

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 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 (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

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)
- 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 17, 2010 Difuntorum E-mail to Drafters, cc Staff:

Mark, Raul & Ellen:

I apologize in advance if I am overlooking a message on this. There are so many.

OCTC commented on Rule 5.2 as set forth below. Do you recommend any revisions in response to OCTC's comment? If not, we could insert the standard reply to the OCTC point about unnecessary comments and augment it to specifically address OCTC's issue with Cmt. [1]. Let me know.

Rule 5.2. Responsibilities of a Subordinate Lawyer.

1. OCTC supports this rule. It appears to be consistent with California law.
2. OCTC is concerned, however, that the Comments are too long, and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC is especially concerned with the last sentence of Comment 1, which states that if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules of Professional Conduct unless the subordinate knows the document's frivolous character. This Comment is inconsistent with CCP section 128.7 and FRCP rule 11 (and the cases interpreting those rules), which hold that by signing a pleading an attorney is certifying that to the best of the signing attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the matter is not being presented for an improper purpose, that the claims, defenses and other legal contentions are warranted under existing law or by nonfrivolous arguments for extension, modification, or reversal of existing law, and the allegations and other factual conclusions have evidentiary support or are likely to have evidentiary support. (See *Moser v. Bret Harte Union High School District* (E.D. Cal. 2005) 366 Fed.Supp.2d 944 [public reprimand to associate attorney and law firm for filing frivolous pleadings], especially pp. 977, 978, 980, and 984.) Gross negligence would support a violation for such conduct.

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

I don't see an inconsistency between Rule 11 and CCP 128.7. Pleading rules and disciplinary rules run on different tracks. A subordinate lawyer's certification may justify monetary sanctions, but not discipline. Also, in the sanctions context the firm always foots the bill, so the lawyer is not placed in the same conundrum.

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

I do believe that we carefully discussed exactly this point at a meeting when we drafted the language. I disagree that there should be a violation of this rule without the "scier" requirement we are building into the comment. I would not change the rule in response to this comment.

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

I had read OCTC's comments as supporting the rule and that we only need to respond to the excessive comments concern. However, in rereading OCTC's concern regarding the last sentence in Comment [1], I tend to agree that the illustration not correct. I propose that we delete that sentence. The Model Rule comment does not have this illustration and we don't need to have it. This will be responsive to OCTC's concerns about the content and length of the comments to this rule.

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

The Model Rule has basically same illustration:

For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character."

Our last sentence of Comment [1] reads:

"For example, if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the Act unless the subordinate knows of the document's frivolous character."

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

You are correct, Raul. Leave the comment as is.

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 22nd.

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 - 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:

I thought I had already responded to OCTC's comments regarding Rule 5.2. In case my response got lost in the blizzard of emails, I submit a revised commenters' chart. I am recommending we delete the last sentence in Comment [1] to the rule to avoid confusion between the duties of subordinates under this rule and under CCP 128.7 and FRCP 11.

Attached:

RRC - 1-310X [5-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-MLT.doc

June 22, 2010 KEM E-mail to Tuft, cc RRC:

I think you are mistaken in suggesting the deletion of the last sentence of Comment [1]. In your previous e-mail exchange w/ Ellen and Raul, you conceded that it should remain. See below.

See June 17, 2010 Martinez E-mail to Drafters, cc Staff: through June 17, 2010 Tuft E-mail to Martinez, cc Drafters & Staff:, above.

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

**TOTAL = 3 Agree = 3
Disagree = 0
Modify = 0
NI = 0**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	A	Yes		Support as drafted.	No response required.
2	San Diego County Bar Association	A	Yes		Support as drafted	No response required.
3	Office of Chief Trial Counsel	A	Yes		<p>OCTC is concerned that the Comments are too long, and cover subjects and discussions best left to treatises, law review articles, and ethics opinions.</p> <p>OCTC is especially concerned with the last sentence of Comment [1], which states that if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules of Professional Conduct unless the subordinate knows the document's frivolous character. This Comment is inconsistent with CCP section 128.7 and FRCP rule 11 (and the cases interpreting those rules), which hold that by signing a pleading an attorney is certifying that to the best of the signing attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the matter is not being presented for an improper purpose, that the claims, defenses and other legal contentions</p>	<p>The Commission disagrees and believes the comments are appropriate and useful in understanding and conforming to the rule.</p> <p>The Commission has eliminated the last sentence in Comment [1] to avoid confusion between the application of this rule and rules of civil procedure.</p>

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

**Rule 5.2 Responsibilities of a Subordinate Lawyer.
[Sorted by Commenter]**

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					are warranted under existing law or by nonfrivolous arguments for extension, modification, or reversal of existing law, and the allegations and other factual conclusions have evidentiary support or are likely to have evidentiary support. Gross negligence would support a violation for such conduct.	

Rule 5.2 Responsibilities of a Subordinate Lawyer
(Commission’s Proposed Rule – Clean Version)

- (a) A lawyer shall comply with these Rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.
- (b) A subordinate lawyer does not violate these Rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.

select, and the subordinate may be guided accordingly. If the subordinate lawyer believes that the supervisor’s proposed resolution of the arguable question of professional duty would result in a violation of these Rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

COMMENT

- [1] The fact that a lawyer is under the supervisory authority of another lawyer does not excuse the subordinate lawyer from the obligation to comply with these Rules or the State Bar Act. Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acts at the direction of a supervisor, that fact may be relevant in determining whether the lawyer has violated the Rules or the Act. See Rule 8.4(a). For example, if a subordinate signs a frivolous pleading at the direction of a supervisor, the subordinate would not violate the Rules or the Act unless the subordinate knows of the document’s frivolous character.
- [2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers’ responsibilities under these Rules or the State Bar Act and the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable alternatives to