

Rule 1.3 Diligence. [Sorted by Commenter]						
No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Zitrin, Richard (law professors group)	D	Yes	(b) and Comment [2]	<p>The Commission's explanation ...argues that 'diligence is a professional responsibility standard that is subsumed within a lawyer's duty of competence.' This is not so."</p> <p>"..other important components of diligence merit no mention in the proposed competence rule, and thus no mention at all in California: work overload (ABA Rule 1.3, Comment ,-r 2), procrastination and delay (ABA Comment,-r 3), and following through on matters to completion (ABA Comment,-r 4). "</p> <p>"We strongly agree with the Commission's minority report with respect to this rule. Simply put, competence, in the eyes of most lawyers (and most people) relates to requisite skill, while diligence relates to a different and distinct concept: paving adequate attention. MR 1.3 and its comments need to be approved by the Board."</p>	

TOTAL = \_1\_ Agree = \_\_  
 Disagree = \_1\_  
 Modify = \_\_  
 NI = \_\_

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

**Rule 1.3 Diligence.  
[Sorted by Commenter]**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response

**McCurdy, Lauren**

RE: Rule 1.10  
3/27/09 Commission Meeting  
Open Session Agenda Item III.X.

**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Wednesday, June 16, 2010 9:10 AM  
**To:** Kevin Mohr; Vapnek, Paul W.  
**Cc:** JoElla L. Julien; Robert L. Kehr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; McCurdy, Lauren  
**Subject:** RE: RRC - 3-310 1-10 - Public Comment Chart - By Commenter

I agree with Kevin's additions to the chart.

Mark L. Tuft  
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=====  
**From:** Kevin Mohr [mailto:kemohr@charter.net]  
**Sent:** Wednesday, June 16, 2010 9:05 AM  
**To:** Vapnek, Paul W.  
**Cc:** Mark Tuft; JoElla L. Julien; Robert L. Kehr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Difuntorum, Randall; McCurdy, Lauren  
**Subject:** Re: RRC - 3-310 1-10 - Public Comment Chart - By Commenter

Greetings:

I've attached Draft 2.1 (6/15/10) of the public comment chart, which adds the comments of Senator

et al. and OCTC re Rule 1.10, and provides responses. For Senator, I simply copied and pasted the response to COPRAC. For OCTC, I copied and pasted the previous responses of the Commission to OCTC points, which had been made before. All are highlighted in yellow.

As to whether the Commission should vote screening up or down, there is precedent for diverging from the BOG in the vote the Commission took on modifications to fee agreements. Notwithstanding the revisions that the Commission drafted to address BOG concerns, the vote was against the provisions the BOG eventually adopted.

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

Kevin

Attached:

RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc

Vapnek, Paul W. wrote:

I agree with Mark that we (the Commission) should go on record as supporting some form of screening in this rule, and I expressed that view at our last meeting. The Supreme Court should know what we recommended even if the Board disagrees with us.

---

**From:** Mark Tuft [<mailto:MTuft@cwclaw.com>]

**Sent:** Tuesday, June 15, 2010 5:15 PM

**To:** JoElla L. Julien; Robert L. Kehr; Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Vapnek, Paul W.

**Cc:** Difuntorum, Randall; McCurdy, Lauren

**Subject:** RRC - 3-310 1-10 - Public Comment Chart - By Commenter

<<RRC - 3-310 1-10 - Public Comment Chart - By Commenter - XDFT1 (6-14-10).doc>>

Attached is a draft response to COPRAC's recommendation that Rule 1.10 be amended to include screening as provided in Model Rule 1.10. If it is the will of the Commission to respond in this fashion, the same response can be made to similar comments more recently received from several law firms.

I personally am not satisfied with the response because it refers the Board's actions and does not respond on the merits. Although the Board rejected our propose rule with limited screening and recently approved the rule without screening, I personally believe the Commission should go on record that there should be an imputation rule with limited screening. I opposed the rule that was initially sent to the Board because it contained unworkable restrictions on limited screening that, in my opinion, had not been properly vetted by the Commission. I also oppose unlimited screening as reflected in the current version of Model Rule 1.10(a)(2) and advocated by COPRAC. The Supreme Court is entitled to our views on this important issue as well as COPRAC's and a response to COPRAC and the other commenters that the Board has rejected screening is not sufficient.

I urge us to take a position on the policy issue that COPRAC and others have raised whether California should provide for screening in a rule of professional conduct rather than through the piecemeal case-by-case approach and, if so, whether non-consensual screening should be limited to

lateral attorneys who are not substantially involved in the matter and who are not "switching sides." The Board's action on the proposed rule has not precluded COPRAC from expressing its views and the Court at a minimum should have the benefit of our position on the merits.

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**Rule 1.10 Imputation of Conflicts: General Rule**  
**[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
 Disagree = \_\_  
 Modify = \_\_  
 NI = \_\_

No.	Commenter	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		<p>COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly urges the adoption of paragraph 1.10(a)(2) of the Model Rule. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.</p> <p>In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of</p>	<p>The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening. \</p>

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

49

**Rule 1.10 Imputation of Conflicts: General Rule**  
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					screening in the rule could nevertheless subject a lawyer to discipline.	
3	Office of Chief Trial Counsel ("OCTC")	M		1.10(a)	<p>1. Commenter is concerned with the use of the term "knowingly" in paragraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases.</p> <p>2. As it has noted with respect to other rules, the commenter believes there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>1. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in other jurisdictions that have adopted imputation as a disciplinary standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction.</p> <p>2. The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.</p>
				Comment	Comment [1] simply states that whether two	The Commission did not make a change. Comment

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**Rule 1.10 Imputation of Conflicts: General Rule**  
**[Sorted by Commenter]**

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				[1]	or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment [1] provides guidance as to what constitutes a law firm.	[1] provides a cross-reference to proposed Rule 1.0.1(c) – which defines “law firm” – and cmts. [2]-[4] thereto. The Commission does not believe that it is possible to define in advance how the term “law firm” will be applied in all situations. For example, there might be facts under which two independent law firms work so closely together that they should be considered a single law firm for purposes of imputation.
				Comment [3]	Comment [3] should be clarified or stricken.	The Commission has made no change. Comment [3] is derived nearly verbatim from Model Rule 1.10. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment ‘deals with the elimination of imputation of a lawyer’s personal-interest’ conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.’ See also proposed Rule 1.7.
				Comment [4]	Comment [4] discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people.	The Commission has retained this Comment, which is based on Model Rule 1.10, cmt. [4]. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment reflects current case law and “is intended to give guidance to lawyers about important practical questions.”
				Comment [9]	Comment [9] needs more clarification or should be stricken	The Commission has not made the requested change to Comment [9]. As noted in the

**Rule 1.10 Imputation of Conflicts: General Rule**  
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						Explanation of Changes to proposed Rule 1.10, the comment has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it. Nevertheless the Commission has made some clarifying changes to the Comment and added references to California case law.
2	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	Model Rule 1.10(a)(2)	<p>Whether it is ethically proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited.</p> <p>Trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. Because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today.</p> <p>Ethical screens have been shown to be effective to protect confidential client</p>	<p>The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening.</p>

**Rule 1.10 Imputation of Conflicts: General Rule**  
**[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
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					<p>information. As the court in <i>Kirk v. First American Title Ins. Co.</i> put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." <i>Kirk</i>, supra, at * 16.</p> <p>The commenter urges the Board of Governors to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).</p>	



**Rule 1.10: Imputation of Conflicts of Interest: General Rule**  
(Commission's Proposed Rule - Clean Version)

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless
  - (1) the matter is the same as or substantially related to that in which the formerly associated lawyer represented the client; and
  - (2) any lawyer remaining in the firm has information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A prohibition under this Rule may be waived by each affected client under the conditions stated in Rule 1.7.
- (d) The imputation of a conflict of interest to lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

**COMMENT**

Definition of "Firm"

- [1] Whether two or more lawyers constitute a firm for purposes of this Rule can depend on the specific facts. See Rule 1.0.1(c), Comments [2] - [4].

Principles of Imputed Conflicts of Interest

- [2] The rule of imputed disqualification stated in paragraph (a) gives effect to the duties of loyalty and confidentiality owed to the client as they apply to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing the duties of loyalty and confidentiality owed to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty and confidentiality owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).
- [3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation

by others in the firm, the firm should not be prohibited from further representation. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal prohibition of the lawyer would be imputed to all others in the firm.

- [4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm if the lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. In both situations, however, such persons must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0.1(k) and 5.3. See also Comment [9].
- [5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Business and Professions Code section 6068(e) and Rules 1.6 and 1.9(c).

- [6] Rule 1.10(c) removes imputation with the informed consent of each affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and Comments [14A] to [17A], and that each affected client or former client has given informed written consent to the representation. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0.1(e).
- [7] Where a lawyer has joined a private firm or a government agency after having represented the government or another government agency, imputation is governed by Rule 1.11(b) and (c), not this Rule. Where a lawyer has become employed by a government agency after having served clients in private practice or other nongovernmental employment, imputation is governed by Rule 1.11(e).
- [8] Where a lawyer is prohibited from engaging in certain transactions under Rules 1.8.1 through Rule 1.8.9, Rule 1.8.11, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

#### Rule Not Determinative of Disqualification Motions

- [9] This Rule does not limit or alter the power of a court of this State to control the conduct of lawyers and other persons connected in any manner with judicial proceedings before it, including matter pertaining to disqualification. See Code of Civil Procedure section 128(a)(5); Penal Code section 1424; *In re Charisse C.* (2008) 45 Cal.4th 145; *Rhabum v. Superior Court* (2006) 140 Cal.App.4th 1566.

[10] Rule 1.10 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 (a) or (b). 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.



**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 14, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

New comments in opposition or recommending modifications have been received for the following rules and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

- 1.10 (Agenda Item III.X)
- 1.13 (Agenda Item III.AA)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 3-600 [1-13] - Public Comment Complete - REV (06-14-10).pdf  
RRC – 3-310 [1-10] - Public Comment Complete - REV (06-14-10).pdf  
RRC - 3-600 [1-13] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc  
RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT1 (06-14-10).doc

**June 15, 2010 Difuntorum E-mail to Drafters (Tuft, Julien, Kehr, Vapnek & KEM), cc Staff:**

More comments keep arriving. More supplemental assignments are being prepared. Since time is short, here's another heads-up. Three prominent law firms have joined in a comment advocating that Rule 1.10 provide for the use of ethical screens for lateral hires in non-governmental settings. This can be regarded as "asked and answered" given the recent Board action but I wanted you to have a heads-up.

***Attached:***

RRC - 3-310 [1-10] - 06-14-10 Senator (Munger) Letter re Screening.pdf

**June 15, 2010 Tuft E-mail to Drafters, cc Staff:**

Attached is a draft response to COPRAC's recommendation that Rule 1.10 be amended to include screening as provided in Model Rule 1.10. If it is the will of the Commission to respond in this fashion, the same response can be made to similar comments more recently received from several law firms.

I personally am not satisfied with the response because it refers the Board's actions and does not respond on the merits. Although the Board rejected our propose rule with limited screening and recently approved the rule without screening, I personally believe the Commission should go on record that there should be an imputation rule with limited screening. I opposed the rule that was initially sent to the Board because it contained unworkable restrictions on limited screening that, in my opinion, had not been properly vetted by the Commission. I also oppose unlimited screening as reflected in the current version of Model Rule 1.10(a)(2) and advocated by COPRAC. The Supreme Court is entitled to our views on this important issue as well as COPRAC's and a response to COPRAC and the other commenters that the Board has rejected screening is not sufficient.

I urge us to take a position on the policy issue that COPRAC and others have raised whether California should provide for screening in a rule of professional conduct rather than through the piecemeal case-by-case approach and, if so, whether non-consensual screening should be limited to lateral attorneys who are not substantially involved in the matter and who are not "switching sides." The Board's action on the proposed rule has not precluded COPRAC from expressing its views and the Court at a minimum should have the benefit of our position on the merits.

***Attached:***

RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2 (6-15-10).doc

**June 15, 2010 Vapnek E-mail to Drafters, cc Staff:**

I agree with Mark that we (the Commission) should go on record as supporting some form of screening in this rule, and I expressed that view at our last meeting. The Supreme Court should know what we recommended even if the Board disagrees with us.

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

I've attached Draft 2.1 (6/15/10) of the public comment chart, which adds the comments of Senator et al. and OCTC re Rule 1.10, and provides responses. For Senator, I simply copied and pasted the response to COPRAC. For OCTC, I copied and pasted the previous responses of the Commission to OCTC points, which had been made before. All are highlighted in yellow.

As to whether the Commission should vote screening up or down, there is precedent for diverging from the BOG in the vote the Commission took on modifications to fee agreements. Notwithstanding the revisions that the Commission drafted to address BOG concerns, the vote was against the provisions the BOG eventually adopted.

Please let me know if you have any questions.

**Attached:**

RRC - 3-310 [1-10] - Public Comment Chart - By Commenter - XDFT2.1 (06-15-10).doc

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

I agree with Kevin's additions to the chart.

**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)

**RRC – Rule 1.10 [3-310]  
E-mails, etc. – Revised (6/21/2010)**

**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 Drafters, cc Staff:**

I do not recommend any changes to rule 1.10 in response to OCTC comments.

**June 20, 2010 Kehr E-mail to RRC:**

Here are my comments on this proposed Rule:

1. OCTC says that the “knowingly” standard in paragraph (a) is inconsistent with Comment [4] to Rule 1.7 (now located at Comment [3]), which says that ignorance caused by a failure to have proper conflicts checking procedures will not excuse a lawyer's conflict. The RRC Response at p. 50 of the agenda materials only is that this is the standard everywhere else. (‘Faith, I ran when I saw others run. I Henry IV, Act I, Scene 4) I think that OCTC is entitled to a better answer. There is an interplay between Rules 1.7 and 1.10 that is not explained and is not obvious. For example, while what now is Comment [3] to Rule 1.7 applies to a sole practitioner, does it apply to a lawyer in a law firm other than with the lawyer's individual conflicts, or is it Rule 1.10 that applies exclusively to a lawyer's duties within a law firm? If so, Comment [3] to Rule 1.7 would seem to be written incorrectly b/c its language presumes its application to a lawyer whose conflicts are caused by the conflicts of other firm lawyers. There is no other reason that I can see for it to refer to the size of the law firm. And why is there no version of Comment [3] in Rule 1.10?
2. I wonder why paragraph (a) speaks of a lawyer's personal interests but not a lawyer's personal relationships. Personal relationships are the subject of rule 3-310(B)((1) – (3)

and might be part of the proposed Rule 1.7 b/c of its Comments [8], [11], [26], and [29A]. However, it appears to have been excluded from Rule 1.10.

3. In the third line of Comment [9] (at the 2<sup>nd</sup> unnumbered page following agenda p. 53), I think that “matter” should be pluralized.

**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 - 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:**

1. I do not believe Rule 1.10(a) is inconsistent with Rule 1.7 Cmt. [3]. Rule 1.7 imposes a duty on the lawyer to determine whether the lawyer has conflict by adopting appropriate procedures for the type and size of firm and practice. The lawyer cannot claim ignorance by failing to have conflict checking procedures. This is a responsibility we all have regardless of where or with whom we practice. The "knowing" standard in Rule 1.10(a) applies to other lawyers associated in practice with the tainted lawyer. OCTC has overlooked Rule 5.1 which requires partners and managers to have reasonable policies and procedures designed to detect and resolve conflicts of interests and the duties of supervisory lawyers. Solo practitioners often hire contract and temporary lawyers. Cmt [3] is not incorrect and is not inconsistent with Rule 1.10.

2. Rule 1.7(a)(2) refers to the personal interests of the lawyer and not personal relationships.

**June 22, 2010 Julien E-mail to Drafters, Chair, Vice-Chairs & Staff:**

This issue on screening is still bothersome to me. I think I am agreeing with Mark because all I know is that if I have a confidential relationship (and I say "IF" advisedly, i.e., 1.14 rule) with an attorney, I want it just that--confidential. This rule does not seem to provide me that protection. Am I misreading the rule in its simplest terms???

I anxiously await more clarity on this at the meeting.



**Rule 1.10 Imputation of Conflicts: General Rule.  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	COPRAC	M	Yes		<p>COPRAC supports the implementation of screening in California through the Rules of Professional Conduct, and accordingly urges the adoption of paragraph 1.10(a)(2) of the Model Rule. COPRAC believes that implementation of screening through a piecemeal, case-by-case approach works to the detriment of the profession. Rather than having the screening doctrine worked out over a period of years through a series of cases, which leaves lawyers uncertain of the application of precedent to their particular situations, better guidance to the profession would be available through an explicit rule, which could be referenced easily, and uniformly applied. We strongly believe that this would provide superior guidance and clarity to the professional seeking to comply with their ethical duties.</p> <p>In addition, case law will determine whether screening will permit a lawyer to avoid disqualification. The rule should inform a lawyer whether screening will permit the lawyer to avoid discipline. Even if case law develops to permit screening as a method to avoid disqualification, the absence of</p>	<p>The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening. \</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.10 Imputation of Conflicts: General Rule.  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					screening in the rule could nevertheless subject a lawyer to discipline.	
3	Office of Chief Trial Counsel ("OCTC")	M		1.10(a)	<p>1. Commenter is concerned with the use of the term "knowingly" in paragraph (a). This appears to sanction the lack of conflict procedures regarding clients of other members of the firm and is inconsistent with Comment 4, rule 1.7, which states: "Ignorance caused by a failure to institute such procedures [referring to conflict detection procedures] will not excuse a lawyer's violation of this Rule." The same should apply here. Although negligence is not a basis for discipline, gross negligence or recklessness is. Thus, what conflict procedures, if any, exist should be an important factor in determining if the attorney violated this rule and should be disciplined. Also, by using the term "knowingly," the Commission may inadvertently affect disqualification rulings in civil and criminal cases.</p> <p>2. As it has noted with respect to other rules, the commenter believes there are too many comments and many are too long and seem more appropriate for treatises, law review articles, and ethics opinions.</p>	<p>1. The Commission disagrees with the commenter and has retained the "knowingly" standard in the rule and comment. As in other jurisdictions that have adopted imputation as a disciplinary standard, the Commission's position is that the Model Rule's standard should be adopted. Although a lawyer without actual knowledge could be properly disqualified in a civil action, the lawyer would not be subject to discipline. California should not depart from this approach, which is taken in every jurisdiction.</p> <p>2. The Commission disagrees. The comments provide useful guidance to lawyers and courts on the application of the Rule.</p>
				Comment	Comment [1] simply states that whether two	The Commission did not make a change. Comment

**Rule 1.10 Imputation of Conflicts: General Rule.  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				[1]	or more lawyers constitute a firm depends on specific facts. However, neither the rule nor Comment [1] provides guidance as to what constitutes a law firm.	[1] provides a cross-reference to proposed Rule 1.0.1(c) – which defines “law firm” – and cmts. [2]-[4] thereto. The Commission does not believe that it is possible to define in advance how the term “law firm” will be applied in all situations. For example, there might be facts under which two independent law firms work so closely together that they should be considered a single law firm for purposes of imputation.
				Comment [3]	Comment [3] should be clarified or stricken.	The Commission has made no change. Comment [3] is derived nearly verbatim from Model Rule 1.10. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment “deals with the elimination of imputation of a lawyer’s ‘personal-interest’ conflicts to others in the firm because there is no risk to loyal and effective representation of the client. The Comment also provides illustrations of when this exception to imputation might and might not apply.” See also proposed Rule 1.7.
				Comment [4]	Comment [4] discusses non-lawyer situations: secretaries, paralegals, law clerks and provides for screening of them. It is not clear why this Comment is provided given that the rules do not regulate these people.	The Commission has retained this Comment, which is based on Model Rule 1.10, cmt. [4]. As noted in the Ethics 2000 Reporter’s Explanation of Changes, this comment reflects current case law and “is intended to give guidance to lawyers about important practical questions.”
				Comment [9]	Comment [9] needs more clarification or should be stricken	The Commission has not made the requested change to Comment [9]. As noted in the

**Rule 1.10 Imputation of Conflicts: General Rule.  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						Explanation of Changes to proposed Rule 1.10, the comment "has been added to signal that the Rule, which in effect has codified the court-created doctrine of imputation, is not intended to override a court's inherent authority to monitor and control the conduct of persons before it." Nevertheless, the Commission has made some clarifying changes to the Comment and added references to California case law.
2	Senator, Stuart N. (Alston & Baird LLP, Duane Morris LLP, Morgan Lewis & Bockius LLP, and Munger Tolles & Olson LLP)	M	Yes	Model Rule 1.10(a)(2)	<p>Whether it is ethically proper to use a screen for non-government lateral hires to avoid an imputation of a conflict of interest is squarely before the Board, and the proposal to defer this question as "a matter of case law" should be revisited.</p> <p>Trends in the legal profession over the past three decades, including massive growth in the size of law firms and a dramatic spike in attorney mobility, have undermined the rationale for automatic vicarious disqualification. Because lawyer mobility is now an embedded feature of the legal profession, in marked contrast to the situation a generation ago, the automatic vicarious disqualification rule imposes far greater constraints on the industry today.</p> <p>Ethical screens have been shown to be effective to protect confidential client</p>	The Commission did not make the requested change. Although the Commission recommended that Rule 1.10 include limited non-consensual screening for lateral attorneys who are not substantially involved in the matter and who do not switch sides in the same case, the Board rejected the proposed rule. The Board subsequently approved the proposed rule without any provision for screening.

**Rule 1.10 Imputation of Conflicts: General Rule.  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>information. As the court in <i>Kirk v. First American Title Ins. Co.</i> put it, "[t]here is no legitimate reason to believe that the same screening could not work in the context of private attorneys in a private firm." Kirk, supra, at * 16.</p> <p>The commenter urges the Board of Governors to reconsider its present position and adopt the approach to ethical screens set forth in ABA Model Rule 1.10(a)(2).</p>	

**Difuntorum, Randall**

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**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

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

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

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**From:** Robert L. Kehr [mailto:rlkehr@kscllp.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

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**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.

Mark L. Tuft  
Cooper, White & Cooper LLP  
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San Francisco, CA 94111  
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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.

Mark L. Tuft  
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=====  
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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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		<p>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."</p> <p>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.</p> <p>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.</p>	<p>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.</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.18 Duties to Prospective Client  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commentator	Position	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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.</p> <p>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.</p> <p>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).</p>	<p>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.</p> <p>3. The noted discrepancy has been corrected.</p>
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 = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.18(c),(d)	<p>is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.</p> <p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p> <p>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.</p>
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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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</p>	

**Rule 1.18 Duties to Prospective Client  
[Sorted by Commenter]**

TOTAL = \_\_ Agree = \_\_  
Disagree = \_\_  
Modify = \_\_  
NI = \_\_

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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."</p> <p>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.</p>	<p><del>The noted discrepancy has been corrected.</del></p>
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 matter 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 <sup>1</sup>	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 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):

- 1.6 (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](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 - 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

**RRC – Rule 1.18 [MR 1.18]  
E-mails, etc. – Revised (6/21/2010)**

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 and the purpose of their presence".

**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.

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

**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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
3	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		<p>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."</p> <p>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.</p> <p>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.</p>	<p>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.</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 1.18 Duties to Prospective Client  
[Sorted by Commenter]**

TOTAL = 4 Agree =     
Disagree = 1  
Modify = 3  
NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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.</p> <p>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.</p> <p>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).</p>	<p>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.</p> <p>3. The noted discrepancy has been corrected.</p>
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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
				1.18(c),(d)	<p>is part of the common law, invokes the current rules, or exists in some other rule such as competence, confidences, and conflicts.</p> <p>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.</p> <p>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.</p>	<p>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.</p> <p>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.</p> <p>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.</p>
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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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</p>	

**Rule 1.18 Duties to Prospective Client  
[Sorted by Commenter]**

TOTAL = 4 Agree =     
Disagree = 1  
Modify = 3  
NI =   

No.	Commentator	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>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."</p> <p>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.</p>	<p><b>2. The noted discrepancy has been corrected.</b></p>
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 <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response

**McCurdy, Lauren**

RE: Rule 4.1  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.UU.

**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Wednesday, June 16, 2010 11:05 AM  
**To:** Raul Martinez; McCurdy, Lauren  
**Cc:** Lee, Mimi; Difuntorum, Randall; kemohr@charter.net; kevin\_e\_mohr@csi.com; pwvapnek@townsend.com; hbsondheim@verizon.net; kevinm@wsulaw.edu  
**Subject:** RE: NEW (4.1) RRC Assignment Materials for Raul Martinez: June 25 & 26, 2010 Meeting - Due June, 16th

My copy says they strongly recommend adoption of rule 4.1.

Mark L. Tuft  
Cooper, White & Cooper LLP  
201 California St.  
17th Floor  
San Francisco, CA 94111  
(415)433-1900  
(415)765-6215 (Direct Line)  
(415)433-5530 (Fax)  
(415)309-1735 (Cell)  
<mailto:mtuft@cwclaw.com>

=====  
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=====  
**From:** Raul Martinez [mailto:MARTINEZ@lbbslaw.com]  
**Sent:** Wednesday, June 16, 2010 10:59 AM  
**To:** Lauren McCurdy; Mark Tuft  
**Cc:** Mimi Lee; Randall Difuntorum; kemohr@charter.net; kevin\_e\_mohr@csi.com; pwvapnek@townsend.com; hbsondheim@verizon.net; kevinm@wsulaw.edu  
**Subject:** RE: NEW (4.1) RRC Assignment Materials for Raul Martinez: June 25 & 26, 2010 Meeting - Due June, 16th

Yes, but the law professors' letter was directed at rule 4.4(a).

>>> On 6/16/2010 at 10:19 AM, in message <43C27BDDAB319F438D82134A0AA43FB8047D7CA5@CWC-EXCHANGE.CWCLAW.com>, "Mark Tuft" <MTuft@cwclaw.com> wrote:

Raul, I did consider the merits of the comments and that is the reason for my disagreement with your response. Have you read the law professors' letter?

Mark L. Tuft  
Cooper, White & Cooper LLP  
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17th Floor  
San Francisco, CA 94111  
(415)433-1900  
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**From:** Raul Martinez [<mailto:MARTINEZ@lbbslaw.com>]  
**Sent:** Wednesday, June 16, 2010 10:15 AM  
**To:** Lauren McCurdy; Mark Tuft  
**Cc:** Mimi Lee; Randall Difuntorum; kemohr@charter.net; kevin\_e\_mohr@csi.com; pwvapek@townsend.com; hbsondheim@verizon.net; kevinm@wsulaw.edu  
**Subject:** RE: NEW (4.1) RRC Assignment Materials for Raul Martinez: June 25 & 26, 2010 Meeting - Due June, 16th

Then seek to reconsider the merits, not argue with the explanation for the decision. As for the protocol for seeking reconsideration, that is the Chair's decision. But I think there has to be a threshold before disgruntled minority members can revisit a rule. It denigrates the prior vote, and it's not an efficient way to make decisions. And I don't think a single comment from SD which basically disagrees with our decision not to adopt rule 4.1 is enough to shoe horn reconsideration. Otherwise, the losing minority can use a single comment that disagrees with our decision as an excuse to reconsider a rule. This could happen with every rule.

>>> On 6/16/2010 at 10:00 AM, in message <43C27BDDAB319F438D82134A0AA43FB8047D7CA0@CWC-EXCHANGE.CWCLAW.com>, "Mark Tuft" <MTuft@cwclaw.com> wrote:

I respectfully disagree. We should consider the comments on the merits and not simply parrot our previous position. Otherwise, what is the purpose of asking for public comments if we are not going to debate the merits?

Mark L. Tuft  
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<mailto:mtuft@cwclaw.com>

=====

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=====

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**From:** Raul Martinez [mailto:MARTINEZ@lbbslaw.com]

**Sent:** Wednesday, June 16, 2010 9:48 AM

**To:** Lauren McCurdy; Mark Tuft

**Cc:** Mimi Lee; Randall Difuntorum; kemohr@charter.net; kevin\_e\_mohr@csi.com; pwwapnek@townsend.com; hbsondheim@verizon.net; kevinm@wsulaw.edu

**Subject:** RE: NEW (4.1) RRC Assignment Materials for Raul Martinez: June 25 & 26, 2010 Meeting - Due June, 16th

The purpose of the statement is to explain the rationale for the Commission's decision, not to debate the merits. Although I voted for the rule, those were the concerns of the majority as I understand them. The exercise in drafting responses to the comments is to explain the views of the majority of the Commission, not to inject the minority view.

Raul

>>> On 6/16/2010 at 9:27 AM, in message

<43C27BDDAB319F438D82134A0AA43FB8047D7C96@CWC-EXCHANGE.CWCLAW.com>, "Mark Tuft" <MTuft@cwclaw.com> wrote:

I disagree with this proposed response to SDCBA's comment. SDCBA and the letter recently received from 29 ethics law professors that California needs rule 4.1 are correct. No evidence has been produced that rule 4.1 has a "chilling effect" on legitimate advocacy. It certainly has not had such an effect in the vast majority of states that have this rule. The response is based on pure speculation and ignores 27 years of experience with the rule. Civil litigation as remedy is no substitute for public protection and guidance this rule provides. There are no comparable statutes in California and those that exist have are inherently vague and afford inadequate guidance for lawyers in advance of the prohibited conduct. We should listen to the commenters and revisit the unfortunate vote not to include this core rule of professional conduct.

Mark L. Tuft

Cooper, White & Cooper LLP

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=====

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=====

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**From:** Raul Martinez [mailto:martinez@lbbslaw.com]  
**Sent:** Tuesday, June 15, 2010 7:50 PM  
**To:** Lauren McCurdy  
**Cc:** Mimi Lee; Randall Difuntorum; kemohr@charter.net; kevin\_e\_mohr@csi.com; Mark Tuft; pwwapnek@townsend.com; hbsondheim@verizon.net; kevinm@wsulaw.edu  
**Subject:** Re: NEW (4.1) RRC Assignment Materials for Raul Martinez: June 25 & 26, 2010 Meeting - Due June, 16th

Mark, here is the proposed comment chart on this rule.  
Raul

>>> On 6/15/2010 at 4:56 PM, in message  
<B044B9B5C13D964FA34BF4BAB89BE44F02A8DDE0@SFMAIL04.calsb.org>, "McCurdy, Lauren" <Lauren.McCurdy@calbar.ca.gov> wrote:

Raul,

A comment in opposition or recommending modifications has been received for the following rule and an updated commenter table is attached. The comment compilation for this rule is attached, and has also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule>). Please review the assignment instructions described in my earlier message below.

4.1 (Agenda Item III.UU) Co-Lead with Tuft

**RULE 4.1 NOTE:** Like rule 6.1, this is a rule recommended for rejection. The SDCBA's comment should be construed as a comment disagreeing with the rejection of the rule, and a comment in support of adopting Rule 4.1.)



**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):

**RRC – Rule 4.1 [MR 4.1]  
E-mails, etc., -- Revised (6/21/2010)**

- 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 15, 2010 McCurdy E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

Mark,

New comments in opposition or recommending modifications have been received for the following rules and updated commenter tables are attached. The comment compilations for these rules are attached, and have also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule> ). Please review the assignment instructions described in my earlier message below.

- 1.4.1 (Agenda Item III.F)
- 4.1 (Agenda Item III.UU) Co-Lead with Martinez

**RRC – Rule 4.1 [MR 4.1]  
E-mails, etc., -- Revised (6/21/2010)**

**RULE 4.1 NOTE:** Like rule 6.1, this is a rule recommended for rejection. The SDCBA's comment should be construed as a comment disagreeing with the rejection of the rule, and a comment in support of adopting Rule 4.1.)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-15-10).doc  
RRC - [4-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-15-10).doc  
RRC - 3-410 [1-4-1] - Public Comment Complete - REV (06-15-10).pdf  
RRC – [4-1] - Public Comment Complete - REV (06-15-10).pdf

**June 15, 2010 McCurdy E-mail to Martinez, cc Chair, Vice-Chairs & Staff:**

Raul,

A comment in opposition or recommending modifications has been received for the following rule and an updated commenter table is attached. The comment compilation for this rule is attached, and has also been uploaded to the Google site (<http://sites.google.com/site/commentsrrc/byrule> ). Please review the assignment instructions described in my earlier message below.

4.1 (Agenda Item III.UU) Co-Lead with Tuft

**RULE 4.1 NOTE:** Like rule 6.1, this is a rule recommended for rejection. The SDCBA's comment should be construed as a comment disagreeing with the rejection of the rule, and a comment in support of adopting Rule 4.1.)

The assignment deadline for these rules is the same as the earlier assignments -- **5:00 pm on Wednesday, June, 16, 2010.**

***Attached:***

RRC - [4-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-15-10).doc  
RRC – [4-1] - Public Comment Complete - REV (06-15-10).pdf

**June 15, 2010 Martinez E-mail to Tuft, cc Chair, Vice-Chairs & Staff:**

A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel.

***Attached:***

RRC - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

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

I disagree with this proposed response to SDCBA's comment. SDCBA and the letter recently received from 29 ethics law professors that California needs rule 4.1 are correct. No evidence

has been produce that rule 4.1 has a "chilling effect" on legitimate advocacy. It certainly has not had such an effect in the vast majority of states that have this rule. The response is based on pure speculation and ignores 27 years of experience with the rule. Civil litigation as remedy is no substitute for public protection and guidance this rule provides. There are no comparable statutes in California and those that exist have are inherently vague and afford inadequate guidance for lawyers in advance of the prohibited conduct. We should listen to the commenters and revisit the unfortunate vote not to include this core rule of professional conduct.

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

The purpose of the statement is to explain the rationale for the Commission's decision, not to debate the merits. Although I voted for the rule, those were the concerns of the majority as I understand them. The exercise in drafting responses to the comments is to explain the views of the majority of the Commission, not to inject the minority view.

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

I respectfully disagree. We should consider the comments on the merits and not simply parrot our previous position. Otherwise, what is the purpose of asking for public comments if we are not going to debate the merits?

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

Then seek to reconsider the merits, not argue with the explanation for the decision. As for the protocol for seeking reconsideration, that is the Chair's decision. But I think there has to be a threshold before disgruntled minority members can revisit a rule. It denigrates the prior vote, and it's not an efficient way to make decisions. And I don't think a single comment from SD which basically disagrees with our decision not to adopt rule 4.1 is enough to shoe horn reconsideration. Otherwise, the losing minority can use a single comment that disagrees with our decision as an excuse to reconsider a rule. This could happen with every rule.

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

Raul, I did consider the merits of the comments and that is the reason for my disagreement with your response. Have you read the law professors' letter?

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

Yes, but the law professors' letter was directed at rule 4.4(a).

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

My copy says they strongly recommend adoption of rule 4.1.

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

I see it now. It's in the 3 series.

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

Raul,

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>).

**4.1** (Agenda Item III.UU) - Co-Lead with/Tuft – 1 Comment: Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

**4.2** (Agenda Item III.VV) 4 Comments: **San Bernardino County Public Defender, Oliver & Dalton (attached)**; and, OCTC (sent with Randy's 6/15/10 e-mail)

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

**4.4** (Agenda Item III.YY) – OCTC; and Law Practice Management & Technology Section (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 - 2-100 [4-2] - 06-15-10 Dalton Letter to RRC.pdf

RRC - 2-100 [4-2] - 06-14-10 Oliver Letter to RRC.pdf

RRC - 2-100 [4-2] - 06-15-10 San Bernardino PD [Boxer] Letter to RRC.pdf

**June 18, 2010 Tuft E-mail to Martinez, cc Difuntorum, McCurdy, Sondheim & KEM:**

What about the 5th amendment that applies to appointed counsel in Immigration and parental rights cases? Do we want to "flag" that as well? Each time we come up with a creative comment for one class of lawyers there are invariably unintended consequences. There is legal support

**RRC – Rule 4.1 [MR 4.1]  
E-mails, etc., -- Revised (6/21/2010)**

for prosecutors which the ABA and most jurisdictions recognize in applying 4.2. I am not aware of any precedent for what you propose and I don't believe we should be making one up.

**June 21, 2010 McCurdy E-mail to Martinez, cc Drafters, Chair & Staff:**

Raul,

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 - 2-100 [4-2] - Public Comment Chart - By Commenter - XDF (06-21-10).doc  
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 - [4-1] - Public Comment Chart - By Commenter - XDFT2 (06-15-10).doc

**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 – Rule 4.1 [MR 4.1]  
E-mails, etc., -- Revised (6/21/2010)**

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

**Rule 4.1 Truthfulness in Statements to Others  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	A	Yes		We approve the rule in its entirety.	After further consideration following public comment, the Commission decided not to recommend proposed Rule 4.1. The obligations encompassed by this rule are addressed by existing statutes and California case law. See Business and Professions Code section 6106; Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal.App.4th 282, 291 ["If an attorney commits actual fraud in his dealings with a third party, the fact he did so in the capacity of attorney for a client does not relieve him of liability."]; Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 69. At the same time, Rule 4.1 was also seen as potentially chilling legitimate advocacy and contrary to California case law limiting a lawyer's duties to third parties. (Goodman v. Kennedy (1976) 18 Cal.3d 335, 344 [attorney owes no duty to adverse party who bargained with attorney's clients at arm's length]; Major Clients Agency v. Diemer (1998) 67 Cal.App.4th 1116, 1133 [If an attorney is saddled with a duty to a potentially adverse party, then his loyalty to the client cannot be undivided.]); Norton v. Hines (1975) 49 Cal.App.3d 917, 921 [an adverse party is not an intended beneficiary of the adverse counsel's client.]) Rule 4.1 was also seen as incomplete in failing to include elements of deception, reliance, and causation.

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 4.1 Truthfulness in Statements to Others  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Zitrin, Richard (law professors group)	A	Yes		<p>“...This rule, admonishing lawyers that they may not make false material statements while representing a client, seems to be a simple and completely appropriate statement about proper lawyer behavior.</p> <p>The Commission in its May 2010 Non-Adoption Summary argues, however, that use of the word "knowingly" raises the issue of what constitutes "knowledge," claims that "gross misconduct" is already disciplinable under the Business &amp; Professions Code, and finally states that a rule is unnecessary because the concept is "as old as the legal profession itself." None of those reasons have any merit when a simple, straightforward rule of common usage and understanding can be adopted to clearly codify the prohibited conduct.</p> <p>We strongly recommend implementation of this rule. We see no valid articulable reason not to have this important rule.”</p>	<p>Please see response to SDCBA, above.</p>

**McCurdy, Lauren**

RE: Rule 4.4(a)  
6/25&26/10 Commission Meeting  
Open Session Agenda Item III.XX.

**From:** Mark Tuft [MTuft@cwclaw.com]  
**Sent:** Wednesday, June 16, 2010 7:49 PM  
**To:** Raul Martinez (E-mail); Difuntorum, Randall; McCurdy, Lauren; Kevin Mohr; Kevin Mohr (Work) (E-mail); Kevin Mohr (Home#1) (E-mail); Paul Vapnek; Harry Sondheim  
**Subject:** Commenters' Chart to Rule 4.4

As a co-drafter of this rule, I agree with the comments of the 29 California ethics law professors who strongly recommend implementation of Model Rule 4.4(a) and move that we reconsider our decision not to recommend this provision of the rule.

Mark L. Tuft  
Cooper, White & Cooper LLP  
201 California St.  
17th Floor  
San Francisco, CA 94111  
(415)433-1900  
(415)765-6215 (Direct Line)  
(415)433-5530 (Fax)  
(415)309-1735 (Cell)  
<mailto:mtuft@cwclaw.com>

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**Rule 4.4(a) Respect for Rights of Third Persons  
[Sorted by Commenter]**

TOTAL = 2 Agree = 1  
Disagree = 1  
Modify = 0  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	San Diego County Bar Legal Ethics Committee	D	Yes	(a)	The Commissions arguments against adopting the current ABA Model Rule 4.4(a) are not persuasive. A prohibition against "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person "would not chill legitimate litigation tactics. ABA Model Rule 4.4(a) should be adopted verbatim.	See Response to Zitrin, below.
1	Zitrin, Richard (law professors group)	A	Yes	(a)	The Commission is concerned that such a rule might have "a chilling effect on legitimate advocacy."  However, no such chilling effect has been shown to exist in the vast number of states that have approved Rule 4.4(a). Perhaps this is because the rule does not simply <u>prevent</u> actions that embarrass, delay and burden. Rather it limits a lawyer where s/he uses "means that have <u>no substantial purpose</u> other than" these impermissible goals. Emphasis added.	Rule 4.4(a) is more restrictive of advocacy than the commenters suggest. While the rule uses the term "substantial purpose," ABA Rule 1.0 defines "substantial" to mean a "material matter of clear and weighty importance." This means that a lawyer facing discipline would have to counterbalance the embarrassment, delay or burden on a third party by demonstrating that the lawyer acted with some "clear and weighty" purpose (whatever that means) justifying the lawyer's conduct.  The commenters also offer no empirical evidence that the Rule does not chill legitimate advocacy. Because Rule 4.4(a) suffers from problems of vagueness and overbreadth, it will necessarily have

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 4.4(a) Respect for Rights of Third Persons  
[Sorted by Commenter]**

TOTAL = 2 Agree = 1  
Disagree = 1  
Modify = 0  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>that effect. Vagueness pervades this rule. Since the Rule prohibits the "use of methods of obtaining evidence that violate the legal rights of a person", this language reaches legitimate litigation activities. For example, sending out a burdensome or objectionable discovery request would fall under the Rule since it would violate the "legal rights" of a person, a term which is left undefined in the Rule. Additionally, aggressive questioning of a witness at a deposition could be construed to violate the rule, as it could be seen as embarrassing or harassing. The word "method" is also vague and undefined. While discovery codes are careful to define the methods of prohibited discovery, this rule provides no guidance to lawyers.</p> <p>The first phrase of the rule, which refers to "means" that have no substantial purpose other than to "embarrass, harass or maliciously injure a third person," also fails to provide any proper line of demarcation between aggressive, yet permissible litigation tactics, and those that supposedly cross the line. Conduct which may be perceived by one person to be embarrassing or harassing, may not be perceived in the same manner by another person.</p> <p>The Rule lacks objective standards necessary to guide enforcement. A vague rule is, by definition, a rule with respect to which persons of common intelligence must necessarily guess as to its</p>

**Rule 4.4(a) Respect for Rights of Third Persons  
[Sorted by Commenter]**

TOTAL = 2 Agree = 1  
Disagree = 1  
Modify = 0  
NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						meaning and differ as to its application. See, e.g., <i>U.S. v. Wunsch</i> (9th Cir. 1996) 84 F.3d 1110, 1119 [because the term "'offensive personality' could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute."]

E-mails,

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

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

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

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

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

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

Because the comment period deadline of June 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):

**1.0.1** (Agenda Item III.B)

**1.7** (Agenda Item III. J) Co-Lead w/Mohr

**1.8.7** (Agenda Item III.S)  
**1.16** (Agenda Item III.DD)  
**8.3** (Agenda Item III.VVV)

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

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

[www.calbar.org/proposedrules](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 - KEHR - DFT1 (06-09-10).pdf  
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT2.2 (05-24-10)RLK-KEM.doc  
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).pdf  
RRC - 1-120 [8-3] - Rule - PCD [6] (12-14-09).doc  
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.pdf  
RRC - 3-310 [1-7] - Rule - PCD [2.2A] (02-28-10) - CLEAN-LAND.doc  
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf  
RRC - 3-310 [1-8-7] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc  
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.pdf  
RRC - 3-700 [1-16] - Rule - PCD [8] (10-19-09) - CLEAN-LAND.doc  
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).pdf  
RRC - 1-100 [1-0-1] - Rule - PCD [6.1] (04-24-10).doc

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

Bob,

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 should be up-to-date shortly (<http://sites.google.com/site/commentsrrc/byrule> ).

**1.0.1** (Agenda Item III.B) – **2 Comments: Balin/Dilworth; and, LA Public Defender-Michael Judge (attached)**

**1.8.5** (Agenda Item III.Q) – OCTC (comment sent by Randy's 6/15/10 e-mail)

**RRC – Rule 5.7 (1-310X)  
E-mails, etc. – Revised (6/21/2010)**

- 1.8.6** (Agenda Item III.R) – OCTC (comment sent by Randy's 6/15/10 e-mail)  
**1.9** (Agenda Item III.W) – OCTC (comment sent by Randy's 6/15/10 e-mail)  
**1.17** (Agenda Item III.EE) Co-Lead w/Sapiro – OCTC (comment sent by Randy's 6/15/10 e-mail)  
**5.7** (Agenda Item III.GGG) – Zitrin/Law Professors (comment sent by 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 - 1-100 [1-0-1] - BASF (Balin, Dilworth) re Tribunal (06-14-10).pdf  
RRC - 1-100 [1-0-1] - 06-14-10 LAPD (Judge) Comment.pdf

**June 17, 2010 Difuntorum E-mail to Drafters (Kehr & Sapiro), cc Staff:**

Bob & Jerry:

The Zitrin/Law Professors letter commented on the Commission's rejection of MR 5.7 as set forth below. **Do you recommend that the Commission reconsider the rejection of Rule 5.7 in response to this comment?**

Zitrin/Law Professors Comment:

6. Rule 5.7 – Rule application to "law-related services"

Similarly, the Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.

The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.

Here is an excerpt from the explanation of the Commission's decision to not recommend adoption of MR 5.7.

"The Commission is not recommending adoption of Model Rule 5.7 because California authorities, including case law and ethics opinions, offer broader and more nuanced guidance, thereby affording better public protection. Generally, the Commission agrees with the concept of Model Rule 5.7 but has determined that there are certain specific terms and standards provided for in the rule that are materially inconsistent with existing California authorities. The Commission reviewed the existing California authorities and concluded that adoption of any California counterpart to Model Rule 5.7 might undermine existing law and guidance."

Here's the Commission minority statement:

"Minority. A minority of the Commission disagrees with the decision not to adopt a California version of Model Rule 5.7. The minority notes that many law firms, both inside and outside of California today own, operate or are otherwise affiliated with ancillary businesses, including: lobbying; financial counseling and planning; client asset management through registered investment companies; human resources and benefits; consulting and training; international trade; education; environmental and health care consulting; ADR; and litigation support services. In addition, law firms are restructuring due to the impact of technology and globalization and this will cause inevitable confusion among lawyers and the public about how the rules apply to law related services, particularly where the services are offered by a "law firm." The minority contends that, if the proposed new California rules are to remain viable for the foreseeable future, a version of Model Rule 5.7 is critical."

My personal view is that it is unfortunately very late in the game to attempt to develop a California version of MR 5.7 given the material differences between MR 5.7 and existing California law. A primary difference is in the test set forth in MR 5.7 for determining when a lawyer (put aside entities controlled by a lawyer) is subject to the rules in the provision of non-legal services. Under MR 5.7, a lawyer is subject to the rules only if the services are provided in circumstances that are "not distinct from the lawyer's provision of legal services to clients." In contrast, California case law does not rely on whether services are "not distinct." (See *Kelly v. State Bar* (1991) 53 Cal.3d 509, 517 [attorney's conduct in rendering non-legal services in a business transaction on behalf of a person who is a client in other matters remains subject to the rules] and *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 428-429 [a lawyer who breaches a fiduciary duty to a non-client in a manner that would justify discipline if that relationship had been a lawyer-client relationship may be subject to discipline even if no formal lawyer-client relationship existed].) There are more differences in California law (such as California's specific standards in B&P sec. 6175 - 6177) but just this one major difference means that a California version of MR 5.7 that seeks to codify existing law would be a significant departure from the Model Rule as it would reject the MR 5.7 test for determining when the rules govern non-legal services.

**June 17, 2010 Kehr E-mail to Difuntorum, cc Sapiro & Staff:**

No, I don't. Any more detailed response will have to wait until we do whatever chart it is we have for rules we recommend not be adopted.

**June 17, 2010 Sapiro E-mail to Difuntorum, cc Sapiro & Staff:**

I agree with Bob.

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

Bob,

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

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

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

***Attached:***

RRC - 1-120 & 1-500B [8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 1-100 [1-0-1] - Public Comment Chart - By Commenter - XDFT1.1 (06-21-10).doc  
RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-700 [1-16] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 3-310 [1-8-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc  
RRC - 3-310 [1-8-6] - Public Comment Chart - By Commenter - XDFT2 0(6-21-10)ML.doc  
RRC - 3-310 [1-7] - Public Comment Chart - By Commenter - XDFT3.3 (06-21-10)RLK-KEM-AT.doc  
RRC - 2-300 [1-17] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc  
RRC - 4-210 [1-8-5] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

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

Jerry: Attached for your comments is a commenter chart for this rule (or non-rule).

***Attached:***

RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2.1 (06-21-10)ML-RLK.doc

**June 22, 2010 Sapiro E-mail to Kehr, cc Chair, Vice-Chairs & Staff:**

Attached is a redlined version showing my suggestions. Thanks for doing this.

***Attached:***

RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-RLK-JS.doc

**June 22, 2010 Kehr E-mail to Sapiro, cc Chair, Vice-Chairs & Staff:**

I'm fine with all of your suggestions and will incorporate them in a revised chart. Thank you again for taking the time to look carefully at my work.

**June 22, 2010 Kehr E-mail to Sapiro, cc Chair, Vice-Chairs & Staff:**

Here is a revised commenter chart that incorporates Jerry's suggestions with some minor tinkering.

***Attached:***

RRC - [5-7] - Public Comment Chart - By Commenter - XDFT2.3 (06-22-10)ML-RLK-JS.doc

**Rule 5.7 Law-Related Services  
[Sorted by Commenter]**

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

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Zitrin, Richard (for group of law professors)	NI	Yes		<p>The Commission has determined not to adopt Model Rule 5.7. This rule simply makes it clear that when lawyers, increasingly doing multi-disciplinary work, are not acting as lawyers in "law-related" matters, they still must comply with the rules of attorney conduct.</p> <p>The Commission argues that California case law provides "broader and more nuanced guidance," such as to make the rule unnecessary. However, adding this rule will in no way have a chilling effect on the ability of California courts to provide more specific and nuanced guidance. Perhaps some matters would not require "nuanced" court adjudication if this rule is adopted.</p>	<p>The Commission made an extensive effort to capture in rule format the principles embodied in the many reported California appellate decisions related to the subject of this Model Rule. The Commission did not make this effort because doing so is needed for discipline; California lawyers have been disciplined many times other bases without the existence of a rule of this sort. The Commission did so in the hope of providing guidance to lawyers. The Commission finally concluded that this effort was not successful, that any iteration of the rule likely would be inaccurate and misleading, and that it would be better for lawyers to refer to California case law in this area. It finally decided not to recommend adoption of the rule. A number of other states also have rejected the Model Rule. It appears that some 12 other states have taken this step, and that five additional states have made major revisions to the Model Rule version.</p>

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

Commenter	Rule	Position
Alameda County Bar Association	6.1	DISAGREE
Anne Fadenrecht	6.1	DISAGREE
Asian Pacific American Legal Center	6.1	DISAGREE
Bet Tzedek Legal Services & Legal Aid Association of California	6.1	DISAGREE
California Commission on Access to Justice	6.1	DISAGREE
Central California Legal Services	6.1	DISAGREE
Christina Skaf Hathaway	6.1	DISAGREE
Clare Pastore	6.1	DISAGREE
COPRAC	6.1	DISAGREE
Derek Milosavljevic	6.1	DISAGREE
Disability Rights Legal Center	6.1	DISAGREE
Elizabeth Rindskopf Parker	6.1	DISAGREE
Glenn Alex	6.1	AGREE
Golden Gate University School of Law	6.1	DISAGREE
HIV & AIDS Legal Services Alliance	6.1	DISAGREE
Jamienne Studley	6.1	DISAGREE
Karen Goodman	6.1	DISAGREE
Legal Aid of Marin	6.1	DISAGREE
Legal Services for Prisoners with Children	6.1	DISAGREE
Legal Services of Northern California	6.1	DISAGREE
Leonard Herr	6.1	DISAGREE
Los Angeles Center for Law and Justice	6.1	DISAGREE
Los Angeles County Bar Assn. Access to Justice Committee	6.1	DISAGREE
M. Sue Talia	6.1	DISAGREE
Martin Carr	6.1	DISAGREE
Mental Health Advocacy Services, Inc.	6.1	DISAGREE
Michael Mills	6.1	DISAGREE
Neighborhood Legal Services of Los Angeles County	6.1	DISAGREE
On behalf of Public Counsel	6.1	DISAGREE
Ophelia Zeff	6.1	DISAGREE
Peter Carson	6.1	DISAGREE
Public Interest Clearinghouse, Executive Director	6.1	DISAGREE
Richard Odgers	6.1	DISAGREE
Russ Hurley	6.1	DISAGREE
San Diego County Bar Association	6.1	DISAGREE
Shauna Marshall	6.1	DISAGREE
Standing Committee on the Delivery of Legal Services	6.1	DISAGREE
The Public Interest Law Project	6.1	DISAGREE
UC Irvine School of Law	6.1	DISAGREE
Ugochi Anaebere	6.1	DISAGREE
University of San Francisco, School of Law	6.1	DISAGREE
Walter Pyle	6.1	DISAGREE



## Difuntorum, Randall

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Thursday, June 17, 2010 2:59 PM  
**To:** Dominique Snyder (Home) (E-mail); Linda Foy; JoElla L. Julien; Ignazio J. Ruvolo  
**Cc:** Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr G  
**Subject:** RRC - 6.1 - III.HHH - 06/25-26/10 Meeting Materials  
**Attachments:** RRC - [6-1] - Rule - DFT5 (06-17-10) - Cf. to DFT4 (03-27-10) - LAND.doc; RRC - [6-1] - Rule - DFT5 (06-17-10) - CLEAN-LAND.doc

Greetings Dom and other drafters:

I've attached a revised draft 5 (6/17/10) of Rule 6.1, redline, compared to Draft 4 (3/27/10), the draft RAC/BOG rejected at its May 2010 meeting. It incorporates two changes suggested by representatives of the access to justice community during the public hearing last week, as well as by the State Bar's legal services office. See Randy's 5/7/10 e-mail to me that I have pasted below (the e-mail, not myself).

I've also attached a clean version of the revised draft 5.

Please let me know if the attached works for you as a discussion draft for the next meeting, at which there might be a motion to request RAC/BOG to reconsider its decision.

I haven't had time to do much more work on the public comment chart as I had promised to do. That will have to await quieter times.

Thanks,

Kevin

Attached:

RRC - [6-1] - Rule - DFT5 (06-17-10) - CLEAN-LAND.doc  
RRC - [6-1] - Rule - DFT5 (06-17-10) - Cf. to DFT4 (03-27-10) - LAND.doc

### **5/7/10 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff:**

The staff in the State Bar's Office of Legal Services ("OLS") has asked that I convey a friendly amendment to Rule 6.1. In the Rule 6.1 chart below, you can see that the Commission has deleted the last sentence of MR 6.1 Cmt.[4] which expressly encourages pro bono program lawyers to share court-awarded fees with the pro bono program that hired them. OLS staff believes (and I agree) that the Commission's version of Cmt.[4] would be improved by a cross reference to proposed Rule 5.4 Cmt.[8] which states: "Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221], see also Rule 6.3.)" Because the Commission did not adopt MR 5.4 (a)(4) (w/c flatly states that a lawyer may share court-awarded fees w/ a nonprofit) and has stricken the last sentence of MR 6.1 Cmt.[4] (encouraging such fee sharing), it is quite possible that the Commission's position on the issue of sharing court-awarded fees may be misunderstood. Adding the suggested cross reference would help avoid a misreading. Do you agree? -Randy D.

P.S.

The RRC response in the 6.1 chart below also could be clarified by deleting the last sentence (w/c says "Thus, such fee sharing would violate proposed Rule 5.4.") as that is an overstatement of the Commission's approach. The Commission's approach is to commend the *Frye* case to lawyers and let them make their own decision on whether a fee sharing is permitted under California law. Thus, unlike the ABA (in MR 5.4(a)(4)), the Commission is not making a definitive statement in the rules on the permissibility of such fee sharing. To me, the Commission's approach is consistent with Standard 3.5-6 of the ABA's STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (see attached) because that standard says the law of the specific jurisdiction must be considered in making pro bono program policies for fee sharing. Lastly, there is a nit in the proposed Rule 5.4 Model Rule Comparison Chart. The RRC explanation of the deletion of MR 5.4(a)(4) refers to the *Frye* discussion in Rule 5.4 Cmt.[5] but the correct updated reference should be to Rule 5.4 Cmt.[8]. Please help me remember to correct this nit in the next version of the Rule 5.4 Model Rule Comparison Chart.

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**Rule 6.1: Voluntary Pro Bono Publico Service**  
(Commission's Proposed Rule – Draft 5 (6/17/10) – COMPARED TO Draft 4 (3/27/10))

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should ~~aspire to~~<sup>1</sup> provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the 50 hours of legal services without expectation of compensation other than reimbursement of expenses to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

<sup>1</sup> Model Rule language has been restored after comments received from representatives of the access to justice community.

- (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
- (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

**COMMENT**

- [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.
- [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal

services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

- [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.
- [4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Concerning the

contribution of such fees to organizations or projects that benefit persons of limited means, see Rule 5.4, Comment [8].<sup>2</sup>

- [5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).
- [6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a

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<sup>2</sup> Cross-reference made per request of the State Bar's Office of Legal Services and representatives of the access to justice community. Comment [8] to proposed Rule 5.4 provides: "Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221], see also Rule 6.3.)" See also 5/7/10 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff.

wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not enforceable through disciplinary process.

**Rule 6.1: Voluntary Pro Bono Publico Service**  
**(Commission's Proposed Rule – Draft 5 (6/17/10) – CLEAN VERSION)**

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the 50 hours of legal services without expectation of compensation other than reimbursement of expenses to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or

- (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

**COMMENT**

- [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.
- [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the

provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

- [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.
- [4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. ~~Concerning the contribution of such fees to organizations or projects that benefit persons of limited means, see Rule 5.4, Comment [8].~~
- [5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory

or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

- [6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.
- [7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.
- [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice,

are a few examples of the many activities that fall within this paragraph.

- [9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.
- [10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.
- [11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.
- [12] The responsibility set forth in this Rule is not enforceable through disciplinary process.

**Rule 6.1: Voluntary Pro Bono Publico Service**  
(Commission's Proposed Rule – Draft 4 (3/27/10) – CLEAN)

Every lawyer, as a matter of professional responsibility, should provide legal services to those unable to pay. A lawyer should provide or enable the direct delivery of at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the 50 hours of legal services without expectation of compensation other than reimbursement of expenses to:
  - (1) persons of limited means or
  - (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
  - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
  - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or

- (3) participation in activities for improving the law, the legal system or the legal profession, particularly with the goal of increasing access to justice.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

**COMMENT**

- [1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.
- [2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the

provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

- [3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in a qualified legal services program under Business and Professions Code section 6213 and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals under paragraph (a)(1) or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means under paragraph (a)(2). The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.
- [4] Because service must be provided without compensation, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section.
- [5] While it is preferable that a lawyer fulfill his or her annual responsibility to perform pro bono services through activities described in paragraphs (a)(1) and (2), the lawyer's commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers from performing the pro bono services outlined in

paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

- [6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, claims under the California Fair Employment and Housing Act, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.
- [7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.
- [8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession, particularly those designed to increase access to justice. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession, particularly with the goal of increasing access to justice, are a few examples of the many activities that fall within this paragraph.

- [9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.
- [10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.
- [11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.
- [12] The responsibility set forth in this Rule is not enforceable through disciplinary process.



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

Dom,

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

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

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

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

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

Because the comment period deadline of June 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):

- 3.5** (Agenda Item III.OO)
- 6.1** (Agenda Item III.HHH) NRFA
- 6.3** (Agenda Item III.JJJ)

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 - SNYDER - DFT1 (06-09-10).pdf
- RRC - 5-300-[3-5] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [6-1] - Public Comment Chart - By Commenter - XDFT1 (04-22-10)2.doc
- RRC - [6-3] - Rule - PCD [3] (06-08-09) - CLEAN-LAND.pdf
- RRC - [6-3] - Rule - PCD [3] (06-08-09) - CLEAN-LAND.doc
- RRC - 5-300 [3-5] - Rule - PCD [5.1] (10-19-09) - CLEAN-LAND.pdf
- RRC - 5-300 [3-5] - Rule - PCD [5.1] (10-19-09) - CLEAN-LAND.doc

**June 10, 2010 Sondheim E-mail to RRC re June 25-26, 2010 Agenda:**

Since I am going out of town this Saturday until June 24 with 2 of my grandchildren and will not have time to send e-mails regarding the proposed RRC responses to comments on our rules (including oral comments we heard today) as I will be busy taking care of these grandchildren, I want to send a few thoughts on some of the comments or rules based upon a quick review of what we have received and heard so far.

**Rule 1.4**

While this is not based upon a comment, in reviewing this rule it seemed to me that there may be an inconsistency between (c)(2) and comment 6.

**Rule 1.8.1**

The COPRAC comment appears to me to be a clarification of out intent.

**Rule 3.4**

While I realize that most, if not all, of the SDCBA comments are reiterations of what was submitted before, I think further consideration should be given to Comment 1 regarding (e) (3).

**Rule 6.3**

**RRC – Rule 6.1 [MR 6.1]  
E-mails, etc., -- Revised (6/21/2010)**

We should give further consideration to what we mean by "legal service organization." Do we mean just those organizations covered by B&P section 6213? If so, then we should make a reference to 6213. I have asked Toby Rothschild to give this matter some thought and he may be sending an email regarding his views.

Based upon the oral testimony we heard today, I have the following observations:

**Rule 1.5**

It is my understanding that Barry Tarlow believes that "non-refundable" and "earned on receipt" language is useful in avoiding forfeiture, seizure, etc. of the attorney's fee and that if this language is permitted, he would not be adverse to requiring the fee agreement to state that the client "may or may not be entitled to a refund." I would suggest that consideration be given to this type of language, rather than our proposed disclosure regarding seeking a return of the fee. As to the disclosure that the client can terminate the representation, it was my understanding that he believes this language would create a greater risk that the fee may be forfeited, seized, etc. He pointed out that this language is not required by our proposed rules in other types of fee agreements. We can discuss this further at the meeting.

**Rule 6.1**

Toby pointed out that we deleted the last sentence of ABA comment 4 and suggested that the sentence be retained as it makes it clear that the attorney's fees can be donated when the matter has been referred to someone willing to do pro bono work. At least one other speaker supported this view. We may want to reconsider this deletion.

**June 11, 2010 Snyder E-mail to KEM:**

I've attached two revised commenter charts as we discussed. Does this look right? I added something in response to the comment that emails should be sent to attorneys instead of a pro bono rule.

***Attached:***

RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

RRC - [6-3] - Public Comment Chart - By Commenter - XDFT2 (06-11-10).doc

**June 14, 2010 KEM E-mail to Snyder, cc Difuntorum, McCurdy & Lee:**

I've attached revised xdraft 2.1 (6/13/10) for Rule 6.1. My changes/additions are highlighted in yellow.

I've copied Randy, Lauren & Mimi so they know that I have already included the additional public comment received from several groups that was not included in the Chart that Lauren circulated to you on 6/9/10. I've also resorted the commenters in alphabetical order and re-titled the second column as "Commenter".

I suspect that we will be receiving many more comments in the next day or two (that was the indication at the Public Hearing). I ask that Lauren and Mimi (or whoever is adding the

**RRC – Rule 6.1 [MR 6.1]  
E-mails, etc., -- Revised (6/21/2010)**

comments to the chart) use the attached as the starting point for the additions and insert the new comments alphabetically to save time by inserting rows where necessary. I think the stock response that you drafted (see, e.g., the response to Alameda County) can be used as the response for any anticipated submission. That should also save time. You could then review the new comments staff has added to see if any additional response is required (e.g., as you did in addressing Mr. Alex's suggestions re e-mails).

Please let me know if you have any questions.

***Attached:***

RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2.1 (06-13-10).doc

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

I've attached a revised draft 5 (6/17/10) of Rule 6.1, redline, compared to Draft 4 (3/27/10), the draft RAC/BOG rejected at its May 2010 meeting. It incorporates two changes suggested by representatives of the access to justice community during the public hearing last week, as well as by the State Bar's legal services office. See Randy's 5/7/10 e-mail to me that I have pasted below (the e-mail, not myself).

I've also attached a clean version of the revised draft 5.

Please let me know if the attached works for you as a discussion draft for the next meeting, at which there might be a motion to request RAC/BOG to reconsider its decision.

I haven't had time to do much more work on the public comment chart as I had promised to do. That will have to await quieter times.

***Attached:***

RRC - [6-1] - Rule - DFT5 (06-17-10) - CLEAN-LAND.doc

RRC - [6-1] - Rule - DFT5 (06-17-10) - Cf. to DFT4 (03-27-10) - LAND.doc

***5/7/10 Difuntorum E-mail to KEM, cc Chair, Vice-Chairs & Staff:***

The staff in the State Bar's Office of Legal Services ("OLS") has asked that I convey a friendly amendment to Rule 6.1. In the Rule 6.1 chart below, you can see that the Commission has deleted the last sentence of MR 6.1 Cmt.[4] which expressly encourages pro bono program lawyers to share court-awarded fees with the pro bono program that hired them. OLS staff believes (and I agree) that the Commission's version of Cmt.[4] would be improved by a cross reference to proposed Rule 5.4 Cmt.[8] which states: "Paragraphs (a) and (b) do not prohibit the payment of court-awarded legal fees to non-profit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221], see also Rule 6.3.)" Because the Commission did not adopt MR 5.4 (a)(4) (w/c flatly states that a lawyer may share court-awarded fees w/ a nonprofit) and has stricken the last sentence of MR 6.1 Cmt.[4] (encouraging such fee sharing), it is quite possible that the Commission's position on the issue of sharing court-awarded fees may be misunderstood. Adding the suggested cross reference would help avoid a misreading. Do you agree? -Randy D.

P.S.

The RRC response in the 6.1 chart below also could be clarified by deleting the last sentence (w/c says “Thus, such fee sharing would violate proposed Rule 5.4.”) as that is an overstatement of the Commission’s approach. The Commission’s approach is to commend the *Frye* case to lawyers and let them make their own decision on whether a fee sharing is permitted under California law. Thus, unlike the ABA (in MR 5.4(a)(4)), the Commission is not making a definitive statement in the rules on the permissibility of such fee sharing. To me, the Commission’s approach is consistent with Standard 3.5-6 of the ABA’s STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (see attached) because that standard says the law of the specific jurisdiction must be considered in making pro bono program policies for fee sharing. Lastly, there is a nit in the proposed Rule 5.4 Model Rule Comparison Chart. The RRC explanation of the deletion of MR 5.4(a)(4) refers to the *Frye* discussion in Rule 5.4 Cmt.[5] but the correct updated reference should be to Rule 5.4 Cmt.[8]. Please help me remember to correct this nit in the next version of the Rule 5.4 Model Rule Comparison Chart.

**June 21, 2010 KEM E-mail to McCurdy, Difuntorum & Lee:**

As requested, I've attached XDFT2.2 (6/20/10) of the public comment chart for 6.1. I've summarized all the comments received through 6/18/10 (I downloaded the complete public comment chart PDF from the public comment web site on Saturday). I've also inserted a stock response to each of the public comments received.

Please let me know if you have any questions.

***Attached:***

RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-20-10).doc

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

Dom,

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 - [6-3] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10).doc

RRC - 5-300 [3-5] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10)-RD.doc

RRC - [6-1] - Public Comment Chart - By Commenter - XDFT2.2 (06-21-10).doc

RRC - [6-2] - Public Comment Chart - By Commenter - XDFT2 (6-21-10)ML.doc

RRC - 3-210 [1-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-17-10)KEM-DS-MLT.doc

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
Disagree = 43  
Modify =      
NI =    

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
5	Alameda County Bar Association	D	Yes		<p>It is important to have a rule, in addition to a Board resolution and statutory language, because legal education and law practice focus on the Rules of Professional Conduct and pro bono is too important to leave out of the rules.</p> <p>The need for pro bono services is critical. All efforts to increase pro bono service and access to justice are welcome.</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
2	Alex, Glenn C.	A	No		<p>While attorneys should be encouraged to provide pro bono legal services, Rule 6.1 should not be included in the Rules of Professional Conduct.</p> <p>The Bar should conclude, as it has in other contexts within the Rules that this subject is beyond the scope of the Rules. Instead of including Rule 6.1, the Bar should periodically send emails to all attorneys recommending pro bono work and listing numerous possibilities with contact information.</p>	<p>Although the commenter agrees with the Board of Governor's decision not to adopt proposed Rule 6.1, the Commission disagrees with that position and has requested that the Board reconsider its decision. In recommending the adoption of this Rule, the Commission recognized the overwhelming need to increase access to justice in California, and that proposed Rule 6.1 provides a direct means of accomplishing that goal.</p> <p>Although there is a Board of Governors' Resolution which expresses this policy, many members of the bar are unaware of its existence. This Rule will be a stronger policy statement if it is approved by the Supreme Court. Given the repeated statements by Chief Justice George regarding access to justice issues, and the findings of the Commission on</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

**TOTAL = 44    Agree = 1  
Disagree = 43  
Modify =      
NI =**

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						<p>Access to Justice, it is likely that the Supreme Court would look favorably upon such a rule.</p> <p>While e-mails to attorneys might be a way of reminding attorneys to perform pro bono work, an aspirational rule is a far more effective means to advise law students and lawyers that all attorneys should perform this important function.</p>
40	Anaebere, Ugochi	D	Yes		<p>I have been a lawyer for 6 years, 3 of which have been devoted to public interest law. It was through a public interest law clinic with the Legal Aid Association of Los Angeles where the reasons why I attended law school became crystallized: service to others to ensure that equal access under the law is something that is achieved for all, regardless of income.</p> <p>I serve as Pro Bono Coordinator for a legal aid Organization in the Central Valley, and have been shocked at what I have seen, in terms of access to legal services. While we are fortunate to have small firm attorneys and solo practitioners who generously provide pro bono legal services, the good work of this relatively small group of attorneys does not translate to a strong, widespread pro bono culture needed to begin to meet the demand of services that I knew while living in my</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
 Disagree = 43  
 Modify =      
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>hometown. Further, unlike urban areas where legal aid programs can recruit volunteer interns from numerous law schools, there is only one law school in our service area, and a significant number of the students hold full time positions as they pursue their legal studies. Moreover, there are very few large firms in our service area that can easily provide significant amounts of pro bono services.</p> <p>When I heard that the State Bar was considering amending the Rules of Professional Conduct by strongly encouraging that attorneys volunteer at least 50 hours of pro bono services to a local legal aid agency, I thought to myself- finally, a real push towards encouraging lawyers (who are in a service profession) to give back to others. There are 1200 lawyers in the city where I practice, and the hours of service these individuals could provide to our clients completely doable- as they boil down to about 1 hour a week. The time spent with an individual who is unable to afford legal services, no matter how small, is invaluable, and is greatly appreciated. For many of our clients, they are looking for finality with their legal issues. They are looking for an avenue, a resource, a guide. As lawyers who have</p>	

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44 Agree = 1  
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Modify =      
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>been trained and have legal knowledge, it is our responsibility to give to the least among us. For to whom much is given, much is required. Passing this amendment will do much to ease our state's huge justice gap. I urge the State Bar to pass this amendment.</p>	
39	Asian Pacific Legal Center [Karin Wang]	D	Yes		<p>On behalf of the Asian Pacific American Legal Center (APALC), I am writing to urge the Board of Governors to adopt the rule. We believe that strong encouragement from the State Bar through the State Bars rules sends a strong message about the importance of pro bono.</p> <p>The proposed Rule 6.1 is similar to ABA Model Rule 6.1, and encourages attorneys to provide or enable the direct delivery of pro bono services to persons of limited means, and, in essence, to improve the access to justice in the State of California.</p> <p>There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

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 Modify =     
 NI =   

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to be left out of the rules.</p> <p>Since the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.</p> <p>Last, but not least, the proposed rule is not mandatory, and language can be added to emphasize that this rule is only aspirational, to avoid any misperception that this rule would require attorneys to do pro bono.</p> <p>For all the aforementioned reasons, I urge its adoption by the Board of Governors.</p>	
14	Bet Tzedek Legal Services & Legal Aid Association of California [Mitchell A. Kamin] (Public Hearing)	D	Yes		<p>I echo and adopt the comments of Toby Rothschild from LAFLA concerning the value of Rule 6.1 to our ongoing ability to recruit pro bono support.</p> <p>The importance of 6.1 extends beyond our individual programs in Los Angeles and other</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
 Disagree = 43  
 Modify =      
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>parts of the state. In so many ways, California is a leader on Access to Justice Issues: the Access Commission; AB 590; a Chief Justice profoundly committed to access in general and pro bono in particular. At the same time, low-income Californians face a daunting Justice Gap, with approximately 2/3 of eligible legal aid clients being denied services due to lack of resources.</p> <p>The adoption of Rule 6.1 will maintain California's status as an access leader. Moreover, it will help organizations – including those in rural parts of the state – recruit help to close the Justice Gap.</p> <p>At Bet Tzedek, we reduced our budget by 15% while calls for assistance increased by 40%. Access to pro bono support is vital to help our organizations manage through these rough times – Indeed, we are concerned that not approving 6.1 could send exactly the wrong message – that pro bono is not a key aspect of all lawyers' professional responsibility – precisely when our organizations, and clients, need pro bono the most.</p> <p>Adoption of 6.1 will help small and rural programs reinforce their message that pro</p>	

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>bono matters. Many programs lack resources to get this word out, and having it come from the bar lends great credibility.</p> <p>Rule 6.1 is not a step toward mandatory pro bono and that I would oppose a mandatory pro bono requirement in California. We are fortunate to have firms and companies with a well founded commitment to pro bono and making it mandatory would be contradictory and counterproductive. But having 6.1 as a Rule of Professional Conduct will send a very positive message and reinforce our efforts to involve more and more private attorneys in making California a leader in access to justice for all.</p>	
12	California Commission on Access to Justice ("CCAJ") [Hon. Ronald B. Robie]	D	Yes		<p>On May 19th , 2010, the Access to Justice Commission voted unanimously to urge the State Bar Board of Governors to recommend a pro bono rule as part of the Rule Revision process.</p> <p>This is an issue of utmost concern to the Commission. It is imperative that our revised Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Rules Revision Commission. Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>first paragraph be amended to include the words “aspire to”, from the ABA’s Model Rule.</p> <p>There were several reasons for the Commission’s unwavering support for this rule.</p> <ul style="list-style-type: none"> <li>• We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono.</li> <li>• It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave it out of the rules. The Bar’s ethics manual, “Pub 250”, does include the board resolution -- but it is on page 387 of a 387-page publication.</li> <li>• At least 44 other states have included a similar provision in their ethics rules.</li> <li>• Other proposed rules are similar in nature –</li> </ul>	

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

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					<p>at least four other rules do not involve disciplinary consequences, but they permit or encourage certain behavior.</p> <ul style="list-style-type: none"> <li>• We appreciate the effort the Rules Revision Commission put into its modification of ABA Model Rule 6.1, which it recommended unanimously. We particularly appreciated the language that strengthened the emphasis on activities that promoted access to justice. With the amendment recommended above, we hope that their proposed language is ultimately adopted.</li> <li>• Some believe that the language describing pro bono work is too broad. However, the vast majority of work done pursuant to Rule 6.1 in other states is legal services for the poor, despite the language allowing other kinds of pro bono activity. And even if some work would be called “pro bono” that we would not consider true pro bono, that is not a reason to have NO ethics rule on the subject.</li> <li>• Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact,</li> </ul>	

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
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					<p>last August, the Judicial Council, under the leadership of the Chief Justice, approved a special pro bono toolkit for judges to use to encourage lawyers to do pro bono. The toolkit can be found through the following link: <a href="http://www.courtinfo.ca.gov/programs/equalaccess/probonotoolkit.htm">http://www.courtinfo.ca.gov/programs/equalaccess/probonotoolkit.htm</a></p> <ul style="list-style-type: none"> <li>• The Access Commission worked hard to establish the new pilot representation project that is being launched next year, and pro bono is a key part of the delivery system anticipated for those pilot projects. This new legislation is getting national attention, and to fail to adopt a pro bono rule at this point would be perceived as a giant step backward in our efforts to implement this new legislation and otherwise to improve access to justice.</li> </ul> <p>The actual provisions are less important than our belief that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by this Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule <b>MUST</b> be adopted, and Commission representatives are available to work with any and all parties to make sure that this Rule is ultimately adopted and recommended to the Supreme Court.</p>	

**Rule 6.1 Voluntary Pro Bono Service  
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21	Carr, Martin D.	D	No		<p>I am writing to convey a small comment in regard to Proposed Rule 6.1.</p> <p>The Commission for the Revision of the Rules of Professional Conduct's April 2010 Draft Following Consideration of Public Comment on the proposed rule states, "Although the Board of Governors' Resolution expresses this policy [encouraging pro bono work], many members of the bar are unaware of its existence."</p> <p>In my experience, this could not be more true. I have been a director of Legal Services of Northern California for 2 years and have been involved in pro bono efforts in my community since becoming an attorney nearly ten years ago. Nonetheless, I had no idea that the State Bar had any interest in encouraging pro bono service until I recently received a copy of Mary Lavery Flynn's May 25th Memorandum to the Access to Justice Commission concerning Proposed Rule 6.1. I had never before heard of the Board of Governors' Resolution, and I would be amazed if many other attorneys have.</p> <p>On the other hand, I am very familiar with the</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					<p>Rules of Professional Conduct. I think most California attorneys know precisely where to find the link to the Rules on the front page of the State Bar's website. Including a statement about pro bono service in the Rules would be a meaningful statement to the members of our State Bar. The little-known Board of Governors' Resolution is not.</p> <p>Our Rules of Professional Conduct should reflect our values as a legal community. If we care about pro bono services, the Rules should say so.</p>	
23	Carson, Peter H.	D	No		<p>I am writing to urge the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1, and instead include the amended version of ABA Model Rule 6.1 with respect to voluntary pro bono legal service in its proposed revisions to the California Rules of Professional Conduct.</p> <p>This is an issue that directly impacts: the hugely underserved client communities of low income and disadvantaged people.</p> <p>This also is an issue in which I have a deep personal interest, as I have provided substantial direct pro bono services in a great many matters throughout this state and country.</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					<p>I believe that it is imperative that California, long a leader in providing pro bona legal services, encourage the provision of pro bono legal services in California by making very clear through its Rules of Professional Conduct that its lawyers are expected to make a serious pro bono commitment.</p> <p>I understand that the failure of the Committee on Regulation and Admissions to recommend Rule 6.1 does not reflect a lack of support for pro Bono among board committee members. Nonetheless, an affirmative failure to include a pro bono rule in the final vote of the Board of Governors will invariably be perceived as a lack of support for pro bono by the State Bar of California, which would be unfortunate and a significant step backwards, and would contrast sharply with the at least forty-four other states that have adopted ABA Model Rule 6.1 or a close variant thereof as their own home ethical rule. Why should California purposefully leave itself behind?</p> <p>Pro bono simply is too important a value within the legal profession to leave it out of California's ethical rules. Please include Rule 6.1 in the proposed Rules of Professional Conduct to encourage the provision of pro</p>	

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					bono services in California and underscore the core value of pro bono of the legal profession in California.	
27	Central California Legal Services [Chris A. Schneider]	D	Yes		<p>I write in support of the Commission's Proposed Rule 6.1.</p> <p>You are no doubt aware of the tremendous "Justice Gap" (the difference between the need for legal services and the amount of services available) throughout California. The Justice Gap is particularly pronounced in areas outside of the large urban centers. The reasons for the urban/rural disparities are numerous and beyond the scope of this letter. However, the disparities very real and our staff members and client communities see them on a daily basis.</p> <p>Throughout California there are numerous efforts to promote pro-bono. Still, it is safe to say that a spirit of probono services does not permeate the entire legal community. There cannot be a better time to work to promote a state-wide culture of pro-bono. As the economic crisis drags on, more and more applicants with meritorious cases find themselves being turned away from legal aid offices because there are insufficient resources. A true spirit of pro-bono could go a long way in alleviating this crisis.</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>California Chief Justice Ronald M. George constantly reminds the legal community of the great need to increase access to justice and to encourage pro-bono work The State Bar has also worked to promote pro-bona and passed resolutions to encourage pro-bono work by all attorneys. Despite these efforts, there still remains large numbers of attorneys who still do not take advantage of pro-bono opportunities that are available to them.</p> <p>The State Bar needs to underscore the resolutions it has passed in support of pro-bono by incorporating this aspirational rule. All attorneys, and attorney applicants, refer to the Rules. The same cannot be said about resolutions passed by the State Bar, no matter how lofty those resolutions may be. By incorporating Rule 6.1 into its Rules, the State Bar would be not only be joining in with the vast majority of other state bars which have adopted similar rules but would be sending a clear message that pro-bono service should be the norm, not the exception.</p> <p>I urge adoption of Rule 6.1.</p>	
6	Chalmers, Tiela <b>(Public Hearing)</b>	D	No		I would like to urge you and the Board of Governors to adopt some version of 6.1. I go to a lot of national conferences on pro bono, and California is viewed as being a leader in	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					pro bono. I think it would be embarrassing, frankly, for California to have rejected a Rule urging people to do pro bono. 44 or 45 states in the country have such a Rule.	
11	Committee on Professional Responsibility and Conduct ("COPRAC")	D	Yes		<p>COPRAC has reviewed the provisions of proposed Rule 6.1 – Voluntary Pro Bono Service. COPRAC understands that the Board intends to reconsider its decision to reject proposed Rule 6.1. We urge the Board to reconsider and to adopt the proposed rule. COPRAC previously reviewed the provisions of proposed Rule 6.1 and offered comments to the Commission for the Revision of the Rules of Professional Conduct. Attached hereto are the comments we offered in support of the proposed Rule.</p> <p>As we commented to the Commission, COPRAC believes that the importance of our professional obligation to improve access to justice, as embodied in this rule, outweighs the objection that the rule is aspirational, and thus different from other rules that mandate or prohibit certain conduct.</p> <p>COPRAC has suggested some minor language changes that would address some of the concerns that have been raised with proposed Rule 6.1. We ask that the Board consider those suggestions, found in the</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>attached letter, when it reconsiders the proposed Rule.</p> <p>The need for legal assistance for persons of limited means is enormous and well documented. COPRAC asks the Board to reconsider proposed Rule 6.1 which, if adopted, will imbed in our Rules the importance of our duty as attorneys to work to meet this need.</p>	
35	Disability Rights Legal Center ("DRLC") [Paula Pearlman]	D	Yes		<p>The Disability Rights Legal Center respectfully requests that proposed Rule 6.1 be submitted to the full State Bar Board of Governors for approval and adoption. Much of DRLC's work is accomplished through partnering with pro bono lawyers. Proposed Rule 6.1 would not require that lawyers do pro bono work. Nonetheless, DRLC makes this request for the following reasons:</p> <ol style="list-style-type: none"> <li>1. At least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.</li> <li>2. It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of</li> </ol>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					<p>Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules.</p> <p>3. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.</p> <p>4. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono. Proposed Rule 6.1 would encourage California lawyers to do more.</p>	
33	Fadenrecht, Anne	D	No		Agree with proposed Rule 6.1 to encourage pro bono work... Support comments of Central California Legal Services as submitted by its Director.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
15	Golden State University School of Law [Dean Drucilla Stender Ramey]	D	Yes		<p>We request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.</p> <p>This issue is of the highest importance to pro bono supporters across the state, and, given California's historic leadership on public service and pro bono legal services, across the nation. Golden Gate believes it is vital that</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>the revised California Rules of Professional Conduct include a rule addressing the integral role of pro bono.</p> <p>Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to" from the ABA's Model Rule, be added to the first paragraph, which would then read, "...A lawyer should aspire to provide or enable the direct delivery of at least 50 hours of pro bono public legal services per year-"</p> <p>We recognize that the decision of the Board Committee not to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the members of the California State Bar.</p> <p>To have the maximum impact on the lawyers in our community, it is crucial to have a pro bono rule, in addition to a Board resolution and statutory language. Pro bono is too essential a value within the legal profession to leave it out of the rules.</p>	

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					<p>At least 44 other states have included a similar provision in their ethics rules.</p> <p>While the exact wording of the new rule is important, it is even more important that a meaningful rule in this area be passed in the first instance. Whether you choose the ABA's Model Rule, or the rule as modified by the Rules Revision Commission, or a modification of either that achieves our shared goal, we in the progressive law school community believe that adoption of a rule promoting pro bono work is absolutely critical to our efforts to ensure access to justice for all,</p>	
22	Goodman, Karen M.	D	No		<p>I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend to the Supreme Court the adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. Rule 6.1 promotes access to justice for all California citizens by explicitly making pro bono services a commitment for all California lawyers.</p> <p>In enacting Rule 6.1, California will join 45 other states in expressly encompassing a commitment to pro bono services in its ethical rules. ABA Model Rule 6.1 is an essential foundation to a lawyer's commitment to the</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					<p>public. A lawyer's commitment to pro bono service is too important to leave out of the rules.</p> <p>Providing pro Bono services is a fundamental component of providing a fair and accessible justice system. Adopting 6.1 which expressly make a commitment to pro bono services an ethical requirement is a step in the right direction. I urge the Board of Governors to reconsider its Committee's recommendation and approve 6.1.</p>	
29	Hathaway, Christina Skaf	D	No		<p>I agree with the comments made on behalf of CCLS to support recommendation for adoption of RULE 6.1 for PRO BONO work. On a personal level, I also urge the recommendation for adoption of RULE 6.1. The need for Pro Bono work is immense and will continue to grow. The adoption of RULE 6.1 will give greater opportunities for those in need to receive legal assistance.</p> <p>By coming together, the legal community can make a difference in their communities. RULE 6.1 furthers this goal. I urge adoption of RULE 6.1.</p>	
31	Herr, Leonard	D	No		<p>For the most part, the legal profession is highly regarded by the public as a whole. The practice of law is very time consuming and it is easy to lose sight of the importance of</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					providing pro bono assistance to the public. Encouraging members of our profession to provide pro bono assistance to the public is helpful to our members and a positive image of lawyers.	
17	HIV & AIDS Legal Services Alliance [Margaret Brewer]	D	Yes		Almost 88% of other states have adopted a similar provision in their Rules of Professional Conduct, and it seems a glaring omission for California to leave out this important value from the rules.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
32	Hurley, Russ	D	No		I join in the comments submitted on behalf of Central California Legal Services.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
16	Legal Aid of Marin [Paul S. Cohen]	D	Yes		Our agency is the beneficiary of over \$1.5 million each year in pro bono or in kind services. Our volunteer attorneys make the difference between clients receiving services or going without. Many of our volunteers serve each year with distinction and receive the Wiley M. Manuel Award. A rule encouraging a favorable pro bono commitment should be the mandate of the State Bar of California and I urge its full consideration and adoption.  It is long overdue.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
26	Legal Services for Prisoners with Children ("LSPC") [Carol Strickman]	D	Yes		LSPC urges the adoption of Model Rule 6.1. We are acutely aware of the lack of legal representation for low income people in our	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject

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					society. In particular, we hear every day from prisoners who have received inadequate medical care, who have been sexually harrassed by correctional officers, or have other actionable claims. We are contacted by prisoners and formerly incarcerated people who need legal assistance in establishing visitation rights with their children. Federally funded legal aid programs are prohibited by law from representing incarcerated people. Yet these people retain certain civil and constitutional rights. California has over 170,000 people incarcerated in state prison, and many more in our county jails. This is a significant underserved population. Our courts and our laws offer the possibility of justice, but without legal representation, this possibility is slim. Model Rule 6.1 would encourage attorneys to perform pro bono legal services to individuals such as them. For these reasons, we urge the adoption of this rule.	the Rule.
20	Legal Services of Northern California [W.H. Whitaker]	D	Yes		I request the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions not to recommend the adoption of Rule 6.1.  The Rural Task Force of the Access To Justice Commission contains a thorough discussion of this issue in its report, Improving Civil Justice in Rural California, and	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>recommends that California lawyers, including urban lawyers, consider ways to provide pro bono services to under-served rural Californians. The report includes the following language among its core recommendations:</p> <p>"Because rural areas have fewer lawyers, law schools, and economic resources, urban bar associations and lawyers should consider partnering with rural organizations, of course being mindful that impoverished urban Californians are also underrepresented and need pro bono help as well. Attorneys who are precluded by ethics rules from representing some individuals should be made aware of all of the options for meeting the recommendation, such as devoting time or money to legal aid programs or otherwise furthering access to justice. "</p> <p>The Proposed Rule 6.1 fits perfectly with the Rural Task Force recommendations. It would be an essential tool for judges, law schools, court self-help centers, local bar associations and referral services, legal services programs, and many others in their pro bongQ recruitment efforts.</p>	
37	Los Angeles Center for Law and Justice	D	Yes		As a free legal services provider to low income residents of Los Angeles County, we	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the

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	[Hellen Hong]				<p>see the importance of having a model rule to encourage pro bono service in our legal community. There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono.</p> <p>It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules. Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports. In fact, at least 44 other states have included a similar provision in their rules. According to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.</p> <p>A message from the Board of Governors to make a statement to encourage attorneys to provide pro bono is a powerful statement of the importance of pro bono in our profession.</p>	Board of Governors reconsider its decision to reject the Rule.

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					<p>Language can be added to emphasize that this rule is only aspirational, to avoid any misperception that this rule would require attorneys to do pro bono.</p> <p>Therefore we ask the subcommittee to reconsider proposed Rule 6.1 and urge the Board of Governors to adopt Model Rule 6.1.</p>	
28	Los Angeles County Bar Association Access to Justice Committee [Toby Rothschild]	D	Yes		<p>The Access to Justice Committee (AJC) of the Los Angeles County Bar (LACBA) greatly appreciates the work of the Rule Revision Commission in recommending the adoption of Rule 6.1. We are extremely disappointed that the Board of Governors failed to send the rule out for comment.</p> <p>For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it.</p> <p>While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.</p> <p>Business and Professions Code section 6068</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that requirement by encouraging the provision of pro bono services to people who otherwise would be defenseless.</p> <p>The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send to the Supreme Court a revision of the Rules of Professional Conduct that does not include this provision.</p>	
9	Mental Health Advocacy Services, Inc. (Pamela Marx)	D	Yes		<p>Mental Health Advocacy Services, Inc. (MHAS) writes to request reconsideration of the Board's decision not to adopt proposed Rule 6.1. MHAS is a nonprofit legal services agency serving adults and children with mental health disabilities in the greater Los Angeles area. Our clients are low-income individuals with disabilities; many of them survive on limited government benefits incomes. When they have legal problems, they must rely on legal services agencies and the pro bono resources those agencies are able to access.</p> <p>Rule 6.1 is an aspirational, not mandatory,</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>rule concerning attorneys' annual provision of pro bono legal services. As an aspirational rule, which would be included within the rules of professional responsibility, it provides guidance to attorneys that the provision of pro bono services and the financial support of legal services organizations and programs is consistent with the obligations of those licensed to practice law in California. Equal access to the law is a foundational concept in our constitutional society. Non-profit legal services providers meet only a fraction of the need for legal representation. Only with the provision of pro bono services by attorneys with expertise in much needed areas of representation such as litigation, real property transactions and family law can the legal profession hope to meet more of the need for services that exists.</p> <p>The "Pro Bono Opportunities" page of the State Bar website notes that, while California has made gains, our state's legal services programs are unable to provide even minimal legal assistance to as much as 67 percent of the legal needs of California's poor residents. The Brennan Center for Justice in a 2010 white paper supporting federal funding of legal services noted that the economic crisis has only increased the need for legal services</p>	

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					<p>for the poor.</p> <p>In light of the continuing and rising need for legal services for the poor, including those with disabilities, MHAS respectfully requests that the State Bar Board of Governors adopt Rule 6.1 Voluntary Pro Bono Publico Service.</p>	
41	Mills, Michael N.	D	No		<p>I am writing to urge the Board of Governors to reconsider the recent action of the Committee of Regulations and Admissions riot to recommend the Supreme Court adoption of Proposed Rule 6.1. The Commission's proposal was the product of a long and thoughtful process which carefully reviewed the various issues.</p> <p>Rule 6.1 sets out the professional responsibility of lawyers to provide pro bono publico services to those otherwise unable to obtain access to the legal system and the courts. For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it.</p> <p>While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
 Disagree = 43  
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					<p>ability of pro bono programs to increase the number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.</p> <p>Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that laudable requirement by encouraging the provision of pro bono services to people who otherwise would have no legal voice.</p> <p>The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board should not send the Supreme Court a revision of the Rules of Professional Conduct that does include this important provision.</p>	
25	Neighborhood Legal Services of Los Angeles County ("NLS-LA") [Derek Milosavljevic]	D	Yes		<p>I encourage the Board of Governors to adopt the proposed Rule 6.1 in the Rules of Professional Conduct and ask that it be submitted to the Supreme Court.</p> <p>NLS-LA continues to have a great unmet need for private attorneys to provide pro bono services to those otherwise unable to obtain access to the legal system and the courts.</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service  
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TOTAL = 44    Agree = 1  
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					<p>While Rule 6.1 will not enforceable by discipline, it will be a compelling tool in the ability of our Private Attorney Involvement (PAI) programs to successfully recruit volunteers willing to provide such services.</p> <p>For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility diminishes the status of our state and our legal community as leaders in the efforts to provide access for those unable to afford it.</p> <p>Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 complements and reaffirms that requirement by encouraging the provision of pro bono services to people who otherwise would be defenseless.</p> <p>The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send to the Supreme Court a recommendation that we substantially adopt the ABA Model Rules, while omitting such an important rule on one of the topics the Chief</p>	

**Rule 6.1 Voluntary Pro Bono Service  
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TOTAL = 44    Agree = 1  
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					Justice most ardently supports.	
36	Neighborhood Legal Services of Los Angeles County ("NLS-LA") [Neal S. Dudovitz]	D	Yes		<p>I am writing to express my strong support for including proposed Rule 6.1 in the Rules of Professional Conduct that will be recommended for adoption to the California Supreme Court.</p> <p>Neighborhood Legal Services has worked tirelessly for more than 45 years to improve access to justice for low income communities in Los Angeles County. With a staff of 100+, including 45 lawyers and an annual operating budget of \$12 million, NLS-LA provides legal assistance through offices in El Monte, Pacoima and Glendale, as well as 10 courthouse-based Self-Help Centers and 4 domestic violence clinics spread throughout Los Angeles County. In 2009, NLS-LA provided assistance on a variety of legal matters to more than 70,000 LA residents.</p> <p>Although Neighborhood Legal Services ("NLS-LA") is one of California's largest legal services programs, with well over 1 million people financially eligible for our assistance, there is little doubt that we can only meet a small fraction of the legal needs of the communities we serve. We need the full support and assistance of the private bar - law</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service  
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					<p>firms, partnerships and sole practioners.</p> <p>To that end, in 2009 the NLS-LA Board of Directors renewed its commitment to expand the availability of legal services to our clients through new and improved partnerships with the private bar. We are seeking additional help from private attorneys in Los Angeles on a broad array of new, innovative projects.</p> <p>Undoubtedly, Rule 6.1 will play an important role in making our pro bono campaign a success by helping to develop a renewed culture of pro bono commitment within the legal community. If California continues to be one of only a handful of states without a directive encouraging pro bono assistance in its Rules of Professional Responsibility, it will diminish the status of California as a national leader in providing access to justice for low income communities.</p> <p>While Rule 6.1 is not enforceable by discipline, it will nevertheless be a compelling tool in the ability of legislative pro bono programs to increase the number of volunteers and to expand the numbers and types of cases for which help is provided.</p> <p>In sum, Rule 6.1 is essential for access to</p>	

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					justice to become a reality for California's poor.	
13	Odgers, Richard	D	No		<p>I am writing to urge that the Board include the amended version of ABA Model Rule 6.1 with respect to voluntary pro Bono service in its proposed revisions to the Rules of Professional Conduct, The version I support is the one unanimously recommended by the Rules Revision Commission, with the addition of the words "aspire to" in the first sentence of the Rule.</p> <p>The Rules Revision Commission unanimously recommended that an amended version of ABA Model Rule 6.1 be adopted in California as it has been in almost every other state. And my experience has taught me that in today's world, where the profession of law is in danger of becoming the business of law, it is vital that California, long a leader in providing pro bono legal services, make very clear that every one of its lawyers is expected to make a serious pro bona commitment.</p> <p>The current crisis in the provision of legal services to those who can't afford them cries out for California's State Bar to take a strong stand to make clear that all California lawyers are expected to do their part to provide and financially to support pro bono services.</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					If my understanding is correct, one of the reasons that the Committee on Regulation and Admissions did not recommend inclusion of Proposed Rule 6.1 is that the rule is hortatory but would not carry disciplinary sanctions, whereas the other rules that aren't supported by sanctions are permissive. If I am correct, this is a very thin basis on which to refuse strongly to encourage California lawyers to step up to what all acknowledge is a desperate need. We need to do whatever we can to encourage the provision of pro bona services in California, Please include Rule 6.1 in the proposed Rules of Professional Conduct.	
38	Pastore, Claire	D	No		As a member of the faculty at USC and as the co-chair of the Right to Counsel Task Committee of the California Commission on Access to Justice and a former longtime legal services attorney, I am well aware of the growing and urgent need for pro bono counsel for litigants who cannot afford to hire attorneys.  I urge you to reconsider your decision not to recommend adoption of proposed rule 6.1. According to the published materials explaining the decision, there appears to be no substantive opposition to the concept that	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service  
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					<p>providing pro bono services should be part of the professional duties of every lawyer in California and that the goal of providing 50 hours per year per attorney is a worthy one. Instead, the explanatory materials cite the opposition of one membership group (the California Young Lawyers Association) which felt that the proposed rule was duplicative of statements contained in statute and a Board of Governor's Resolution, and that rules which are aspirational rather than mandatory should not be included in the Rules of Professional Conduct. Neither is a sufficient reason to reject Rule 6.1.</p> <p>First, the fact that proposed rule 6.1 reiterates an aspirational goal of 50 pro bono hours per year per attorney that is also contained in Business and Professions Code 6073 and a 1989 Resolution is a reason to include the rule, not to reject it. Just as statutes (like section 6073) can make important statements about the goals or values of our profession, so too can and should the Rules of Professional Conduct. Moreover, one need not look far to find Rules of Conduct which duplicate statutory measures. (See, for just one example, the rules implementing Business and Professions Code § 6068(e)'s exceptions to the duty of confidentiality). As a</p>	

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					<p>practical matter, including Rule 6.1 in the Rules of Professional Conduct will bring more attention to its concededly worthwhile goal. For example, I have never attended a training at which Resolutions were covered, but I regularly attend trainings which cover changes to the conduct rules. Including 6.1 will inevitably bring more attention to this important topic and elevate the importance of the bar's commitment to pro bono services.</p> <p>Moreover, nearly every state has included some version of Rule 6.1 in its state rules of conduct. There is no reason for California to take a contrary position, which risks giving the impression that Rule 6.1 was unimportant to our bar leadership, or, worse yet, contrary to the ideals of the profession in this state.</p> <p>Finally, it is simply not the case that all rules of conduct serve a disciplinary function and that there is no place for aspirational or hortatory rules. The same argument could have been made for statutes such as section 6073, and yet the Legislature chose to include this measure expressing the commitment and values of the profession. The Bar should do the same.</p>	
8	Public Advocates, Inc. (Jamiene Studley)	D	Yes		Adoption of Rule 6.1 would be consistent with adoption in the great majority of states. The	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the

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					central professional responsibility of pro bono service and the value of giving as many people as possible the chance for legal representation in should be embedded formally in the core statement of values and rules, the California Rules of Professional Conduct. The legal profession needs every possible reinforcement of our profession's and state's commitment to filling the serious legal services gap. This would be consistent with the Chief Justice's leadership on pro bono and legal services. While the statement would not create a specific requirement for any individual attorney, it would be completely appropriate to state the responsibility and aspiration in every appropriate setting.	Board of Governors reconsider its decision to reject the Rule.
10	Public Counsel (Elizabeth Bluestein)	D	Yes		Public Counsel supports the adoption of the Commission's proposed Rule 6.1, and urges the Board of Governors to reconsider the adoption of Rule 6.1.  Public Counsel is the largest public interest law firm specializing in delivering pro bono legal services to low-income communities. Public Counsel is dedicated to advancing equal justice under law by delivering pro bono legal services to indigent and underrepresented children and adults, ensuring that communitybased organizations	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>serving this population have legal support, mobilizing the volunteer resources of the private bar, and providing technical assistance to pro bono attorneys and projects throughout California. Public Counsel is also the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers Committee for Civil Rights Under Law.</p> <p>It is very important for California to adopt an aspirational rule on pro bono to provide formal recognition that all attorneys should aspire to perform pro bono work. It is important to have a Rule that addresses pro bono, in addition to the existing Board resolution, because legal education and law practice routinely focus on the Rules of Professional Conduct. Pro bono is an important value within the legal profession, and should be included in the Rules. This is especially true because California is currently one of only six states that have not adopted some version of the ABA Model Rule on pro bono. Declining to do so sends the wrong message to the bar as well as to the general public.</p> <p>Pro bono participation by attorneys is needed now more than ever - the need for legal</p>	

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					services for those with limited means continues to expand in these challenging economic times.	
34	Public Interest Clearinghouse [Julia R. Wilson]	D	Yes		<p>The Public Interest Clearinghouse (PIC) is a statewide nonprofit that increases access to legal help for underserved Californians by building infrastructure and partnerships in the legal community. PIC serves as the IOLTA-funded support center on pro bono efforts throughout the state, and its Pro Bono Initiative incubates and supports statewide and local pro bono projects in California. PIC administers the statewide pro bono website - <a href="http://www.CAProBono.org">www.CAProBono.org</a> - and supports the Southern California legal services community in running <a href="http://www.SoCalProBono.org">www.SoCalProBono.org</a>. PIC's REAL (Rural Education &amp; Access to the Law) Project works to expand the pro bono resources available in rural areas of the state, including through our Justice Bus(TM) service learning trips that involve law students, firms, and lawyers in urban areas in pro bono legal assistance clinics for rural residents.</p> <p>Tens of thousands of California attorneys volunteer each year to bring much-needed legal help to our most vulnerable residents. And yet, even with that level of commitment by our profession, there remains a terrible</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>"justice gap" between the overwhelming need for legal assistance and the limited resources to meet that need. There will never be sufficient state, federal or private funding to provide a nonprofit legal services attorney for all the lowincome seniors, families and persons with disabilities who require legal help. Therefore, innovative partnerships between the private and nonprofit sectors are the only viable way to build a bridge across the justice gap.</p> <p>Based on PIC's statewide expertise in working with both the nonprofit and for-profit segments of the legal profession, we strongly disagree with the recommendation to not adopt proposed Rule 6.1. A failure to adopt some version of an aspirational rule relating to pro bono would leave California on the outskirts of the national commitment in this area, exactly at the time when funding for legal services delivery is dropping dramatically. At least 44 other states have included a similar provision in their rules, and according to the report of the Rules Revision Commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.</p> <p>In our opinion, it is essential to have a pro bono rule, in addition to a Board resolution</p>	

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					<p>and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession for our rules to be completely silent on the issue. We are also deeply concerned about the unintentional but possible message if the rules are ultimately approved by the Supreme Court include most of the ABA Model Rules, but leave out the rule on pro bono entirely. If necessary for adoption, PIC would support the idea of adding language to emphasize that the rule's aspirational nature.</p> <p>Based on the reasons above, the Public Interest Clearinghouse respectfully urges the recommendation that the Board of Governors adopt Proposed Rule 6.1.</p>	
7	Public Interest Law Project	D	Yes		<p>At least 44 other states have included a similar provision in their rules.</p> <p>It is important to have a pro bono rule, in addition to a Board resolution and statutory language, because legal education and law practice routinely focus on the Rules of Professional Conduct, and pro bono is too important a value within the legal profession to leave out of the rules.</p> <p>Because the rules are ultimately approved by the Supreme Court, it may seem like a glaring omission for the Bar to recommend that we</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					<p>mostly adopt the ABA Model Rules, but leave out the rule on one of the topics the Chief Justice most strongly supports.</p> <p>There is a great need for legal services that is not now being filled, despite the existing pro bono resolution, the statute, and judicial support for pro bono.</p>	
1	San Diego County Bar Association Legal Ethics Committee	D	Yes		We approve the new rule in its entirety.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.
4	State Bar's Standing Committee on the Delivery of Legal Services (SCDLS)	D	Yes		<p>It is absolutely critical that CA adopt an aspirational rule on pro bono to provide formal recognition that all attorneys have a professional responsibility to perform pro bono work.</p> <p>As one of only 6 states not having a pro bono rule, declining to adopt one would send to wrong message to the bar as well as the general public.</p> <p>A pro bono rule will have more far-reaching and sustained attention than a Board resolution as Rules are studied and referred to by lawyers and law students.</p> <p>SCDLS voted unanimously to urge Board to</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>reconsider adoption of rule and would also support insertion of the word “aspire to” in second sentence of introductory clause to emphasize the aspirational nature of the rule.</p> <p>Would also support adoption of ABA Model Rule 6.1 or combination of RRC proposal and ABA Model Rule.</p> <p>Specific language is not as crucial as the adoption of a pro bono rule in some form.</p>	
3	Talia, M. Sue	D	No		<p>The Rules Revision Commission got it right and unanimously recommended an aspirational rule.</p> <p>I travel all over the United States and Canada speaking to groups of lawyers on the subject of limited scope representation and know firsthand how behind some of our professional colleagues are on access issues. Please don't allow California to join them. I urge reconsideration of the failure to recommend this rule.</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>
19	UC Hastings School of Law [Dean Shauna Marshall]	D	Yes		<p>We write to request that the Board .of Governors reconsider its recent decision not-to recommend proposed Rule 6.1.</p> <p>This is an issue of utmost concern to pro bono supporters across the state and particularly to law schools who are uniquely situated to</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

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					<p>instill, foster and promote a commitment to pro bona in future lawyers. In order to ensure greater involvement in pro bona throughout the legal profession, it is imperative that the revised California Rules of Professional Conduct include a rule directly addressing the important role of pro bono. The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p> <p>We understand that there were concerns that the rule was not clearly aspirational in nature, therefore, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph. We also understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include an aspirational pro bono rule in the final vote of the Board of Governors undermines .the. efforts of the State Bar of California, County Bar Associations, the judiciary, law schools and others to engage all members of the legal profession in :pro bono.</p> <p>As legal educators, the inclusion of a formal pro bono rule communicates to students and</p>	

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					<p>the next generation of lawyers.</p> <p>Despite the current Board resolution and statutory language encouraging pro bono, the need for pro bono services continues to outpace the number of attorneys seeking to meet it. The addition of a formal rule would further state unequivocally that pro bono is too important a value within the legal profession to leave it out of the rules.</p> <p>At least 44 other states have included a similar provision in their ethics rules; the absence of such a provision in California sends the wrong message to current and future Bar members.</p> <p>The actual language of the provision is less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted.</p>	
18	UC-Irvine School of Law [Dean Erwin Chemerinsky]	D	Yes		I strongly recommend the approval of Proposed Rule 6.1. As the dean of a California law school, I think it is essential that the Rules of Professional Conduct clearly communicate the importance of lawyers doing	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>pro bono work. The proposed Rule would not require pro bono work, but it would express the view that this is something all lawyers should aspire to do.</p> <p>Forty-four other states have adopted this Rule. Because of its aspirational nature, it has posed no problems.</p> <p>There is an urgent need for lawyers to do more pro bono work to help fulfill the great unmet needs for legal services. Proposed Rule 6.1 sends a message to law students and lawyers that this is every attorney's responsibility.</p>	
30	University of San Francisco School of Law [Dean Jeffrey S. Brand]	D	Yes		<p>I request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.</p> <p>This is an issue of utmost concern to pro bono supporters across the state. It is imperative that the revised California Rules of Professional Conduct include a rule addressing the important role of pro bono.</p> <p>Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph.</p>	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members. However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the State Bar of California.</p> <p>It is important to have a pro bono rule, in addition to a Board resolution and statutory language, and pro bono is too important a value within the legal profession to leave it out of the rules.</p> <p>At least 44 other states have included a similar provision in their ethics rules.</p> <p>The actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted,</p>	
42	University of the Pacific, McGeorge School of Law [Dean Elizabeth Rindskopf Parker]	D	Yes		I am writing to request that the Board of Governors reconsider its recent decision not to recommend proposed Rule 6.1.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

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					<p>This is an issue of utmost concern to pro bono supporters across the state. We believe that it is imperative that the revised California Rules of Professional Conduct include a rule addressing the important role of pro bono, and we urge the Board of Governors to do everything in its power to ensure passage of this rule.</p> <p>Because we understand that there were concerns that the rule was not clearly aspirational in nature, we recommend that the words "aspire to", from the ABA's Model Rule, be added to the first paragraph. We understand that the failure of the Board Committee to recommend Rule 6.1 does not reflect a lack of support for pro bono among board committee members.</p> <p>However, we fear that failure to include a pro bono rule in the final vote of the Board of Governors will be perceived as a lack of support for pro bono by the State bar of California.</p> <p>It is important to have a pro bono rule, in addition to a Board resolution and statutory language, and pro bono is too important a value within the legal profession to leave it out of the rules. At least 44 other states have</p>	

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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>included a similar provision in their ethics rules.</p> <p>The actual provisions are less important than the fact that we need to have a pro bono rule adopted. It can be the ABA's Model Rule, it can be the rule as modified by the Rules Revision Commission, or it can be some combination. The critical point is that we believe a pro bono rule MUST be adopted.</p>	
24	Zeff, Ophelia	D	No		<p>I urge the Board of Governors to reconsider the recent action of the Committee of Regulation and Admissions not to recommend the Supreme Court adoption of the Rules Revision Commission's Proposed Rule 6.1 pertaining to pro bono service. The Commission's proposal was the product of a long and thoughtful process which carefully reviewed the various issues raised by the proposed rule.</p> <p>For California to be one of only a handful of states not to include Rule 6.1 in its Rules of Professional Responsibility would diminish the status of California as a leader in the efforts to provide access for those unable to afford it.</p> <p>While Rule 6.1 is not enforceable by discipline, it will be a compelling tool in the ability of pro bono programs to increase the</p>	<p>The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.</p>

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
 Disagree = 43  
 Modify =      
 NI =    

No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>number of volunteers willing to provide such services, and to expand the numbers and types of cases for which help is provided.</p> <p>Business and Professions Code section 6068(h) requires lawyers: "Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." Rule 6.1 gives content to that laudable requirement by encouraging the provision of pro bono services to people who otherwise would have no legal voice.</p> <p>The President of the State Bar and the Chief Justice of California are both very strong advocates of lawyers providing pro bono services. The Board of Governors should not send the Supreme Court a revision of the Rules of Professional Conduct that does not include this extremely important provision.</p>	
43	Steven Austin, California Commission on Access to Justice <b>(Public Hearing)</b>	D	Yes		We strongly urge the State Bar to recommend a pro bono Rule as part of the Rule revision process. At least 45 other states have included a similar provision in their ethics rules. According to the report of this Rules and Revision commission, nearly every jurisdiction has adopted some version of Model Rule 6.1.	The Commission agrees in substance that there should be a Rule 6.1 and has requested that the Board of Governors reconsider its decision to reject the Rule.

**Rule 6.1 Voluntary Pro Bono Service  
[Sorted by Commenter]**

TOTAL = 44    Agree = 1  
 Disagree = 43  
 Modify =     
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No.	Commenter	Position <sup>1</sup>	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
44	Linda Kim, Public Interest Clearinghouse <b>(Public Hearing)</b>	D	Yes		<p>The Public Interest Clearinghouse strongly supports the inclusion of an aspirational rule on pro bono in the Rules of Professional Conduct. We believe that even an aspirational rule not intended to be the basis for discipline would be valuable, because it would provide formal recognition in California that all lawyers have a professional responsibility to do pro bono work.</p> <p>It is unthinkable that a leadership state like California would not have an aspirational rule, and we urge the State Bar Board of Governors to adopt Proposed Rule 6.1.</p>	