

January 10, 2017 McCurdy Email to Drafting Team, cc Difuntorum, Mohr, Marlaud & Lee:

Yesterday, I inadvertently circulated the public comments and assignment instructions for Rule 8.1 to the wrong Commission members. George Cardona helpfully responded with the message directly below.

Please review the attached public comments and refer to my message below George's reply for the instructions concerning this rule assignment.

January 10, 2017 Cardona Email to Drafting Team, cc Difuntorum, Mohr, McCurdy Marlaud & Lee:

With respect to OCTC, I think they have a point with respect to including reckless disregard in paragraph (b). I do not believe this is appropriate with respect to (c), which deals with failure to disclose. But with respect to (b), which deals with affirmative statements, I think it would make sense to extend it to reckless disregard, even though it deals with applications of someone other than the lawyer.

With respect to COPRAC, I would favor a change in (d) from "provision" to "process" as suggested.

January 10, 2017 Mohr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy Marlaud & Lee:

To move things along, I've inserted George's suggested responses in the attached revised Synopsis Table. Please review and confirm your agreement or suggest a different response.

I've also attached a revised redline rule with the changes. Thanks,

Attached:

RRC2 - [8.1][1-200] - Rule - YDFT1 (01-10-17) - Cf. to DFT7 [PCD] (10-22-16).docx

RRC2 - [8.1][1-200] - Public Comment Synopsis Table Y - REV2 (01-10-17).doc

January 11, 2017 Clinch Email to Drafting Team, cc Difuntorum, Mohr, McCurdy Marlaud & Lee:

I am in agreement with the two modifications to proposed Rule 8.1 as suggested by George and Kevin. Thank you for taking the time to make the suggestions.

January 11, 2017 Kehr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy Marlaud & Lee:

I don't have the time to think about this more carefully now – I need to get back to client matters – but isn't the addition of "reckless disregard" inconsistent with we have done with many other Rules that use only "knowingly", "known", or "knows"? A few minutes ago I sent out a draft public comment synopsis chart on Rule 5.1 that addresses the same point. Rule 5.1 does not add recklessness, gross negligence or willful blindness, all of which OCTC thinks is excluded by the use of "knowingly" and its fellows. I had thought the Commission discussed this point. Thoughts?

January 11, 2017 Mohr Email to Drafting Team, cc Difuntorum, Mohr, McCurdy Marlaud & Lee:

Yes, the Commission has discussed the knowingly point extensively but decided that it was appropriate, in light of the Gossage case, to include "reckless disregard" in 8.1(a) and George just recommended that we include it in paragraph (b). I think that's a closer call. You should not fill out your own admission application with "reckless disregard" but question whether that standard should apply when you are making the statement of fact in connection with another person's application.

I think it's OK in (b) as well but don't feel strongly about it. I think the approach we have taken with respect to most OCTC criticism re "knowingly" (describe 1.0(f), i.e., inferred from the circumstances) would work for (b) as well. However, I think we should keep "reckless disregard" in paragraph (a). Thanks,

January 11, 2017 Kehr Email to Mohr, cc Drafting Team, Difuntorum, Mohr, McCurdy Marlaud & Lee:

I think I'm repeating something I said in the meeting, but I fear the Commission is making a material drafting error here. If OCTC is correct that the concept of "reckless disregard" or "willful blindness" has been applied in a variety of disciplinary situations, then adding "reckless disregard" to a single Rule will be taken to mean that the other uses of "knowingly" or its equivalent do not include a standard of recklessness. I have time at the moment only for a superficial look at this, but I quickly see the use of recklessness with competence (In the Matter of Dahlz, 4 Cal. State Bar Ct. Rptr. 269 (Rev. Dept. 2001)), in a number of cases in which delay was held to be reckless incompetence (e.g., In the Matter of Riordan, 5 Cal. State Bar Ct. Rptr. 41 (Rev. Dept. 2007)), and with respect to confidentiality obligations ("It would be reckless for an attorney to store important client information on a computer that he shared with a nonattorney immigration services provider and that he stored in that provider's separate office." In the Matter of Valinoti, 4 Cal. State Bar Ct. Rptr. 498, 2002 Calif. Op. LEXIS 9, *74). I also think there have been a number of advisory ethics opinions that refer to the reasonableness of conduct, such as with respect to confidentiality obligations, and that concept would refer to recklessness rather than actual knowledge.

I hope this point will be raised again at the next meeting.

January 12, 2017 McCurdy Email to Kehr, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

I understand you have some outstanding concerns regarding this rule, but are you in support of using the attached materials as a starting point for further deliberations at the Jan. meeting?

Please let me know asap as we are compiling the agenda materials for posting.

Attached:

RRC2 - [8.1][1-200] - Public Comment Synopsis Table Y - REV2 (01-10-17)2.doc

RRC2 - [8.1][1-200] - Rule - YDFT1 (01-10-17) - Cf. to DFT7 [PCD] (10-22-16)2.docx

January 12, 2017 Kehr Email to McCurdy, cc Drafting Team, Difuntorum, Mohr, McCurdy & Lee:

I think that is the only practical course. Thank you.