

**Rule 6.3 Membership In Legal Services Organization
(Proposed Rule Adopted by the Board on November 17, 2016)**

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code § 6068(e)(1) or rules 1.7 or 1.9; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 6.3
(No Current Rule)
Membership in Legal Services Organization**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) reviewed and evaluated ABA Model Rule 6.3 (Membership in Legal Services Organization) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 6.3 (Membership in Legal Services Organization).

Rule As Issued For 90-day Public Comment

Proposed rule 6.3 is derived from ABA Model Rule 6.3. The proposed rule addresses a lawyer serving as an officer or member in a legal services organization while continuing to practice law in another capacity. The proposed rule’s aim is to provide assurance to lawyers that they will not disqualify themselves or their firm from participating as officers or members of a legal services organization. Such service is important and should be encouraged as long as it does not interfere with the lawyer’s duties to his or her clients.

Proposed rule 6.3 provides that a lawyer may serve as an officer or member of a legal services organization even where the organization serves persons whose interests are adverse to the lawyer’s clients. However, the lawyer is barred from participating in a decision or action of the legal services organization in the following situations.

First, paragraph (a) prohibits such participation if it would be incompatible with certain enumerated duties owed to the lawyer’s clients, including the duty of confidentiality. While ABA Model Rule 6.3 does not include a reference to confidentiality, California has a tradition of heightened client protection in this area.

Second, paragraph (b) prohibits a lawyer from participating in a decision or action of a legal services organization where it would have an adverse effect on the organization’s client whose interests are adverse to those of the lawyer’s client.

The comment provides that a lawyer participating as an officer or member of a legal services organization does not have a lawyer-client relationship with the persons served by the organization. The comment explains the policy underlying the proposed rule, namely, that without such a rule, the profession’s involvement in legal services organizations would be severely curtailed.

National Background – Adoption of Model Rule 6.3

As California does not presently have a direct counterpart to Model Rule 6.3, this section reports on the adoption of the Model Rule in United States’ jurisdictions. The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 6.3: Membership in Legal Services Organizations,” revised May 4, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.pdf

Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim. Seven states have adopted a slightly modified version of Model Rule 6.3. Two states have adopted a version of the rule that is substantially different from Model Rule 6.3. Four states have not adopted any version of Model Rule 6.3.”

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made non-substantive stylistic edits and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 6.3

Commission Drafting Team Information

Lead Drafter: Raul Martinez

Co-Drafters: Lee Harris, Toby Rothschild

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 6.3, from which proposed rule 6.3 is derived.]

Rule 6.3 Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed rule 6.3

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed rule 6.3

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 6.3 Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code § 6068(e)(1) or rules 1.7 or 1.9; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 6.3)

Rule 6.3 Membership In Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under ~~rule~~[Business and Professions Code § 6068\(e\)\(1\) or rules 1.7 or 1.9](#); or

- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT Comment

~~[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.~~

~~[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.~~

V. RULE HISTORY

Although the origin and history of Model Rule 6.3 was not the primary factor in the Commission's consideration of proposed Rule 6.3, that information is published in *A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982-2013*, Art Garwin, Editor, 2013 American Bar Association, at pages 719-722, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):

1. OCTC supports this rule, but the Comment is unnecessary. It is merely a philosophical discussion of the reasons for the Rule, which are evident.

Commission Response: The Commission disagrees. The comment explains the policy underlying the Rule that permits withdrawal from decision-making but does not require resignation in the event a conflict arises involving a client of a lawyer serving on the organization's board.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, five public comments were received. Four comments agreed with the proposed Rule and one comment agreed only if

modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

In addition, the following authorities were among the statutes, cases and ethics opinions considered by the Commission in studying the current rule.

- California Rule 1-600 (Legal Services Program)
- California Rule 3-300 (Avoiding Interests Adverse to Client)
- California Rule 3-310 (Avoiding the Representation Adverse to Client)
- California Business and Professions Code §§ 6210 et seq. (State Bar Act – Article 14 Funds for the Provision of Legal Services to Indigent Persons)
- 42 U.S.C. § 2996 et seq. (Legal Services Corporation Act)

B. ABA Model Rule Adoptions

The ABA Comparison Chart, entitled “Variations of the ABA Model Rules of Professional Conduct, Rule 6.3: Membership in Legal Services Organizations,” revised September 15, 2015, is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_3.authcheckdam.pdf (last accessed 2/7/17)
- Thirty-eight jurisdictions have adopted Model Rule 6.3 verbatim.¹ Seven jurisdictions have adopted a slightly modified version of Model Rule 6.3.² Two jurisdictions have adopted a version of the rule that is substantially different from Model Rule 6.3.³ Four jurisdictions have not adopted any version of Model Rule 6.3.⁴

¹ The thirty-eight jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

² The seven jurisdictions are: Florida, Georgia, Illinois, Kansas, Maryland, New York, and Tennessee.

³ The two jurisdictions are: Michigan and New Jersey.

⁴ The four jurisdictions are: California, Kentucky, Ohio, and Texas.

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. Proposed Rule 6.3 – inclusion of reference to Business and Professions Code § 6068(e)(1).
 - Pros: The ABA does not include a reference to confidentiality but California has a tradition of heightened client protection in this area. Including a reference to § 6068(e)(1) is an appropriate companion to the reference to Rule 1.7 that codifies loyalty, Rule 1.9 that codifies duties to former clients and Rule 1.18 that codifies duties to prospective clients.
 - Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend inclusion of Model Rule Comment [2]
 - Pros: Consistent with the rule adopted in most jurisdictions.
 - Cons: The Comment is aspirational and inconsistent with the Commission's Charter.

This section identifies concepts the Commission considered before the Rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the Rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. If proposed Rule 6.3 is adopted, it would be a new rule establishing a new charging vehicle for misconduct. While certain concepts overlap with other existing law, such as the duty of loyalty, the statement of these duties in this new rule constitute substantive changes to the current rules.

D. Non-Substantive Changes to the Current Rule:

None.

E. Alternatives Considered:

1. The primary alternative policy was to reject the addition of these Model Rules for which there are no current California counterparts.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 6.3 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 6.3 in the form attached to this Report and Recommendation.