Difuntorum, Randall

RE: Rule 1.18
6/25&26/10 Commission Meeting
Open Session Agenda Item III.FF.

From: Mark Tuft [MTuft@cwclaw.com]
Sent: Friday, June 18, 2010 11:19 AM
To: Robert L. Kehr; Kevin Mohr
Cc: Vapnek, Paul W. ; JoElla L. Julien; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Harry Sondheim
Subject: RE: RRC - 1.18 - III.FF. - 6/25-26/10 Meeting & Screening

My email, which you just found, was sent to Harry as well.

From: Robert L. Kehr [mailto:rlkehr@ksclip.com]
Sent: Friday, June 18, 2010 7:44 AM
To: Kevin Mohr; Mark Tuft
Cc: Vapnek, Paul W. ; JoElla L. Julien; Randall Difuntorum; Lauren McCurdy; Lee, Mimi; Harry Sondheim
Subject: RE: RRC - 1.18 - III.FF. - 6/25-26/10 Meeting & Screening

Kevin: Funny thing about your literary sources – last night I was thinking about how to rearrange one of our awkward sentences and wondered how Procrustes would have handled the problem.

rlk

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Friday, June 18, 2010 6:04 AM
To: Mark Tuft
Cc: Vapnek, Paul W. ; JoElla L. Julien; Robert L. Kehr; Randall Difuntorum; Lauren McCurdy; Lee, Mimi; Harry Sondheim
Subject: Re: RRC - 1.18 - III.FF. - 6/25-26/10 Meeting & Screening

Mark:

I just found this e-mail of yours as I attempt to clean up my inbox (an Augean Stable task given the e-mail traffic of the last several days; perhaps if I divert the L.A. River ...)

At any rate, I didn't think I was being reticent in my earlier e-mail. I agree that the Commission can take a position contrary to RAC/BOG -- the precedent having been set w/ the deliberations and votes on fee K modifications. I also agree that the Commission's position on screening should be communicated to RAC and the Supreme Court, so long as it is the Commission's position, which would require a majority vote at the next meeting. Moreover, even if there is not a majority of the Commission, however, there is nothing that prevents a minority of the Commission from taking a dissenting position from what is being sent to the RAC or the Supreme Court. In short, I agree there should be a vote on the rules you identify below and those votes will determine how the communication re screening will be characterized -- as either the position of the Commission or as the views of a substantial minority of the Commission.

Finally, the audience for this e-mail exchange is the 1.18 drafting team, not the entire Commission. To have the reconsideration of the screening rules placed on the agenda, the rules should not be placed on the consent agenda. I've copied Harry so he is aware of the position you and Paul have

taken.

Thanks,

Kevin

Mark Tuft wrote:
Because of the number and content of public comments received on the issue of screening and because the issue of screening in the public and private sectors is a major issue in the regulation of lawyers in California and elsewhere, RAD, the Supreme Court and the public are entitled to know how the Commission voted on screening in Rules 1.18, 1.10 and 1.11 in response to the public comments. Although I may be in the minority, I want my vote recorded on this important issue. And, I want the Board, the Court and the public to know the views of the Commission however the votes turn out.

I remind those who are opposed to any screening in lawyer conduct rules, that the Supreme Court clearly favors screening in the public sector (which does not mean only government lawyers) and has left open the issue of limited screening in the private sector. Who better than us to provide guidance on this significant issue? If COPRAC can take a position, why can't the Commission? I do not understand the reticence in your message, Kevin.

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From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Thursday, June 17, 2010 9:27 AM
To: Vapnek, Paul W.
Cc: Mark Tuft; JoElla L. Julien; Robert L. Kehr; Randall Difuntorum; Lauren McCurdy; Lee, Mimi
Subject: Re: RRC - 1.18 - III.FF. - 6/25-26/10 Meeting & Screening

Greetings Mark & Paul:

I don't disagree with you on Rule 1.18, or on Rule 1.10 for that matter. However, whether to take a position in favor of rules w/ screening notwithstanding RAC's vote is the Commission's decision and I don't have a vote. I noted in an e-mail I sent earlier re Rule 1.10 that there is precedent in the Commission vote on fee K modifications for the Commission to continue to take a position that is favorable to screening. A vote or votes could be taken at the next meeting on whichever day all (or at least the most number of) Commission members are present.

I also think that the Commission should do the same for Rule 1.11(e). I thought the Commission had resolved the government's problems re notice but RAC had its mind made up before we ever presented the revisions. A memo that had been circulated to RAC by Gov. Angela Davis, an AUSA who works w/ George Cardona, concerned itself with the previous draft of 1.11 and, despite my repeated statements during the discussion before RAC that we had resolved the one issue that Gov. Davis had raised (i.e., the notice issue), RAC voted overwhelmingly against the provision.

Putting 1.11(e) aside for the moment, the response I drafted re COPRAC's submission on 1.18 and the response Mark drafted re COPRAC's submission on 1.10 is as far as the Commission can go in the public comment chart, at least unless or until the Commission takes a position in favor of screening despite RAC's vote. The Commission has not had a vote on screening since RAC's decision not to adopt either rule w/ screening. The vote to approve 1.10 w/o screening is arguably misleading because a number of those members voting in favor of the motion expressed their preference for a rule w/ screening. Similarly, the vote on 1.18 was taken when three members, who the day before had opposed a motion to delete the screening provision, were absent. Of course, minds may have changed since the votes favoring screening were taken, but we should determine the will of the Commission on this issue.

Rule 1.11(e) is a separate issue. I know that Mark disagrees with the position the Commission took but if the Commission seeks reconsideration of RAC's screening votes on 1.10 and 1.18, it might also consider seeking reconsideration of the 1.11(e) vote.

Thanks,

Kevin

Vapnek, Paul W. wrote:
I am with Mark on his request. We should ask the Board to reconsider their ill-advised rejection of screening.

From: Mark Tuft [mailto:MTuft@cwclaw.com]
Sent: Wednesday, June 16, 2010 6:53 PM

To: Kevin Mohr; JoElla L. Julien; Robert L. Kehr
Cc: Randall Difuntorum; Lauren McCurdy; Lee, Mimi; Vapnek, Paul W.
Subject: RE: RRC - 1.18 - III.FF. - 6/25-26/10 Meeting

I think the response to COPRAC's well reasoned comment that 1.18 mandates a screening provision is, to say the least, is an abdication of our responsibilities. If COPRAC can recommend that the Board reconsider its decision that California depart from the accepted norm in lawyer regulation in having rule 1.18 without screening, why can't the Commission which is charged with the responsibility of crafting rules that better reflect normative principles of lawyer conduct, make the same request? I move that we ask the Board to reconsider the Model Rule formulation of a lawyer's duties to prospective clients.

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From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Wednesday, June 16, 2010 6:22 PM
To: JoElla L. Julien; Robert L. Kehr; Mark Tuft
Cc: Randall Difuntorum; Lauren McCurdy; Lee, Mimi; Paul Vapnek
Subject: Re: RRC - 1.18 - III.FF. - 6/25-26/10 Meeting

Sorry. Just saw that there was nothing attached. Here it is.

Kevin

Kevin Mohr wrote:
Greetings all:

I've attached updated Public Comment Chart, XDraft 2.1 (6/16/10) to this e-mail. This draft adds the comments of COPRAC, OCTC and OCBA, together w/ responses, to the chart. Changes are highlighted in yellow. Highlights in turquoise are there to remind me to make a change to the rule.

There is one minor change to the proposed Rule that I will make once the dust settles. It involves the deletion of reference to "(d)(1)," a subparagraph that, w/ the elimination of the screening provision by the BOG, no longer exists. See the last paragraph of both the COPRAC and OCBA comments.

One last point. The response to COPRAC states that their request for reconsideration will be communicated to the BOG. That does not mean that the RRC will formally request reconsideration, just that all public comment is provided to the BOG in our submission.

Please let me know if you have any questions. Thanks,

Kevin

Attached:
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc

Kevin Mohr wrote:
Greetings:

I've attached the public comment chart, XDFT2 (6/12/10). The only comment received to date is the comment of the San Diego Co. Bar Ass'n, which simply resubmitted their comment on the initial public comment draft version. They appear not to have reviewed the most recent public comment version of the Rule. Otherwise, they would have realized that RAC/BOG agreed in substance with their comment concerning former paragraph (d)(2) (permitting screening to rebut the presumption of shared confidences) and authorized a new rule version.

At any rate, their comment is moot. Nevertheless, I have drafted a minimal response. I don't think we need spend any more time on this.

I do not recommend any further changes to the Rule.

The only issue is whether the members who joined in Dissent A or C to the BOG's position will want to continue those dissents in the Final Report to the Supreme Court. That, however, should not require the Commission's attention at the 6/25-26/10 meeting.

Please let me know if you have any questions. Thanks,

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly, prefers the prior version of the rule in which paragraph (d) permitted screening to rebut the presumption of shared confidences if "the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." If the rule were to permit screening, it should not require that the screening have been, in hindsight, "effective," but rather should require that the lawyer or firm took reasonable measures to screen the prohibited lawyer. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession by leaving lawyers uncertain of the application of precedent to their particular situations. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening.	1. As the commenter noted, the Board of Governors voted to adopt a version of proposed Rule 1.18 that does not permit unilateral screening as provided in deleted paragraph (d)(2). However, the commenter's request for reconsideration of that decision will be communicated to the Board.

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

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					In addition, even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline.	
					If this change is not adopted, we are concerned that the language, as drafted may contain a contradiction, in that the rule says that you can undertake the representation if both lawyer and client give informed written consent, but the comment directs lawyers to abide by case law, which may allow screening. Is the Commission relying on the fact that the new provision in the rule does not use the word "only" before "if both the affected client and the prospective client have given informed written consent" to avoid internal inconsistency? If so, we are concerned that this may end up causing confusion.	2. The Commission understands the commenter's concerns but has not made any suggested change. Pursuant to proposed Rule 1.0, the comments to the Rules "provide guidance for their interpretation and for acting in compliance with the Rules." When read in conjunction with Comment [8], the implementation of a screen by itself will not subject the lawyers involved to discipline.
					Finally, we note that Comment [7] incorrectly refers to paragraph (d)(1), when there is no longer a subparagraph (1). In the event the Commission does not follow our recommendation, this reference should be amended to refer to paragraph (d).	3. The noted discrepancy has been corrected.
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		1. The Commission states that this is a new rule to California, although OCTC believes it	1. The Commission is not aware of any Rule of Professional Conduct that addresses duties owed to

TOTAL = __ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.	prospective clients. Thus, this is a "new rule" for California, although some of its concepts can be found in the Evidence Code and ethics opinions.
				1.18(c),(d)	2. OCTC is concerned that subparagraphs (c) and (d) are essentially a repeat of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule.	2. The Commission disagrees with the commenter. As noted previously, a conflict that might arise from a consultation with a prospective client is distinguishable from a former client conflict, requiring that it be treated separately from other conflicts situations. Moreover, non-waivable conflicts typically arise in concurrent representation situations and thus are more appropriately treated under Rule 1.7.
					3. Many of the Comments are more appropriately placed in treatises, law review articles, and ethics opinion. The inclusion of factors in 2A could be confusing and give the impression they are the exclusive factors. Further, if they are to be considered, it should be in the rule.	3. 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.
4	Orange County Bar Association ("OCBA")	M	Yes		The OCBA supports the adoption of proposed Rule 1.18 with one substantive change. Specifically, the OCBA notes that paragraph (d) states that, "[w]hen the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the	1. See Response to COPRAC, ¶ 2, above.

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

TOTAL = __ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					prospective client have given informed written consent." While this statement does not say "...permissible only if...," the language could be interpreted to imply that such a representation can only be undertaken with informed written consent. This interpretation is reinforced by the language of paragraph (c) insofar as it provides a direct prohibition with regard to "represent[ing] a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d)." This single exception is repeated in the next sentence of paragraph (c) with regard to imputation. However, Comment [8] states that "Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law." This appears to contradict the language of the proposed Rule itself, in that paragraph (d) could be read to suggest that a non-consensual screen (even if supported by case law) would not be permitted because it does	

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

TOTAL = __ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					not involve informed written consent by both clients. To correct this inconsistency, the OCBA suggests revising the language of paragraph (d) to add either of the following at the end of the sentence: "...or if otherwise allowed pursuant to case law" or "...or if otherwise allowed by law." On a non-substantive note, the OCBA notes that Comment [7] still refers to paragraph (d)(1), even though subparagraph (1) was removed in the Commission's revisions to this proposed Rule. It appears that this reference was meant to be to paragraph (d) itself.	2. The noted discrepancy has been corrected.
1	San Diego County Bar Association Legal Ethics Committee	M	Yes		Delete paragraph (d)(2). We agree with the opposition's concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very mater in which representation was sought without their consent. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach.	The Board of Governors voted to adopt a version of proposed Rule 1.18 that does not permit unilateral screening as provided in deleted paragraph (d)(2), thereby implementing the commenter's suggested change.

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

TOTAL =__ Agree = __ Disagree = __ Modify = __ NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response

Rule 1.18: Duties to Prospective Client

(Commission's Proposed Rule Following Review of Public Comments)

(a) A person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal confidential information learned as a result of the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the prospective client have given informed written consent.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Hence, although the range of a prospective client's information that is protected is the same as that of a client, a law firm is permitted, in the limited circumstances provided under paragraph (d), to accept or continue representation of a client with interests adverse to the prospective client in the subject matter of the consultation. See Comments [3] and [4]. As used in this Rule, prospective client includes an authorized representative of the client.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who by any means communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or to discuss the prospective client's matter in the lawyer's professional capacity, is not a "prospective client" within the meaning of paragraph (a). Similarly, a person who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person in the lawyer's professional capacity would not have such a reasonable expectation. See *People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]. In addition, a person who communicates information to a lawyer for purposes that do not include a good-faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule.

[2A] Whether a lawyer's representations or conduct evidence a willingness to participate in a consultation is examined from the viewpoint of the

reasonable expectations of the prospective client. The factual circumstances relevant to the existence of a consultation include, for example: whether the parties meet by pre-arrangement or by chance; the prior relationship, if any, of the parties; whether the communications between the parties took place in a public or private place; the presence or absence of third parties; the duration of the communication; and, most important, the demeanor of the parties, particularly any conduct of the attorney encouraging or discouraging the communication and conduct of either party suggesting an understanding that the communication is or is not confidential.

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Sometimes the lawyer must investigate further after the initial consultation with the prospective client to determine whether the matter is one the lawyer is willing or able to undertake. Regardless of whether the lawyer has learned such information during the initial consultation or during the subsequent investigation, paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rules 1.7 and 1.9, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. See Rule 1.0.1(e) for the definition of informed consent. However, the lawyer must take reasonable measures to avoid exposure to more information that prohibits representation than is reasonably necessary to determine whether to represent the prospective client.

[6] Even in the absence of an agreement with the prospective client, under paragraph (c), the lawyer is not prohibited from either accepting or continuing the representation of a client with interests materially adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that is material to the matter. For a discussion of the meaning of "materially adverse" as used in paragraph (c), see Rule 1.9, comment [7]. For a discussion of the meaning of "substantially related" as used in paragraph (c), see Rule 1.9, comments [4] – [6].

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), the consequences of imputation may be avoided if the lawyer obtains the informed written consent of both the prospective and affected clients.

[8] Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

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

Kevin,

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 synopsizing 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):

1.6 (Agenda Item III.I)
1.7 (Agenda Item III.J) Co-Lead w/Kehr
1.18 (Agenda Item III.FF)
7.1 (Agenda Item III.MMM)
7.2 (Agenda Item III.NNN)
7.3 (Agenda Item III.OOO)
7.4 (Agenda Item III.PPP)

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 - MOHR - DFT1 (06-09-10).pdf
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2 (05-21-10)2.doc
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM22.doc
RRC - 3-100 [1-6] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.pdf
RRC - [1-18] - Rule - ALTB (No Screen) - PCD [2] (05-15-10) - CLEAN-LAND.doc
RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.pdf
RRC - 1-400 [7-4] - Rule - PCD [7] (05-31-09) - CLEAN-LAND.doc
RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).pdf
RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10).doc
RRC - 3-100 [1-6] - Rule - ALT - PCD [12.1] (02-28-10) - CLEAN-LAND.pdf
RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.pdf
RRC - 1-400 [7-1] - Rule - PCD [7] (05-30-09) - CLEAN-LAND.doc
RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
RRC - 1-400 [7-2] - Rule - PCD [8] (10-01-09) - CLEAN-LAND.pdf
RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.pdf
RRC - 1-400 [7-3] - Rule - PCD [8] (10-02-09) - CLEAN-LAND.doc

June 13, 2010 KEM E-mail to Drafters, cc Staff:

I've attached the public comment chart, XDFT2 (6/12/10). The only comment received to date is the comment of the San Diego Co. Bar Ass'n, which simply resubmitted their comment on the initial public comment draft version. They appear not to have reviewed the most recent public comment version of the Rule. Otherwise, they would have realized that RAC/BOG agreed in substance with their comment concerning former paragraph (d)(2) (permitting screening to rebut the presumption of shared confidences) and authorized a new rule version.

At any rate, their comment is moot. Nevertheless, I have drafted a minimal response. I don't think we need spend any more time on this.

I do not recommend any further changes to the Rule.

The only issue is whether the members who joined in Dissent A or C to the BOG's position will want to continue those dissents in the Final Report to the Supreme Court. That, however, should not require the Commission's attention at the 6/25-26/10 meeting.

Please let me know if you have any questions.

Attached:
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2 (06-12-10).doc

June 16, 2010 KEM E-mail to Drafters, cc Staff:

I've attached updated Public Comment Chart, XDraft 2.1 (6/16/10) to this e-mail. This draft adds the comments of COPRAC, OCTC and OCBA, together w/ responses, to the chart. Changes are highlighted in yellow. Highlights in turquoise are there to remind me to make a change to the rule.

There is one minor change to the proposed Rule that I will make once the dust settles. It involves the deletion of reference to "(d)(1)," a subparagraph that, w/ the elimination of the screening provision by the BOG, no longer exists. See the last paragraph of both the COPRAC and OCBA comments.

One last point. The response to COPRAC states that their request for reconsideration will be communicated to the BOG. That does not mean that the RRC will formally request reconsideration, just that all public comment is provided to the BOG in our submission.

Please let me know if you have any questions.

Attached:
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc

June 16, 2010 Tuft E-mail to Drafters, cc Staff:

I think the response to COPRAC's well reasoned comment that 1.18 mandates a screening provision is, to say the least, is an abdication of our responsibilities. If COPRAC can recommend that the Board reconsider its decision that California depart from the accepted norm

in lawyer regulation in having rule 1.18 without screening, why can't the Commission which is charged with the responsibility of crafting rules that better reflect normative principles of lawyer conduct, make the same request? I move that we ask the Board to reconsider the Model Rule formulation of a lawyer's duties to prospective clients.

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

Kevin,

It's finally your turn . . . you have exactly 40 minutes to complete this work J . . . I'm sure you're way ahead of me, but just in case . . .

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 .

1.6 (Agenda Item III.I) OCTC (sent with Randy's 6/15/10 e-mail)
1.7 (Agenda Item III.J) Co-Lead w/Kehr - OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
1.8.2 (Agenda Item III.L) - OCTC (sent with Randy's 6/15/10 e-mail)
1.18 (Agenda Item III.FF) - 2 Comments: COPRAC (attached); and OCTC (sent with Randy's 6/15/10 e-mail)
5.4 (Agenda Item III.DDD) OCTC (sent with Randy's 6/15/10 e-mail)
7.1 (Agenda Item III.MMM) OCTC (sent with Randy's 6/15/10 e-mail)
7.2 (Agenda Item III.NNN) OCTC (sent with Randy's 6/15/10 e-mail)
7.3 (Agenda Item III.OOO) OCTC; and Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)
7.5 (Agenda Item III.QQQ) 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 - [1-18] - 06-14-10 COPRAC Comment.pdf

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

I am with Mark on his request. We should ask the Board to reconsider their ill-advised rejection of screening.

June 17, 2010 KEM E-mail to Tuft & Vapnek, cc Drafters & Staff:

I don't disagree with you on Rule 1.18, or on Rule 1.10 for that matter. However, whether to take a position in favor of rules w/ screening notwithstanding RAC's vote is the Commission's decision and I don't have a vote. I noted in an e-mail I sent earlier re Rule 1.10 that there is precedent in the Commission vote on fee K modifications for the Commission to continue to take a position that is favorable to screening. A vote or votes could be taken at the next meeting on whichever day all (or at least the most number of) Commission members are present.

I also think that the Commission should do the same for Rule 1.11(e). I thought the Commission had resolved the government's problems re notice but RAC had its mind made up before we ever presented the revisions. A memo that had been circulated to RAC by Gov. Angela Davis, an AUSA who works w/ George Cardona, concerned itself with the previous draft of 1.11 and, despite my repeated statements during the discussion before RAC that we had resolved the one issue that Gov. Davis had raised (i.e., the notice issue), RAC voted overwhelmingly against the provision.

Putting 1.11(e) aside for the moment, the response I drafted re COPRAC's submission on 1.18 and the response Mark drafted re COPRAC's submission on 1.10 is as far as the Commission can go in the public comment chart, at least unless or until the Commission takes a position in favor of screening despite RAC's vote. The Commission has not had a vote on screening since RAC's decision not to adopt either rule w/ screening. The vote to approve 1.10 w/o screening is arguably misleading because a number of those members voting in favor of the motion expressed their preference for a rule w/ screening. Similarly, the vote on 1.18 was taken when three members, who the day before had opposed a motion to delete the screening provision, were absent. Of course, minds may have changed since the votes favoring screening were taken, but we should determine the will of the Commission on this issue.

Rule 1.11(e) is a separate issue. I know that Mark disagrees with the position the Commission took but if the Commission seeks reconsideration of RAC's screening votes on 1.10 and 1.18, it might also consider seeking reconsideration of the 1.11(e) vote.

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

Because of the number and content of public comments received on the issue of screening and because the issue of screening in the public and private sectors is a major issue in the regulation of lawyers in California and elsewhere, RAD, the Supreme Court and the public are entitled to know how the Commission voted on screening in Rules 1.18, 1.10 and 1.11 in response to the public comments. Although I may be in the minority, I want my vote recorded on this important issue. And, I want the Board, the Court and the public to know the views of the Commission however the votes turn out.

I remind those who are opposed to any screening in lawyer conduct rules, that the Supreme Court clearly favors screening in the public sector (which does not mean only government lawyers) and has left open the issue of limited screening in the private sector. Who better than us to provide guidance on this significant issue? If COPRAC can take a position, why can't the Commission? I do not understand the reticence in your message, Kevin.

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

I've attached the following:

1. Public Comment Chart, XDFT2.1 (6/16/10).

2. Rule, ALTB, Post-public comment draft [3] (6/17/10), redline, compared to PCD [2.1] (5/16/10).

3. Rule, ALTB, Post-public comment draft [3] (6/17/10), clean landscape version.

The rule incorporates the nit both COPRAC and OCBA identified: a reference in the comment to (d)(1), which no longer exists with the deletion of (d)(2) by RAC/BOG.

Please let me know if you have any questions.

Attached:
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-16-10).doc
RRC - [1-18] - Rule - ALTB - Post-PCD [3] (06-17-10) - Cf. to PCD [2.1] (05-16-10) - LAND.doc
RRC - [1-18] - Rule - ALTB - Post-PCD [3] (06-17-10) - CLEAN-LAND.doc

June 18, 2010 KEM E-mail to Tuft, cc Drafters, Chair, Vapnek & Staff:

I just found this e-mail of yours as I attempt to clean up my inbox (an Augean Stable task given the e-mail traffic of the last several days; perhaps if I divert the L.A. River ...)

At any rate, I didn't think I was being reticent in my earlier e-mail. I agree that the Commission can take a position contrary to RAC/BOG -- the precedent having been set w/ the deliberations and votes on fee K modifications. I also agree that the Commission's position on screening should be communicated to RAC and the Supreme Court, so long as it is the Commission's position, which would require a majority vote at the next meeting. Moreover, even if there is not a majority of the Commission, however, there is nothing that prevents a minority of the Commission from taking a dissenting position from what is being sent to the RAC or the Supreme Court. In short, I agree there should be a vote on the rules you identify below and those votes will determine how the communication re screening will be characterized -- as either the position of the Commission or as the views of a substantial minority of the Commission.

Finally, the audience for this e-mail exchange is the 1.18 drafting team, not the entire Commission. To have the reconsideration of the screening rules placed on the agenda, the rules should not be placed on the consent agenda. I've copied Harry so he is aware of the position you and Paul have taken.

June 20, 2010 Kehr E-mail to RRC:

Here are my comments on this proposed Rule:

1. I disagree with the proposed RRC Reply to OCTC's second comment. OCTC is correct that the right of a prospective client to consent to a representation should be governed by the limitations described in Rule 1.7, but only those described in its Comment [17A] (inability to obtain consent b/c of a duty of confidentiality or b/c of a person's lack of capacity). The other situations in which consent is not possible cannot arise in the Rule 1.18 situation b/c they involve a lawyer having two clients.

2. The proposed RRC Response to the third OCTC comment overlooks its criticism of Comment [2A]. I disagree with OCTC's concern b/c [2A] is clear that the listed items are only examples.

3. In [2A], the phrase "in a public or private place" could be shortened to "in public or private".

4. Also in [2A] the "presence or absence of third parties" overlooks a key part of Evid. C. § 952. I would change the phrase to: "the presence or absence of third parties <u>and the purpose of their presence</u>".

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

Kevin,

The moment you've been anticipating . . .

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.

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

Attached:
RRC - 3-100 [1-8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (#)
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc (A)
RRC - [1-18] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-310X [5-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc (A,#)
RRC - 1-400 [7-1] - Public Comment Chart - By Commenter - XDFT2.3 (06-21-10).doc
RRC - 1-400 [7-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-3] - Public Comment Chart - By Commenter - XDFT2.4 (06-21-10).doc
RRC - 1-400 [7-4] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc
RRC - 1-400 [7-5] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc (A, R)

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

*TOTAL = _4_* **Agree = __ Disagree = _1_ Modify = _3_ NI = __**

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly, prefers the prior version of the rule in which paragraph (d) permitted screening to rebut the presumption of shared confidences if "the lawyer who received the information took reasonable measures to avoid exposure to more information that prohibits representation than was reasonably necessary to determine whether to represent the prospective client." If the rule were to permit screening, it should not require that the screening have been, in hindsight, "effective," but rather should require that the lawyer or firm took reasonable measures to screen the prohibited lawyer. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession by leaving lawyers uncertain of the application of precedent to their particular situations. Accordingly, COPRAC urges the reconsideration, and adoption, of the prior language of the rule permitting screening.	1. As the commenter noted, the Board of Governors voted to adopt a version of proposed Rule 1.18 that does not permit unilateral screening as provided in deleted paragraph (d)(2). However, the commenter's request for reconsideration of that decision will be communicated to the Board.

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

TOTAL =_4_ **Agree = __**
Disagree = _1_
Modify = _3_
NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					In addition, even if case law develops to permit screening as a method to avoid disqualification, the absence of screening in the rule could nevertheless subject a lawyer to discipline. If this change is not adopted, we are concerned that the language, as drafted may contain a contradiction, in that the rule says that you can undertake the representation if both lawyer and client give informed written consent, but the comment directs lawyers to abide by case law, which may allow screening. Is the Commission relying on the fact that the new provision in the rule does not use the word "only" before "if both the affected client and the prospective client have given informed written consent" to avoid internal inconsistency? If so, we are concerned that this may end up causing confusion. Finally, we note that Comment [7] incorrectly refers to paragraph (d)(1), when there is no longer a subparagraph (1). In the event the Commission does not follow our recommendation, this reference should be amended to refer to paragraph (d).	2. The Commission understands the commenter's concerns but has not made any suggested change. Pursuant to proposed Rule 1.0, the comments to the Rules "provide guidance for their interpretation and for acting in compliance with the Rules." When read in conjunction with Comment [8], the implementation of a screen by itself will not subject the lawyers involved to discipline. 3. The noted discrepancy has been corrected.
2	Office of Chief Trial Counsel ("OCTC")	M	Yes		1. The Commission states that this is a new rule to California, although OCTC believes it	1. The Commission is not aware of any Rule of Professional Conduct that addresses duties owed to

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

*TOTAL =_4_* **Agree = __ Disagree = _1_ Modify = _3_ NI = __**

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.	prospective clients. Thus, this is a "new rule" for California, although some of its concepts can be found in the Evidence Code and ethics opinions.
				1.18(c),(d)	2. OCTC is concerned that subparagraphs (c) and (d) are essentially a repeat of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule.	2. The Commission disagrees with the commenter. As noted previously, a conflict that might arise from a consultation with a prospective client is distinguishable from a former client conflict, requiring that it be treated separately from other conflicts situations. Moreover, non-waivable conflicts typically arise in concurrent representation situations and thus are more appropriately treated under Rule 1.7.
					3. Many of the Comments are more appropriately placed in treatises, law review articles, and ethics opinion. The inclusion of factors in 2A could be confusing and give the impression they are the exclusive factors. Further, if they are to be considered, it should be in the rule.	3. 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.
4	Orange County Bar Association ("OCBA")	M	Yes		The OCBA supports the adoption of proposed Rule 1.18 with one substantive change. Specifically, the OCBA notes that paragraph (d) states that, "[w]hen the lawyer has received information that prohibits representation as defined in paragraph (c), representation of the affected client is permissible if both the affected client and the	1. See Response to COPRAC, ¶.2, above.

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

*TOTAL =_4_* **Agree = __**
Disagree = _1_
Modify = _3_
NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					prospective client have given informed written consent." While this statement does not say "...permissible only if...," the language could be interpreted to imply that such a representation can only be undertaken with informed written consent. This interpretation is reinforced by the language of paragraph (c) insofar as it provides a direct prohibition with regard to "represent[ing] a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received confidential information from the prospective client that is material to the matter, except as provided in paragraph (d)." This single exception is repeated in the next sentence of paragraph (c) with regard to imputation. However, Comment [8] states that "Rule 1.18 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (c). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law." This appears to contradict the language of the proposed Rule itself, in that paragraph (d) could be read to suggest that a non-consensual screen (even if supported by case law) would not be permitted because it does	

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

*TOTAL =_4_* **Agree = __ Disagree = _1_ Modify = _3_ NI = __**

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					not involve informed written consent by both clients. To correct this inconsistency, the OCBA suggests revising the language of paragraph (d) to add either of the following at the end of the sentence: "...or if otherwise allowed pursuant to case law" or "...or if otherwise allowed by law." On a non-substantive note, the OCBA notes that Comment [7] still refers to paragraph (d)(1), even though subparagraph (1) was removed in the Commission's revisions to this proposed Rule. It appears that this reference was meant to be to paragraph (d) itself.	2. The noted discrepancy has been corrected.
1	San Diego County Bar Association Legal Ethics Committee	M	Yes		Delete paragraph (d)(2). We agree with the opposition's concerns about the unilateral nature of paragraph (d)(2) and that it could enable law firms to receive material confidential information from a prospective client, without any notice to the potential client of the consequences, and then to appear against that person in the very mater in which representation was sought without their consent. It seems requiring informed written consent of both the affected client and the prospective client pursuant to paragraph (d)(1) is the better approach.	The Board of Governors voted to adopt a version of proposed Rule 1.18 that does not permit unilateral screening as provided in deleted paragraph (d)(2), thereby implementing the commenter's suggested change.

Rule 1.18 Duties to Prospective Client
[Sorted by Commenter]

*TOTAL =_4_* **Agree = __**
Disagree = _1_
Modify = _3_
NI = __

No.	Commentator	Position[1]	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response