Proposed Rule 1.16(e)(2): "... consistent with Rule 1.5."	This letter is correct that Rule 1.5 is not cited either in Rule 1.16 or in its Comment, and the Commission does believe that there properly is a connection to be made between the two rules. However, the Commission has concluded that the language recommended by LPMT is not accurate because it suggests that the only measure of whether a lawyer has earned a fee is found in Rule 1.5. In fact, there are other measures such as what the fee agreement says and whether the lawyer is permitted by B&P C sections 6146, <i>et seq.</i> to enforce the fee agreement. Instead, the Commission has added a Rule 1.5 reference to Comment [9], and has done so in language that differs from that recommended.
5	Office of Chief Trial Counsel ("OCTC")	M	Yes	1.16(b)	OCTC is concerned that subparagraph (b)(1) and (3) should mandate withdrawal. Proposed rule 1.16(a)(1) requires an attorney to not represent or withdraw from representation if the lawyer knows or reasonably should know that the representation will result in a violation of these rules. If the client insists upon presenting a defense in litigation or asserting a position or making a demand that is not warranted under existing law and cannot be supported by a good faith argument an attorney's following	The Commission disagrees and did not make the requested change. OCTC argues that paragraphs (b)(1) and (3) should be mandatory rather than permissive withdrawal situations. These are the two "client insists" categories – the client insists that the lawyer pursue a frivolous claim or defense or that the lawyer pursue a course of conduct that is criminal or fraudulent. The Commission believes that a client's improper direction to a lawyer should not be treated by the lawyer as an escape hatch that permits immediate and automatic withdrawal. Instead, a lawyer's initial response to an improper

**Rule 1.16 Declining or Terminating Representation.
[Sorted by Commenter]**

TOTAL = 6 Agree = 3
Disagree =
Modify = 3
NI =

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					<p>the client's instruction would be a violation of B&P Code sections 6068(c) and (g) and Proposed Rule 3.1. So, how can it just be permissive? OCTC recognizes that Current Rule 3-700 has the same language (although the Current Rule also had language requiring withdrawal if the client is bringing an action, conducting a defense, asserting a position, or taking a appeal without probable cause and for the purpose of harassing or maliciously injuring any person. We assume this mandatory requirement was taken out because it is already covered by subparagraph (a)(1)). It makes no sense to make the taking of the position a violation but not require withdrawal for a client insisting (as compared to initially requesting) that the attorney take that position. Frivolous litigation is not limited to cases in which a legal claim is entirely without merit. (See <i>Molski v. Evergreen Dynasty Corp</i> (9th Cir. 2007) 500 Fed.3d 1047, 1060-1, rehearing denied.) Likewise, withdrawal should be mandated if the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent since doing so would be a violation of the these rules and the State Bar Act. Comment [2], in fact, seems inconsistent with placing Proposed Rule 1.16(b)(1) and (3) as permissive and consistent with OCTC's view</p>	<p>client demand is not to resign but to fulfill the duty to competently represent the client, including the duty to consult with the client as described in Rule 1.4. In addition, the Commission notes that the two paragraphs to which OCTC points are found in the current rule as rule 3-700(C)(1)(a) and (c), and it does not suggest that they have caused any problem (nor is the Commission otherwise aware of any such problem with the current rule).</p>

**Rule 1.16 Declining or Terminating Representation.
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					that (b)(1) and (b)(3) should be mandatory. Comments [4], [5], [6], [8], and the first sentence of Comment [9], seem more appropriate for treatises, law review articles, and ethics opinions.	The Commission disagrees and has retained these paragraphs except as modified in response to other comments.
3	Rothschild, Toby	A	No	(e)(1) & Comment [9]	1.16(e)(1) requires files be released "to the client, at the request of the client." Comment [9] defines this duty to apply when "new counsel seeks to obtain client files from the lawyer." The rule and comment should be consistent and make clear that the request can only come from the client, or from a new attorney with client's consent.	The Commission agrees and has modified Comment [9] accordingly.
1	San Diego County Bar Association	A	Yes		Clearer than existing rule	No response required.