

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

Mark,

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

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

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

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

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

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

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

**1.0** (Agenda Item III.A)

- 3.3 (Agenda Item III.MM)
- 4.3 (Agenda Item III.WW)
- 5.1 (Agenda Item III.ZZ)

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

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

[www.calbar.org/proposedrules](http://www.calbar.org/proposedrules)

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

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

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

***Attached:***

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - TUFT - DFT1 (06-09-10).pdf
- RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT1 (04-22-10).doc
- RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.pdf
- RRC - 1-310X [5-1] - Rule - PCD [10] (09-13-09) - CLEAN-LAND.doc
- RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.pdf
- RRC - 1-100 [1-0] - Rule - PCD [8.1] (10-18-09) - CLEAN-LAND.doc
- RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.pdf
- RRC - 5-200 [3-3] - Rule - PCD [11.1] (02-20-10) - CLEAN-LAND.doc
- RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.pdf
- RRC - 2-100 [4-3] - Rule - PCD [6] (10-19-09) - CLEAN-LAND.doc

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

Mark,

Additional comments in opposition or recommending modifications have been received for the following rules. The Google site is also up-to-date

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

- 1.0 (Agenda Item III.A) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.4.1 (Agenda Item III.F) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.11 (Agenda Item III.V) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.10 (Agenda Item III.X) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.13 (Agenda Item III.AA) - OCTC (sent with Randy's 6/15/10 e-mail)
- 3.1 (Agenda Item III.KK)- OCTC (sent with Randy's 6/15/10 e-mail)
- 3.3 (Agenda Item III.MM) – 2 Comments: OCTC; and, Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)
- 4.3 (Agenda Item III.WW) - OCTC (sent with Randy's 6/15/10 e-mail)

**RRC – Rule 3-200 [3.1 & 3.2]  
E-mails, etc. – Revised (6/21/2010)**

**4.4** (Agenda Item III.YY) – Co-Lead w/Martinez – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

**MR 4.4(a)** (Agenda Item III.XX – NRFA) – Co-Lead w/Martinez – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**5.1** (Agenda Item III.ZZ) – 2 Comments: OCTC; and, Law Practice Management & Technology Section (sent with Randy's 6/15/10 e-mail)

**5.2** (Agenda Item III.AAA) - OCTC (sent with Randy's 6/15/10 e-mail)

**5.3** (Agenda Item III.BBB) - 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.**

**June 16, 2010 Tuft E-mail to Ruvolo, Difuntorum, McCurdy & KEM:**

I do not recommend any changes to rule 3.1 in response to OCTC's comments.

**June 17, 2010 Difuntorum E-mail to Tuft & Ruvolo, cc McCurdy & KEM:**

Thanks for all of you work on the comments. There is one comment on Rule 3.1 that I think may not have be provided to you. It is from Glenn Alex. I attach the Rule 3.1 comment collection that includes the Glenn Alex comment and I provide an excerpt below. Please let me know if you recommend any revisions to Rule 3.1 in response to this comment. Thanks. – Randy D.

***Glenn Alex Comment On Rule 3.1:***

"Proposed Rule 3.1 (Meritorious Claims and Contentions).

The proposed Rule should be clarified as to the meaning of the term "proceeding." Under subdivision (a), "[a] lawyer shall not bring, continue or defend a proceeding unless there is a basis in law and fact for doing so that is not frivolous " Official comment [4] states that "[t]his Rule applies to proceedings of all kinds, including appellate and writ proceedings." But neither this Rule nor (draft) Rule 1.0.1 (Terminology) defines "proceeding." (Compare Rule 3.3 (Candor Toward the Tribunal), pertaining to an "adjudicative proceeding"; and Rule 3.9 (Advocate in Nonadjudicative Proceedings)

**RRC – Rule 3-200 [3.1 & 3.2]  
E-mails, etc. – Revised (6/21/2010)**

[BATCH 6]: "A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding...." (Emphasis added.)

Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with proposed Rule 3.9 (Advocate in Nonadjudicative Proceedings) [BATCH 6], and rule 4.1 (Truthfulness in Statements to Others)."

**June 17, 2010 Tuft E-mail to Difuntorum, cc Ruvolo, McCurdy & KEM:**

I do not recommend we define "proceeding" in rule 3.1 or in the terminology rule. The term "proceeding" is used in other rules in the three series (e.g, Rule 3.3(d), Rule 3.5(b) Rule 3.6(a). Defining "proceeding" would be like defining "litigation," "trial" or "matter" in the rules. Lawyers are expected to understand the meaning of terms common to the practice of law such as "proceeding" in complying with the rules. (see Black's Law Dictionary). Otherwise, we will end up having to define terms of common usage throughout the rules.

Had we adopted the Model Rule version of Rule 3.9, Mr. Alex would not be in a quandary whether Rule 3.1 applied in a non-adjudicative proceeding. His comment should motivate us to reconsider our draft version of that rule.

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

Mark,

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

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

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

***Attached:***

RRC - [4-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - [4-4(a)] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-310X [5-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10).doc  
RRC - 3-320 [1-8-11] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)MLT-KEM.doc  
RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-100 [1-0] - Public Comment Chart - By Commenter - XDFT3.1 (06-12-10)KEM.doc

**RRC – Rule 3-200 [3.1 & 3.2]  
E-mails, etc. – Revised (6/21/2010)**

RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-19-10).doc  
RRC - 5-200 [3-3] - Public Comment Chart - By Commenter - XDFT2.3 (06-17-10)MLT-KEM.doc  
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc  
RRC - 2-100 [4-3] - Public Comment Chart - By Commentator - XDFT2.4 (06-19-10)MLT-RM-RD-KEM.doc

**June 22, 2010 Tuft E-mail to RRC List:**

Attached is a revised public commenters' chart for rule 3.1 that addresses Mr. Alex and OCTC's comments. I had sent an email last week that addressed Mr. Alex.

I have two observations that I would like to have included in the record. First, had the RRC adopted the Model Rule version of Rule 3.9, lawyers such as Mr. Alex would not be in a quandary whether rule 3.1 applies in a non-adjudicative proceeding. His comment should motivate us to reconsider our current version of that rule.

Second, OCTC's concern that Rule 3.1 does not carry forward the prohibition in current rule 3-200(A) against bringing an action without probable cause for the purpose of harassing or maliciously injuring any person could better be explained had we recommended adoption of a version of Model Rule 4.4(a). OCTC's comment should be motivation to reconsider the decision not to include a version of that rule.

Lauren, all of the other charts you sent me yesterday have been revised or did not need further revision.

***Attached:***

RRC - 3-200 [3-1] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-MLT.doc

**Rule 3.1 Meritorious Claims and Contentions.  
[Sorted by Commenter]**

TOTAL = 3 Agree = 1  
Disagree =      
Modify = 2  
NI =    

No.	Commenter	Position <sup>1</sup>	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 "proceeding."</p> <p>Rule 3.1 should be clarified to indicate the extent to which it does or does not apply to arbitrations, mediations, and non-adjudicatory hearings and other matters (awards of grants by public bodies, for example; and processes by which public agencies select contractors and enter into agreement with them). Perhaps this can be accomplished through better integration of cross-references with Proposed Rule 3.9 and Rule 4.1.</p>	<p>The Commission does not disagree that a definition of "proceeding" is necessary in rule 3.1 or in the terminology rule. The term "proceeding" is a term of common usage and is used in other rules (e.g, Rule 3.3(d), Rule 3.5(b) Rule 3.6(a). Defining "proceeding" would be like defining "litigation," "trial" or "matter" in the rules. Lawyers are expected to understand the meaning of terms common to the practice of law such as "proceeding" in complying with the rules. (see Black's Law Dictionary).</p>
1	COPRAC	A	Yes		Support as drafted.	No response required.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		<p>OCTC is concerned that Proposed Rule 3.1 has narrowed what is currently contained in rule 3-200(A). It removes the prohibition on bringing an action whose purpose is to harass or maliciously injure any person. We believe that still belongs in the rules.</p> <p>The Comments are too long and they cover subjects and discussions best left to treatises,</p>	<p>The Commission disagrees and has made no change to this rule. Rule 3.1 tracks the Model Rule and in many ways is broader than current rule 3-200(A). Other rules, including Rule 3.4(e) and 8.4(c) and (d) would also protect against actions brought for the purpose of harassing or maliciously injuring any person.</p> <p>The Commission disagrees and believes the four comments are appropriate and useful in</p>

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

**Rule 3.1 Meritorious Claims and Contentions.  
[Sorted by Commenter]**

TOTAL = 3 Agree = 1  
Disagree =      
Modify = 2  
NI =    

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				Comment [2]	<p>law review articles, and ethics opinions.</p> <p>While Comment [2] references Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, it, especially the first sentence, could be interpreted to be contrary to Civil Procedure Code section 128.7 and Rule 11 of the Federal Rules of Civil Procedure, which require an attorney to make an inquiry reasonable under the circumstances. The duty to make a reasonable inquiry should be stated in a clearer language. It should also be made clearer that attorneys may have a duty to even investigate their client's statements. (See <i>Butler v. State Bar</i> (1986) 42 Cal.3d 323, 329 ["While an attorney may often rely upon statements made by the client without further investigation, circumstances known to the attorney may require an investigation."])</p>	<p>understanding and complying with the rule.</p> <p>The Commission does not believe that Comment [2] can be reasonable read to be contrary to CCP § 128.7 or FRCP 11. The statement that the rule requires that lawyers inform themselves about the facts of their client's case and the applicable law and determine that they can make good faith arguments in support of their clients' positions is consistent with the duty to make a reasonable inquiry. This statement which comes from Model Rule Comment [2] coupled with citations to both statutes is adequate to eliminate a reasonable interpretation to the contrary.</p>

**Rule 3.1 Meritorious Claims and Contentions**  
(Commission's Proposed Rule – Clean Version)

- (a) A lawyer shall not bring, continue or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
- (b) A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

**Comment**

- [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.
- [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to

support the action taken by a good faith argument for an extension, modification or reversal of existing law. This Rule also prohibits a lawyer from continuing an action after the lawyer knows that it has no basis in law or fact for doing so that is not frivolous. See Business and Professions Code sections 6068(c) and (g), Civil Procedure Code section 128.7, and Rule 11(b) of the Federal Rules of Civil Procedure.

- [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.
- [4] This Rule applies to proceedings of all kinds, including appellate and writ proceedings.