

McCurdy, Lauren

From: Melchior, Kurt W [kmelchior@nossaman.com]
Sent: Wednesday, October 28, 2009 11:47 AM
To: Jerome Sapiro Jr.; Ignazio J. Ruvolo (E-mail)
Cc: Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren; Harry Sondheim; Paul W. Vapnek (E-mail)
Subject: RE: November Assignment for III.J. Advice of Counsel Rule

Lauren and Randy: in light of Jerry's response, we now have 2 of three drafters supporting the proposal, at least "in principle." We already have a text and comment; and I am about to disappear into a client meeting for the rest of the day. Therefore, to meet the agenda deadline, may I suggest that we use the 2003 material, which Randy sent yesterday and which I copy below:

“Rule X-XXX. Good faith reliance on advice of counsel.

A member seek the advice of another attorney on any question which arises in the course of a client engagement. No discipline shall be imposed and no adverse action taken against the member if his or her action is taken upon the advice of such other attorney, given after full and adequate disclosure to such attorney of all facts [and circumstances[?]] relevant to the consultation.

This Rule does not relieve the member of civil liability under otherwise established rules of law.

Comment: It is not the intent of this rule to allow a member a free pass for any conduct which would clearly result in disciplinary or civil liability if there had been no such consultation; but it is the purpose of this Rule to encourage members to seek confidential, privileged consultation within the scope of a client engagement where a matter of professional difficulty appears.”

To make this easier to follow, I suggest that in the agenda materials we eliminate the brackets and question mark so that the first paragraph will read as follows:

A member seek the advice of another attorney on any question which arises in the course of a client engagement. No discipline shall be imposed and no adverse action taken against the member if his or her action is taken upon the advice of such other attorney, given after full and adequate disclosure to such attorney of all facts and circumstances relevant to the consultation.

And we can state that there is no equivalent Model Rule provision. If another state has any equivalent provision, I am not aware of it and have no time to do a global search (even if I knew how to do one). I think that this is the best we can do within the time limits and should meet your requirements.

Many thanks.

From: Jerome Sapiro Jr. [mailto:jsapiro@sapirolaw.com]
Sent: Wednesday, October 28, 2009 10:57 AM
To: Melchior, Kurt W; 'Ignazio J. Ruvolo (E-mail)'
Cc: 'Difuntorum, Randall'; 'Kevin Mohr G'; 'McCurdy, Lauren'; 'Harry Sondheim'; 'Paul W. Vapnek (E-mail)'
Subject: RE: November Assignment for III.J. Advice of Counsel Rule

I would support such a rule in principle.

Jerry

CONFIDENTIAL E-MAIL from THE SAPIRO LAW FIRM

This e-mail transmission, and any documents, files or previous e-mail messages attached to it, may contain confidential information that is legally privileged. If you are not the intended recipient, or a person responsible for delivering it to the intended recipient, please do not disclose, copy, distribute or use any of the information contained in or attached to this e-mail. Instead, please immediately notify us that you received this e-mail, by: (1) reply e-mail, (2) forwarding this e-mail to postmaster@sapirolaw.com, or (3) telephone at (415) 771-0100. Please then destroy this e-mail and any attachments without reading or saving it. Thank you.

IRS CIRCULAR 230 DISCLOURE: Any Federal tax advice contained herein is not written to be used for, and the recipient and any subsequent reader cannot use such advice for, the purpose of avoiding any penalties asserted under the Internal Revenue Code. If the foregoing contains Federal Tax Advice and is distributed to a person other than the addressee, each additional and subsequent reader hereof is notified that such advice should be considered to have been written to support the promotion or marketing of the transaction or matter addressed herein. In the event, each such reader should seek advice from an independent tax advisor with respect to the transaction or matter addressed herein based on the reader's particular circumstances.

From: Melchior, Kurt W [mailto:kmelchior@nossaman.com]
Sent: Wednesday, October 28, 2009 10:25 AM
To: Ignazio J. Ruvolo (E-mail); Jerome Sapiro Jr. (E-mail)
Cc: Difuntorum, Randall; Kevin Mohr G; McCurdy, Lauren; Harry Sondheim; Paul W. Vapnek (E-mail)
Subject: FW: November Assignment for III.J. Advice of Counsel Rule
Importance: High

I have not heard from either of you. I take it that means we follow the course I outlined at the bottom of yesterday's message (below)? Please confirm -- though of course I'd be happier if you agreed that this needs attention.

From: Melchior, Kurt W
Sent: Tuesday, October 27, 2009 1:08 PM
To: 'Difuntorum, Randall'; Ignazio J. Ruvolo; Jerome Sapiro
Cc: Harry Sondheim; Kevin Mohr; pwwapnek@townsend.com; McCurdy, Lauren; Paul W. Vapnek (E-mail)
Subject: RE: November Assignment for III.J. Advice of Counsel Rule
Importance: High

Thanks to Randy for straightening out some confusion.

My own view is that advice of counsel should be encouraged, and that the way to do so is to afford a safe harbor for disciplinary issues where there has been genuine and complete consultation by the respondent lawyer with competent counsel and the resulting action is taken upon such advice. (If so, the advice and the scope of the consultation would have to be disclosed, as in other situations where advice of counsel is a defense. It would be the respondent/client's choice to open that consultation to scrutiny, as in other such situations.)

Nace and Jerry: in light of Randy's advice, could you let me know asap whether you would support such a rule. If no, and unless either of you has a different proposal we could consider today, I guess that we send an e mail saying no action is proposed, but that Kurt dissents.

From: Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
Sent: Tuesday, October 27, 2009 12:51 PM
To: Melchior, Kurt W; Ignazio J. Ruvolo; Jerome Sapiro; paul_santabarbara@msn.com
Cc: Harry Sondheim; Kevin Mohr; pwwapnek@townsend.com; McCurdy, Lauren; Paul W. Vapnek (E-mail)
Subject: RE: November Assignment for III.J. Advice of Counsel Rule

Advice of Counsel Codrafters:

Pasted below are the action summary excerpts for the Commission's prior consideration of this proposed rule. Kurt is correct that the Commission previously voted in 2003 to abandon consideration of this proposal. However, as we are now proceeding to memorialize a rule concept considered but rejected by the Commission, the upcoming November meeting becomes the last chance for possible reconsideration.

If the codrafters are in agreement with the 2003 action to abandon consideration, then a simple email reporting that agreement is all that is needed for the November agenda materials. If, on the other hand, the codrafters wish to seek reconsideration of the prior action, then a revised draft of the rule is needed together with an explanation of why the rule is desirable. The explanation should be consistent with the recent Commission practice of explaining rule amendment proposals to the Board in relation to the ABA Model Rules as representative of a national standard. –Randy D.

P.S.

The inclusion of the email address of paul_santabarbara@msn.com was erroneous and has been deleted from this message. Please do not copy this recipient on any further messages.

Randall Difuntorum
Director, Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2161
randall.difuntorum@calbar.ca.gov

This E-Mail message may contain confidential information and/or privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply E-Mail and delete all copies of this message.

Good Faith Reliance - Proposed New Rule – COMMISSION CONSIDERATION HISTORY (2001-2007)

7/11/03 Meeting:

The Commission considered a recommendation for a proposed new rule submitted by Mr. Melchior, in consultation with the Chair. Mr. Melchior's recommendation presented the following discussion draft.

“Rule X-XXX. Good faith reliance on advice of counsel.

A member seek the advice of another attorney on any question which arises in the course of a client engagement. No discipline shall be imposed and no adverse action taken against the member if his or her action is taken upon the advice of such other attorney, given after full and adequate disclosure to such attorney of all facts [and circumstances[?]] relevant to the consultation.

This Rule does not relieve the member of civil liability under otherwise established rules of law.

Comment: It is not the intent of this rule to allow a member a free pass for any conduct which would clearly result in disciplinary or civil liability if there had been no such consultation; but it is the purpose of this Rule to encourage members to seek confidential, privileged consultation within the scope of a client engagement where a matter of professional difficulty appears.”

Mr. Melchior explained that this proposal originated from an APRL discussion with Charles Kettlewell. Following brief comments from remaining members present, it was agreed that Mr. Melchior would work with Mr. Sapiro to further develop the proposal for consideration by the Commission.

9/5/03 Meeting:

The Chair invited discussion on staff's recommendation that the Commission's consideration of this item be postponed until such time as the Commission has made substantial progress on the current RPCs. Among the points raised during the discussion were the following.

- (1) This proposal for a new rule reflects the broader conceptual issue of "safe harbors" as a function of the RPCs. A discussion of the concept of safe harbors is valuable at the front-end of the Commission's work not the back-end.
- (2) A rule should not offer immunity to lawyers who are otherwise culpable of a violation.
- (3) Seeking and following the advice of ethics counsel should be encouraged.
- (4) Immunity is not an appropriate method for encouraging lawyers to seek ethics counsel. Such a rule likely would be abused.
- (5) Any potential for abuse is limited by the requirement of "good faith."
- (6) A reasonable safe harbor is appropriate and necessary because of the court's definition of "willfulness" for purposes of discipline.
- (7) Consideration should be given to amending RPC 3-110 as a means to encourage lawyers to seek advice of counsel.
- (8) The Commission should review the State Bar Court case *In re McCarthy* (April 15, 2002) 4 Cal. State Bar Ct. Rptr. 364 [2002 WL 598448, 2 Cal. Daily Op. Serv. 3325,, 2002 Daily Journal D.A.R. 4273].

Following discussion, the Chair determined that this matter will be placed on the next agenda for further discussion provided that the members who are in support of the proposal send to the codrafters actual rule drafts for consideration by the codrafters prior to the agenda mailing. If there is interest in the proposal but no further materials, then the matter will be postponed.

10/24/03 Meeting:

The Commission considered an October 9, 2003 memorandum presented by Mr. Sapiro. The memorandum provided a redraft of a proposed new rule addressing a lawyer's good faith reliance on advice of counsel. Comments on the core concept of the proposed new rule were solicited. Among the points raised during the discussion were the following:

- (1) The concept of advice of counsel could be considered as a defense or as a factor in mitigation. This is an open issue but the core objective is to create an incentive for lawyers to seek counsel.
- (2) As drafted, the rule raises a burden of proof issue.

- (3) The rule also needs clarification on the requirement of a “disinterested” counsel. Would in-house ethics counsel qualify?
- (4) Recognizing that there is an analogy to IP practice and the advice of counsel defense to a claim of willful infringement, problems arise as to the waiver of the attorney-client privilege as a quid pro quo to the assertion of the defense. Cases, such as *Sheffield v. State Bar* and *State Bar v. McCarthy* suggest that the advice of counsel is not recognized as a defense.
- (5) The goal of creating the desired incentive may be accomplished simply by assuring that advice of counsel is an accepted factor in mitigation. The rule probably goes too far in seeking to establish a complete defense.
- (6) Assuming the mitigation approach, consideration should be given to including contact with the State Bar Ethics Hotline.
- (7) Assuming the mitigation approach, consideration should be given to including contact with the State Bar Ethics Hotline.
- (8) The discussion thus far makes clear that this rule is completely inappropriate for the RPCs. As to policy, the rule sends a wrong message by giving a road map to unscrupulous lawyers for obtaining immunity for misconduct. Regarding the points made on mitigation, that topic falls under the State Bar Rules of Procedure not the RPCs.
- (9) The rule has the potential of drawing criticism that the Commission is attempting to pass a “full employment act” for ethics counsel.
- (10) Putting aside perceptions and the potential for unfounded ad hominem criticism, the Commission should focus on the policy decision of balancing a rule-based incentive to obtain counsel versus lost discipline convictions due to contrived counsel.

Following discussion, a motion was made to abandon consideration of this proposed rule at this time. The motion carried by a vote of 6 yes, 2 no, with 0 abstentions. Staff was asked to memorialize this matter as a concept considered but not recommendation for adoption by the Commission.

From: Melchior, Kurt W [mailto:kmelchior@nossaman.com]

Sent: Tuesday, October 27, 2009 11:32 AM

To: Ignazio J. Ruvolo; Jerome Sapiro; paul_santabarbara@msn.com

Cc: Harry Sondheim; Difuntorum, Randall; Kevin Mohr; pwwapnek@townsend.com; McCurdy, Lauren; Paul W. Vapnek (E-mail)

Subject: RE: November Assignment for III.J. Advice of Counsel Rule

Importance: High

Per the message below, we are the drafting team for this rule; and we have until close of business tomorrow to provide a draft rule. I was unaware of this until Lauren so advised last night; and if I missed something on the calendar, I apologize. (I also do not recognize the address paul_santabarbara@msn.com; for that, my apologies as well.)

I have a couple of problems with this task at the outset. First, Kevin's notes show that the Commission voted 6:2 just last week (minutes of 10/23-24, item 16) "to abandon consideration of this rule at this time." So, what are we being asked to do here and why?

Second, though I am being quoted by Kevin just above the recital of that vote, I have no recollection of this discussion, though it would have been just days ago. Moreover, there was no meeting of the Commission on 10/23-24, 2009. It was the week before, and I was absent on that Saturday. Something is radically wrong here.

Subject to the above, if despite the cited vote we are being asked to come up with a rule, which seems to be the case, the discussion seems to have been so deeply divided that there seem at least two wholly disparate places to start. (You may have additional ideas.)

--- One version is that action taken in reliance on advice of counsel (fully informed, etc.) may not be a basis for discipline (see my memo of 6/26/03, 6+ years ago, in Kevin's materials of last night)

--- The other is, that such reliance be a matter in mitigation of any sanctions which would otherwise be imposed.

My own view is that mitigation issues belong in the disciplinary standards, not rules; but I still think that adopting a rule such as I once proposed (and had since forgotten) would be a signpost which encouraged lawyers to seek professional advice in difficult situations.

Kevin sent along an Oregon Rule which seems very unspecific and unclear, but which does seem to go in the direction of mitigation.

But there was no consensus 6 years ago (or 6 days ago???) on going forward. Yet, we have been tasked with drafting something; and I would appreciate your immediate feedback on what we should do to comply, and how. Thank you.

From: McCurdy, Lauren [mailto:Lauren.McCurdy@calbar.ca.gov]
Sent: Monday, October 26, 2009 5:33 PM
To: Kevin Mohr; Melchior, Kurt W; Ignazio J. Ruvolo; Jerome Sapiro; paul_santabarbara@msn.com
Cc: Harry Sondheim; Difuntorum, Randall; Kevin Mohr; pwvapnek@townsend.com
Subject: November Assignment for III.J. Advice of Counsel Rule

Kurt & Codrafters:

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28th.

sent by:

Lauren McCurdy
Office of Professional Competence
State Bar of California
180 Howard Street
San Francisco, CA 94105
phone 415-538-2107
fax 415-538-2171
lauren.mccurdy@calbar.ca.gov

From: Kevin Mohr [mailto:kemohr@charter.net]
Sent: Tuesday, April 07, 2009 1:04 PM
To: Kurt Melchior; Ignazio J. Ruvolo; Jerome Sapiro
Cc: Harry Sondheim; Difuntorum, Randall; McCurdy, Lauren; Lee, Mimi; Kevin Mohr
Subject: [Fwd: Re: RRC - ADVICE OF COUNSEL RULE]

Greetings drafters - Kurt, Nace & Jerry:

As members of the drafting committee, I'm forwarding to you an e-mail I sent to Kurt on 4/5/09 with materials I have concerning the proposed "Advice of Counsel" Rule. Kurt is lead drafter.

I have also attached Oregon Rule 8.6. Although not on point, it may contain language that could prove useful should you determine the RRC should pursue this Rule. Previously the RRC voted not to pursue it "at this time." See my comments in the e-mail to Kurt.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

Finally, please note that this Rule is not calendared until the December 2009 meeting.

However, some of you have requested being provided with the relevant materials in the interim and I'm doing so.

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

Kevin

----- Original Message -----

Subject:Re: RRC - E-mail #1 - ADVICE OF COUNSEL RULE

Date:Sun, 05 Apr 2009 22:27:49 -0700

From:Kevin Mohr <kemohr@charter.net>

To:Melchior, Kurt W <kmelchior@nossaman.com>

CC:Kevin Mohr <kevin_e_mohr@csi.com>, Harry Sondheim <hbsondheim@verizon.net>, Randall Difuntorum <Randall.Difuntorum@calbar.ca.gov>, Lauren McCurdy <Lauren.McCurdy@calbar.ca.gov>

References:<158B1416CC7CC54C938D00455ED8438C029644EB@exsf001.nossaman.local>
<49AEBF8D.8030409@charter.net>

Kurt:

I'm following up on the e-mail I sent you on March 4, 2009. See below.

I now have the materials that I promised you. To avoid confusion, I'll be sending them to you in separate e-mails. This is the first one, concerning Advice of Counsel.

I've attached the following:

1. An e-mail compilation dated 5/5/09 (don't worry about the date; it's simply the deadline date for the next meeting). This contains your original memorandum from June 2003 proposing the Rule and Jerry's October 2003 memo taking the rule a bit further. In Word.
2. My notes on this Rule from the October 23-24, 2003 meeting. In PDF.

Some Comments:

1. I'm not sure of the exact dates on the memos; I think I got them after the October 2003 meeting, where the RRC voted 6-2-0 to put off consideration of the Rule "at this time." See para. 16 of my notes.
2. I don't have anything else on the Rule. Please review my notes. I'm not sure the Commission will have changed its mind about the proposed rule.

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

Kevin

Kevin Mohr wrote:

Kurt:

I can't get to these requests until the end of the week but I can assure you I have materials on all matters you've identified in items 1 to 3. I don't think we'll be addressing the first two items until later in the summer or fall. We will start on the ABA Rule without California counterparts in early summer, but I'm not sure when we'll get to 8.5 (Although 8.5 has some provisions that are also found in 1-100, there are some other aspects of it w/o a counterpart in our Rules -- i.e., choice of law in 8.5(b), so we put off consideration of 8.5 until the end of our journey.)

As to 1.8.13, that is the counterpart to MR 1.8(k), imputation of PERSONAL (and other) conflicts, i.e., conflicts identified in the MR counterparts to our rules (such as 3-300) and other Model Rule provisions that are all gathered in MR 1.8). Rule 1.8.13 will probably be on the agenda for either our May or our July meeting.

Have a safe journey to and from D.C., and good luck on your oral argument. The materials will be waiting for you upon your return from D.C. -- just in case you want to take them with you on vacation. :-)

Thanks,

Kevin

Melchior, Kurt W wrote:

Harry has been talking with me about assignments, and suggested that I ask you about certain details:

1. I am to be lead drafter for a topic "Advice of Counsel," with Nace and Jerry as co-drafters. Harry recalls that the topic was suggested by a message from Jerry in 2003 and that you might have that message, and/or any other materials we could use as a starting point, as this seems to be a new topic for rule making.
2. The same type of question for another topic for which I am to be lead drafter, and Jerry and Mark co-drafters: "Attorney-client privilege." Harry thinks this was my idea, bottomed in thinking about the efforts of the Justice Department to compel target corporations to waive the privilege. (Of course, since then a judge in NY has hit hard at that DoJ strategy; and I believe that the 2d

Circuit more or less affirmed him. But that history and a change in administrations doesn't necessarily moot the question -- and the topic as stated in 2 words is so much broader than that.) I would ask for the same assistance.

3. I have been assigned as lead drafter for a Rule 8.5, which would be the equivalent of our 1-100, with Stan and Ellen as co-drafters. While I know what the subject matter is, I would also appreciate any relevant data you may have assembled.

4. Harry has on my list (as co-drafter) a rule 1.8.13; but neither he nor I could identify the subject matter by that number. Can you help on that?

Many thanks for your help. FYI, I am leaving tomorrow to argue a case in DC; will be back on Sunday and will go abroad for vacation on Tuesday, returning only at the end of the month. So this is either super-urgent or not urgent at all: best, of course, the latter.

Thanks again.

Kurt W. Melchior

Attorney at Law
NOSSAMAN LLP
50 California Street, 34th Floor
San Francisco, CA 94111
kmelchior@nossaman.com
T 415.398.3600 F 415.398.2438
D 415.438.7279 M 415.516.8216

 [SUBSCRIBE TO E-ALERTS](#)
nossaman.com

PLEASE NOTE: The information in this e-mail message is confidential. It may also be attorney-client privileged and/or protected from disclosure as attorney work product. If you have received this e-mail message in error or are not the intended recipient, you may not use, copy, nor disclose to anyone this message or any information contained in it. Please notify the sender by reply e-mail and delete the message. Thank you.

--
Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

--
Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147

714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

--
Kevin E. Mohr
Professor
Western State University College of Law
1111 N. State College Blvd.
Fullerton, CA 92831
714-459-1147
714-738-1000 x1147
714-525-2786 (FAX)
kevin_e_mohr@compuserve.com
kevinm@wsulaw.edu

*All Members
and
Melchior,
Lampport,
Sapiro

H. Consideration of Proposed New Rule Regarding Good Faith Reliance on the Advice of Counsel

[anticipated 1/2-hour discussion]

(Materials enclosed.) [pages 117 - 126]

SAPIRO REDRAFT OF PROPOSED RULE (See CalBar - RRC - Advice of Counsel - 10-24-03 Mtg Materials - III.H. - Sapiro (10-09-03).doc)

A. A member may seek the advice of another attorney on any question regarding compliance with the State Bar Act, with these rules, or with professional, ethical standards applicable to a client engagement.

B. No discipline shall be imposed upon, and no adverse action taken against, the member if the member acts in good faith reliance on the advice of counsel as provided in paragraph A, provided:

(i) The consulted attorney is disinterested and competent;

(ii) The applicability of the rule or ethical standard was not clear in light of the facts and circumstances;

(iii) The member made full and adequate disclosure to the consulted attorney of all facts and circumstances relevant to the consultation;

(iv) The advice is sought before the conduct on which the disciplinary proceeding is based; and

(v) The member had no reason to know or to believe that the advice of counsel was erroneous.

1. Jerry: Tried to build on Kurt's concept for a discussion draft.
 - a. Need a core of a valid concept.
 - b. Not sure that he has it right at this time.
 - c. When might defense of counsel be used as a defense vs. a factor in mitigation.
 - d. Have to establish when the BOP would be on the attorney in discipline case and when it would be on the OCTC.
 - e. Disagreement with Kurt:

**RRC – Rule – “Advice of Counsel”
October 23-24, 2009 KEM Meeting Notes**

- (1) L must be disinterested and competent.
 - (a) Kurt thinks it's OK to go to in-house ethics counsel.
 - (b) In some instances it should work, but he hasn't parsed them out yet.
 - (2) Advice of counsel is not a defense if the conduct would have been a clear violation of the rule.
 - (a) Problem: trial of competence of independent counsel during discipline hearing.
 - (3) Analogy: Advice of counsel in insurance cases.
Problem: requires a mens rea, so insurance bad faith may not be entirely analogous.
 - (4) Analogy: IP area.
2. Kurt: Supports this rule.
- a. No problems with (iii), (iv) or (v).
 - b. Problem with (ii). Biggest problem.
 - (1) If L thought advice was necessary and it was given in good faith, then there should be no problem.
 - c. Problem with (i). How do you determine competence?
 - (1) Disinterested. Yes, it is necessary. But what about in-house ethics counsel, who have same privileges, etc., as outside counsel.
3. Paul: Potential problems here.
- a. Advice of counsel is defense to claim of willful infringement.
 - (1) But you waive the A-C Privilege as to anything you communicated to the counsel, etc.
 - (2) Also problem is that there is a case before Fed Circuit that you willfully infringed patent if you did NOT consult with counsel!
 - b. Believes this should go to mitigation and that most judges on State Bar court would accept evidence as to advice of counsel.
 - c. Sheffield v. State Bar case is important here. Defense was rejected here.

**RRC – Rule – “Advice of Counsel”
October 23-24, 2009 KEM Meeting Notes**

- d. State Bar v. McCarthy is also an important case here.
4. KEM: Pass.
5. Linda: Likes the rule because it encourages lawyers to seek advice.
 - a. It should be a factor in mitigation but not an absolute defense.
 - b. If mitigation, should it also include calls to the hotline (KEM: effect on confidentiality re this).
 - c. Pennsylvania case: Recent case held that in-house ethics counsel. There is no client here. Preparation for legal malpractice litigation.
6. Raul: This rule is a huge mistake.
 - a. Sends the wrong message.
 - b. A free pass if you consult another fox. Factor in mitigation but not a defense to a disciplinary charge.
7. Mark: Thought of OPM Leasing case.
 - a. Legal ethics advice by a professor that lawyers could not disclose information about a pyramid scheme. Bad advice.
 - b. MR 1.6(b)(2). Re confidentiality.
 - c. Should be factor in mitigation; it's either an evidentiary issue or a procedural issue.
8. Nace: Commends proponents. Outside-the-box thinking, but ...
 - a. This is the subject of mitigation.
 - b. We are setting up a proxy for the discipline system.
 - c. Some opinions, as Mark noted, may be for sale (similar to marijuana-prescribing doctors).
9. Tony: Need to consider the integrity of the members of the Commission, who are the kinds of lawyers upon whose advice other lawyers will be relying.
10. Mary: Fox guarding the hen house (Raul).
11. Joella: Full employment for ethics folk.
 - a. Does the member being asked get out of jail too?
12. Randy: Passes.

**RRC – Rule – “Advice of Counsel”
October 23-24, 2009 KEM Meeting Notes**

- 13. Harry: Criminal law is passed to protect the public.
 - a. If D.A. makes an opinion not to prosecute a defendant, but A.G. takes over the case, the defense cannot then claim that D.A. gave him “advice of counsel.”
- 14. Diane: Can look to 6086. Also Solin & Paladino.
- 15. Kurt: We should not be discouraged by public perception.
 - a. Which is worse, losing convictions because of contrived advice or encouraging lawyers to seek advice?
 - b. This rule is designed for the small practitioner rather than the law firm.

16. Motion: Abandon consideration of this rule at this time.

For: 6 Against: 2 Abstain: 0

**Oregon Rule 8.6 Written Advisory Opinions On Professional Conduct;
Consideration Given In Disciplinary Proceedings**

(a) The Oregon State Bar Board of Governors may issue formal written advisory opinions on questions under these Rules. The Oregon State Bar Legal Ethics Committee and General Counsel's Office may also issue informal written advisory opinions on questions under these Rules. The General Counsel's Office of the Oregon State Bar shall maintain records of both OSB formal and informal written advisory opinions and copies of each shall be available to the Oregon Supreme Court, Disciplinary Board, State Professional Responsibility Board, and Disciplinary Counsel. The General Counsel's Office may also disseminate the bar's advisory opinions as it deems appropriate to its role in educating lawyers about these Rules.

(b) In considering alleged violations of these Rules, the Disciplinary Board and Oregon Supreme Court may consider any lawyer's good faith effort to comply with an opinion issued under paragraph (a) of this rule as:

- (1) a showing of the lawyer's good faith effort to comply with these Rules; and
- (2) a basis for mitigation of any sanction that may be imposed if the lawyer is found to be in violation of these Rules.

(c) This rule is not intended to, and does not, preclude the Disciplinary Board or the Oregon Supreme Court from considering any other evidence of either good faith or basis for mitigation in a bar disciplinary proceeding.

Table of Contents

June 26, 2003 Melchior Memo to RRC re Proposed Rule on “Advice of Counsel”:..... 1
October 24, 2003 Sapiro E-mail to RRC: 2
April 5, 2009 KEM E-mail to Melchior, cc Chair & Staff: 6
April 7, 2009 KEM E-mail to Drafters (Melchior, Ruvolo & Sapiro), cc Chair & Staff:..... 6
August 27, 2009 McCurdy E-mail to Melchior, cc Chair, Vapnek, Tuft & Staff: 8
October 26, 2009 McCurdy E-mail to Drafters (Melchior, Ruvolo, Sapiro), cc Chair, Vapnek & Staff: 10
October 31, 2009 Kehr E-mail to KEM:..... 10
October 31, 2009 KEM E-mail to Kehr:..... 10

June 26, 2003 Melchior Memo to RRC re Proposed Rule on “Advice of Counsel”:

**PROPOSED RULE REGARDING
GOOD FAITH RELIANCE ON ADVICE OF COUNSEL**

Unfortunately, I missed two successive meetings, and am writing this assignment as the sole minder of the subject, but without having seen any discussion of the topic. So I am more or less flying blind.

I am inherently sympathetic to the proposition that any professional, indeed any person or entity, should be able to consult counsel on matters of legal concern: the graver the concern, the more protection should be accorded to a person who acts in good faith reliance on the advice of counsel. In many but not all contexts outside the discipline of lawyers, advice of counsel is considered a defense. It is certainly, and almost always, a defense against penalties for misguided or incorrect action. But I see two major difficulties in this respect. One is that the party which consults the lawyer expects that lawyer’s opinion and advice, and may not know of or consent to an outside consultation. (If the client expressly consents to the outside consultation, this concern largely goes away.) The other is that in order to establish the “advice of counsel defense,” the accused lawyer must reveal all of the client’s confidences and a frequently highly complex underlying scenario to an outside person, and if challenged must then disclose that initial disclosure in all its problematic context to the accusing party—public authority or private litigant. These concerns strike me as somewhat daunting but may not be insuperable. Apart from them, I think that reliance on outside advice should be encouraged, and that a lawyer who has sought and obtained such advice should not be penalized—in a civil or disciplinary context—for action taken in such reliance.

For discussion purposes, I suggest that exoneration upon outside counsel’s advice be allowed only if the client has been informed of the consultation and has not objected. I do not propose that the client’s consent be required, because clients may not be sensitive to or knowledgeable about the full circumstances which may cause a lawyer to seek a consultation. This would then be somewhat in the nature of current Rule 3-310(B), where the client is informed but the client’s formal consent is not required. I do not propose to address the question whether the client may or may not be charged for the consultation, believing that this question is very much dependent on the particular circumstances.

From that perspective, here is a first discussion draft for consideration.

Rule X-XXX. Good faith reliance on advice of counsel.

A member may seek the advice of another attorney on any question which arises in the course of a client engagement. No discipline shall be imposed and no adverse action taken against the member if his or her action is taken upon the advice of such other attorney, given after full and adequate disclosure to such attorney of all facts [and circumstances[?]] relevant to the consultation.

This Rule does not relieve the member of civil liability under otherwise established rules of law.

Comment:

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

It is not the intent of this rule to allow a member a free pass for any conduct which would clearly result in disciplinary or civil liability if there had been no such consultation; but it is the purpose of this Rule to encourage members to seek a confidential, privileged consultation within the scope of a client engagement where a matter of professional difficulty appears.

October 24, 2003 Sapiro E-mail to RRC:

Building on Kurt's work, I suggest the following revision of the proposed rule.

REDRAFT OF PROPOSED RULE

- (A) A member may seek the advice of another attorney on any question regarding compliance with the State Bar Act, with these rules, or with professional, ethical standards applicable to a client engagement.
- (B) No discipline shall be imposed upon, and no adverse action taken against, the member if the member acts in good faith reliance on the advice of counsel as provided in paragraph A, provided:
- (i) The consulted attorney is disinterested and competent;
 - (ii) The applicability of the rule or ethical standard was not clear in light of the facts and circumstances;
 - (iii) The member made full and adequate disclosure to the consulted attorney of all facts and circumstances relevant to the consultation;
 - (vi) The advice is sought before the conduct on which the disciplinary proceeding is based; and
 - (v) The member had no reason to know or to believe that the advice of counsel was erroneous.

Discussion:

Even if advice of counsel is not a bar to discipline because the circumstances do not fall within (B), good faith reliance on the advice of competent counsel should be a fact in mitigation of discipline.

This rule does not relieve the member of civil liability under otherwise established law.

MY COMMENTS

Building on the draft rule prepared by Kurt, I have attempted a redraft. Unfortunately, Kurt and I do not agree regarding some aspects of my redraft, but we have not been able to confer before the deadline for circulating this draft.

I believe this concept deserves further study and attention. The correct application of a disciplinary rule is not always clear. In such circumstances, good faith reliance on the advice of competent counsel ought to be a defense in a disciplinary proceeding.

Where a disciplinary rule does not give clear warning about what conduct is prohibited, it is void for vagueness. For example, in *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991), the attorney studied the Rules of Professional Responsibility before holding a press conference about charges pending against the client and answered some of the questions

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

presented to him at the press conference. The Supreme Court reversed the Nevada order of reprimand because the rule was unconstitutionally vague. “The fact that *Gentile* was found in violation of the rules after studying them and making a conscious effort at compliance demonstrates that [the disciplinary rule] creates a trap for the wary as well as the unwary.” *Id.*, 501 U.S. at 1050. However, it ought not be necessary for a court to hold that a statute or rule of professional conduct applicable to lawyers’ conduct is unconstitutionally vague. Adding the defense of advice of counsel would allow a respondent in a disciplinary case to defend successfully without having to broach the constitutionality issue.

One aspect of this draft on which Kurt and I probably disagree is the issue of whether the consulted attorney must be “disinterested” before paragraph B applies. Many firms have in-house ethics counsel or partners who advise attorneys in the firm about compliance with Rules of Professional Conduct and ethical standards. I do not propose that reliance on the advice of in-house counsel should necessarily be a bar to the imposition of discipline. To me, counsel within the firm may have self interest in advising another lawyer within the same firm. I think that such advice might be a factor in mitigation, but that it should not bar the State Bar from prosecuting the offense. I know that Kurt is of the opinion that good faith reliance on the advice of in-house counsel should be a bar to the imposition of discipline. I am open to persuasion. This subject deserves further discussion, not only between me and Kurt but also among members of the Commission.

Kentucky Bar Association v. Guidugli, 967 S.W. 2d 587 (KY. 1998), involved a lawyer’s failure to have disclosed in his bar admission application the fact that he had entered a plea to charges of endangering a minor six years before he sought admission. The lawyer defended on the basis that he relied on legal advice given by his lawyer in the criminal case and by his brother, who was a district judge. The record of the criminal conviction was sealed, and they advised him that therefore it was as if the conviction never existed. The Kentucky Supreme Court found the reliance on advice of counsel a factor in mitigation. The distinction between a “sealed” record and an “expunged” record was not totally clear. “Because of this narrow distinction and the dearth of case law on the issue, Respondent’s actions in seeking legal counsel on the issue of disclosure render his decision within reasonable boundaries.” *Id.*, 967 S.W. 2d at 589. The Supreme Court imposed a thirty day suspension, with a requirement that his reinstatement be conditioned on approval of the Kentucky Character and Fitness Committee.

I included B(ii) and (v) because, to me, advice of counsel ought not to be a bar to discipline if the offense clearly violates a rule or if the consulted attorney’s advice was clearly erroneous. I think Kurt disagrees because the State Bar Court and disciplinary staff would then be “second guessing” the consulted attorney. Again, this should be a subject of discussion, and my opinion is not firm.

Hall v. State Bar of California, 12 Cal. 2d 462 (1939), is distinguishable. The respondent passed fraudulent checks. He had been engaged in practice less than three years and followed the suggestions of an older attorney. The Court found that the act was clearly improper, deliberate, and intentionally fraudulent. The recommendation by the local committee of a reprimand was rejected, and the respondent was suspended. In electing not to disbar the respondent, the Court thought it “. . . proper to take into consideration the youth of the petitioner and the circumstances in which he was placed by his close association with Feinstein” This case is not really in point here, because *Hall* admitted that what he did was improper, and he was not acting in reliance on the advice of a disinterested, competent attorney. [Indeed, the attorney with whom Mr. Hall consorted was himself disbarred after criminal conviction. *Feinstein v. State Bar of California*, 12 Cal. 2d 461 (1938).]

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

People v. Casey, 948 P.2d 1014 (Colorado 1997), involved an allegation of dishonesty and lack of candor to a court. The attorney had not disclosed to the court that his client was using someone else's identity. The lawyer attempted to defend on the basis of Model Rule 5.2, arguing that, as a subordinate, he was immune from discipline because he acted in accordance with the advice of a senior partner in his own firm. The Colorado Supreme Court found that there was no ethical quandary, so Model Rule 5.2 was not applicable. Although the respondent was not entitled to immunity, “. . . an attempt to obtain guidance from a senior partner and a failure of a senior partner to suggest a reasonable and ethical course of conduct could be a factor to be considered in mitigation.” *Id.*, 948 P.2d at 1017.

Cleveland Bar Association v. Reed, Ohio No. 01-1179 (January 16, 2002), imposed a reprimand on a lawyer who assisted an out-of-state lawyer in the unlicensed practice of law. The out-of-state lawyer had shown the Ohio lawyer letters from state disciplinary authorities advising him that his contemplated activities did not involve unauthorized practice. The Ohio disciplinary panel found that the Ohio lawyer had aided a non-lawyer in an unauthorized practice, shared legal fees with the non-lawyer, and engaged in conduct prejudicial to the administration of justice. They recommended a public reprimand. They cited the fact of the lawyer's reliance on the letters from the bar association and disciplinary counsel and the fact that the lawyer believed that he was not engaging in unethical behavior as a factor in mitigation.

In re Struthers, 877 P.2d 789 (Arizona 1994), is distinguishable from the parameters of the rule proposed here. The lawyer claimed that he had asked the State Bar to render an ethics opinion. He argued that, if the Bar had done so, he could have corrected or mitigated the violations before discipline was imposed. The defense was rejected because the lawyer had been using the fee agreements that were in violation of the Arizona rules before he called the bar for advice, and clients had complained about the fee agreements before he had called the bar. In addition, the attorney called the State Bar, he was told that bar counsel had no power to render a formal opinion and had told him that the fee agreements might violate the Rules of Professional Conduct. *Id.*, 877 P.2d at 798.

Oregon has rejected advice from State Bar counsel as a defense to a disciplinary violation. *In re Gatti*, 330 Oregon 517, 8 P.3d 966 (Oregon 200). *In re Ainsworth*, 289 Oregon 479, 490, 614 P.2d 1121 (1980). Even if Bar counsel was fully advised about the facts and opined that it would not violate a disciplinary rule, in Oregon that advice does not insulate a lawyer as a matter of law from holding that they violated the applicable disciplinary rule. *In re Brandt*, 331 Oregon 113, 10 P.3d 906, 918-19 (2000).

One factor that militates against adoption of this rule is that discipline is imposed for a willful violation of these rules. This means merely that the attorney committed the conduct knowing what he or she was doing or not doing, and intending to do it or not to do it. *Phillips v. State Bar*, 49 Cal. 3d 944, 952 (1989). This does not require that the attorney intend to violate a Rule of Professional Conduct or Section of the State Bar Act. By adding this type of defense, we would, in effect, be creating a “good faith” defense where none has previously existed in California disciplinary practice.

The defense of good faith reliance on advice of counsel proposed here is similar to the defense of good faith reliance on the advice of counsel in insurance bad faith litigation. In those cases, good faith reliance on advice of counsel is a factor relevant to determining whether the insurer acted in bad faith. *State Farm Mut. Auto Ins. Co. v. Sup. Ct.*, 228 Cal. App. 3d 721, 725-26 (1991). However, insurance bad faith cases are distinguishable because an element of the tort is that the carrier have a *mens rea*, namely that they acted in bad faith in handling claims.

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

Nevertheless, the language of such cases may be helpful to us in the drafting process because good faith reliance on advice of competent counsel is a defense. *Ibid.* Such a defense is also available in malicious prosecution cases. There, proof of reliance on advice of counsel in good faith after full disclosure of the facts may establish probable cause as a defense. *Citizens State Bank v. Hoffman*, 44 Cal. App. 2d 854, 857 (1941). *Brinkley v. Appleby*, 276 Cal. App. 2d 244, 247 (1969). Again, although the legal principle for which good faith reliance on advice of counsel is distinguishable from the “willfulness” principle applicable here, the language of such cases may be instructive in drafting the rule proposed here.

This is a “work in process.” I apologize that I have not thoroughly coordinated with Kurt. Please treat this as merely a continuation of the discussion.

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

April 5, 2009 KEM E-mail to Melchior, cc Chair & Staff:

I'm following up on the e-mail I sent you on March 4, 2009. See below.

I now have the materials that I promised you. To avoid confusion, I'll be sending them to you in separate e-mails. This is the first one, concerning Advice of Counsel.

I've attached the following:

1. An e-mail compilation dated 5/5/09 (don't worry about the date; it's simply the deadline date for the next meeting). This contains your original memorandum from June 2003 proposing the Rule and Jerry's October 2003 memo taking the rule a bit further. In Word.
2. My notes on this Rule from the October 23-24, 2003 meeting. In PDF.

Some Comments:

1. I'm not sure of the exact dates on the memos; I think I got them after the October 2003 meeting, where the RRC voted 6-2-0 to put off consideration of the Rule "at this time." See para. 16 of my notes.
2. I don't have anything else on the Rule. Please review my notes. I'm not sure the Commission will have changed its mind about the proposed rule.

Please let me know if you have any questions.

On 3/4/09, Kevin Mohr wrote:

Kurt:

I can't get to these requests until the end of the week but I can assure you I have materials on all matters you've identified in items 1 to 3. I don't think we'll be addressing the first two items until later in the summer or fall. We will start on the ABA Rule without California counterparts in early summer, but I'm not sure when we'll get to 8.5 (Although 8.5 has some provisions that are also found in 1-100, there are some other aspects of it w/o a counterpart in our Rules -- i.e., choice of law in 8.5(b), so we put off consideration of 8.5 until the end of our journey.)

As to 1.8.13, that is the counterpart to MR 1.8(k), imputation of PERSONAL (and other) conflicts, i.e., conflicts identified in the MR counterparts to our rules (such as 3-300) and other Model Rule provisions that are all gathered in MR 1.8). Rule 1.8.13 will probably be on the agenda for either our May or our July meeting.

April 7, 2009 KEM E-mail to Drafters (Melchior, Ruvolo & Sapiro), cc Chair & Staff:

As members of the drafting committee, I'm forwarding to you an e-mail I sent to Kurt on 4/5/09 with materials I have concerning the proposed "Advice of Counsel" Rule. Kurt is lead drafter.

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

I have also attached Oregon Rule 8.6. Although not on point, it may contain language that could prove useful should you determine the RRC should pursue this Rule. Previously the RRC voted not to pursue it "at this time." See my comments in the e-mail to Kurt.

Jerry, this is in partial response to the e-mail you sent Harry on 2/19/09 and which he forwarded to Randy and me.

Finally, please note that this Rule is not calendared until the December 2009 meeting.

However, some of you have requested being provided with the relevant materials in the interim and I'm doing so.

Please let me know if you have any questions.

August 27, 2009 McCurdy E-mail to Melchior, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

No lead drafter assignments.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

1. III.EE. Rule 1.8.11 Relationship with Other Party's Lawyer [3-320] (Post Public Comment Draft #4 dated 5/16/08) Codrafters: Julien, Voogd

Assignment: (1) a chart comparing proposed Rule 1.8.11 to RPC 3-320; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

**2. III.FF. Rule 1.8.12 Purchasing Property at a Foreclosure Sale [4-300]
(Post Public Comment Draft #2.2 dated 6/27/08) Codrafters: Foy, Lamport**

Assignment: (1) a chart comparing proposed Rule 1.8.12 to RPC 4-300; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

**1. IV.I. Possible Rule re: A-C Privilege Waiver (no counterpart rules)
Codrafters: Sapiro, Tuft, Voogd**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

**2. IV.J. Possible Rule re: Advice of Counsel (see Oregon Rule 8.6)
Codrafters: Ruvolo, Sapiro**

Assignment: (1) a recommendation whether to adopt a new rule addressing this subject and if a new rule is recommended it should be accompanied by a chart with the first column blank, the clean version of the proposed new rule in the second column, and an explanation for each part of the proposed rule in the third column; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

**RRC – Rule – Advice of Counsel
E-mails, etc. – Revised (11/3/2009)**

October 26, 2009 McCurdy E-mail to Drafters (Melchior, Ruvolo, Sapiro), cc Chair, Vapnek & Staff:

Kurt & Codrafters:

Please refer to Kevin's attachments and April 7, 2009 message below for background materials on this rule assignment.

The assignments for the November meeting are due this Wednesday, October 28th.

Attachments:

RRC - Advice Counsel - 10-23 & 10-24-03 KEM Meeting Notes.pdf

RRC - Advice Counsel - E-mails, etc. - REV (05-05-09).doc

RRC - Advice Counsel - E-mails, etc. - REV (05-05-09).doc

October 31, 2009 Kehr E-mail to KEM:

Did OCTC ever comment on the 2003 advice of counsel draft rule or on the topic it addresses?

October 31, 2009 KEM E-mail to Kehr:

Not that I'm aware. The Commission devoted only one meeting session to the Rule back in fall 2003 but it never had any traction, so I don't believe there was much cause for OCTC to comment. By the way, the copy of my notes in the agenda materials has a date of 2009 (and it should be 10/24-25, not 10/23-24). I've been in a time warp of late, but not six years worth.