

**Rule 6.5 Limited Legal Services Programs  
(Proposed Rule Adopted by the Board on November 17, 2016)**

- (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
  - (1) is subject to rules 1.7 and 1.9(a) only if the lawyer knows\* that the representation of the client involves a conflict of interest; and
  - (2) is subject to rule 1.10 only if the lawyer knows\* that another lawyer associated with the lawyer in a law firm\* is prohibited from representation by rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), rule 1.10 is inapplicable to a representation governed by this rule.
- (c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

**Comment**

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms that will assist persons\* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's informed consent\* to the limited scope of the representation. See rule 1.2(b). If a short-term limited representation would not be reasonable\* under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, these rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1) and rules 1.6 and 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with rules 1.7 and 1.9(a) only if the lawyer knows\* that the representation presents a conflict of interest for the lawyer. In addition,

paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows\* that another lawyer in the lawyer's law firm\* would be disqualified under rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,\* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows\* that any lawyer in the lawyer's firm\* would be disqualified under rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm\* or preclude the lawyer's law firm\* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, rules 1.7, 1.9(a), and 1.10 become applicable.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 6.5  
(Current Rule 1-650)  
Limited Legal Services Programs**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) evaluated current rule 1-650 (Limited Legal Services Programs) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 6.5 (Nonprofit And Court-Annexed Limited Legal Services Programs). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission’s evaluation is proposed rule 6.5 (Limited Legal Services Programs).

**Rule As Issued For 90-day Public Comment**

Proposed rule 6.5 carries forward the substance of current rule 1-650, which was originally derived from Model Rule 6.5. The rule promotes legal services activities by lawyers and aids in addressing the current access to the justice crisis in California.

Paragraph (a) states that if a lawyer provides short-term limited legal services to a client through a program sponsored by a court, government agency, bar association, law school or nonprofit organization the lawyer is:

- (1) subject to rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients] if the lawyer knows that the representation of the client involves a conflict of interest;
- (2) subject to rule 1.10 [Imputation of Conflicts of Interest: General Rule] if the lawyer knows that an associated lawyer in a law firm is prohibited from representation by rules 1.7 [Conflict of Interest: Current Clients] and 1.9 [Duties To Former Clients].

Paragraph (b) clarifies that rule 1.10 [Imputation of Conflicts of Interest] is inapplicable to proposed rule 6.5 outside of the specific language of 6.5(a)(2).

Paragraph (c) states that personal disqualification of a lawyer in a legal services program will not be imputed to lawyers participating in the same program.

Comment [1] explains that there is no expectation that the lawyer’s representation of a client will continue beyond the limited consultation through legal services programs, in which it is unfeasible for a lawyer to systematically screen for conflicts of interest.

Comment [2] requires the client’s informed consent to the limited scope representation when a lawyer provides short-term limited legal services. Furthermore, a lawyer’s duty of confidentiality to the client are applicable to the limited representation.

Comment [3] reaffirms that the lawyer must have actual knowledge that the representation presents a conflict of interest for the lawyer.

Comment [4] reaffirms that imputation of conflicts of interest is applicable only when the lawyer has actual knowledge that another lawyer in the lawyer’s law firm would be disqualified. In addition, imputation will not preclude the disqualified lawyer’s law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the legal service program’s auspices.

Comment [5] clarifies that 1.7 [Conflict of Interest: Current Clients], 1.9 [Duties To Former Clients] and 1.10 [Imputation of Conflicts of Interest] are applicable when the lawyer undertakes to represent the client in the matter on an ongoing basis.

### **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 6.5 [1-650]

## Commission Drafting Team Information

**Lead Drafter:** Raul Martinez

**Co-Drafters:** Lee Harris, Toby Rothschild

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## I. CURRENT CALIFORNIA RULE

### Rule 1-650 Limited Legal Services Programs

- (A) A member who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the member or the client that the member will provide continuing representation in the matter:
- (1) is subject to rule 3-310 only if the member knows that the representation of the client involves a conflict of interest; and
  - (2) has an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would have a conflict of interest under rule 3-310 with respect to the matter.
- (B) Except as provided in paragraph (A)(2), a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm.
- (C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

### Discussion

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A member who provides short-term limited legal services pursuant to rule 1-650 must secure the client's informed consent to the limited scope of the representation. If a short-term limited representation would not be reasonable under the circumstances, the

member may offer advice to the client but must also advise the client of the need for further assistance of counsel. See rule 3-110. Except as provided in this rule 1-650, the Rules of Professional Conduct and the State Bar Act, including the member's duty of confidentiality under Business and Professions Code § 6068(e)(1), are applicable to the limited representation.

[3] A member who is representing a client in the circumstances addressed by rule 1-650 ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (A)(1) requires compliance with rule 3-310 only if the member knows that the representation presents a conflict of interest for the member. In addition, paragraph (A)(2) imputes conflicts of interest to the member only if the member knows that another lawyer in the member's law firm would be disqualified under rule 3-310.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the member's law firm, paragraph (B) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2). Paragraph (A)(2) imputes conflicts of interest to the participating member when the member knows that any lawyer in the member's firm would be disqualified under rule 3-310. By virtue of paragraph (B), moreover, a member's participation in a short-term limited legal services program will not be imputed to the member's law firm or preclude the member's law firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with rule 1-650, a member undertakes to represent the client in the matter on an ongoing basis, rule 3-310 and all other rules become applicable.

## **II. FINAL VOTES BY THE COMMISSION AND THE BOARD**

### **Commission:**

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed rule 6.5 [1-650]

Vote: 15 (yes) – 0 (no) – 0 (abstain)

### **Board:**

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed rule 6.5 [1-650]

Vote: 14 (yes) – 0 (no) – 0 (abstain)

### **III. COMMISSION'S PROPOSED RULE (CLEAN)**

#### **Rule 6.5 [1-650] Limited Legal Services Programs**

- (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
  - (1) is subject to rules 1.7 and 1.9(a) only if the lawyer knows\* that the representation of the client involves a conflict of interest; and
  - (2) is subject to rule 1.10 only if the lawyer knows\* that another lawyer associated with the lawyer in a law firm\* is prohibited from representation by rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), rule 1.10 is inapplicable to a representation governed by this rule.
- (c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

#### **Comment**

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms that will assist persons\* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's informed consent\* to the limited scope of the representation. See rule 1.2(b). If a short-term limited representation would not be reasonable\* under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, these rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1) and rules 1.6 and 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with rules 1.7 and 1.9(a) only if the lawyer knows\*

that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows\* that another lawyer in the lawyer's law firm\* would be disqualified under rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,\* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows\* that any lawyer in the lawyer's firm\* would be disqualified under rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm\* or preclude the lawyer's law firm\* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, rules 1.7, 1.9(a), and 1.10 become applicable.

#### IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-650)

##### Rule 6.5 [1-650] Limited Legal Services Programs

- (Aa) A ~~member~~lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the ~~member~~lawyer or the client that the ~~member~~lawyer will provide continuing representation in the matter:
- (1) is subject to ~~rule 3-310~~rules 1.7 and 1.9(a) only if the ~~member~~lawyer knows\* that the representation of the client involves a conflict of interest; and
  - (2) ~~has an imputed conflict of interest~~is subject to rule 1.10 only if the ~~member~~lawyer knows\* that another lawyer associated with the ~~member~~lawyer in a law firm\* ~~would have a conflict of interest under rule 3-310~~is prohibited from representation by rule 1.7 or 1.9(a) with respect to the matter.
- (Bb) Except as provided in paragraph (Aa)(2), ~~a conflict of interest that arises from a member's participation in a program under paragraph (A) will not be imputed to the member's law firm~~rule 1.10 is inapplicable to a representation governed by this rule.

- (C) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

### Discussion Comment

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms —that will assist persons\* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the ~~lawyer's~~ lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation.

[2] A ~~member~~ lawyer who provides short-term limited legal services pursuant to ~~rule 1-650~~ this rule must secure the client's informed consent\* to the limited scope of the representation. See rule 1.2(b). If a short-term limited representation would not be reasonable\* under the circumstances, the ~~member~~ lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. ~~See rule 3-110.~~ Except as provided in this ~~rule 1-650, the rule, these~~ Rules of Professional Conduct and the State Bar Act, including the ~~member's~~ lawyer's duty of confidentiality under Business and Professions Code § 6068(e)(1), and rules 1.6 and rule 1.9, are applicable to the limited representation.

[3] A ~~member~~ lawyer who is representing a client in the circumstances addressed by ~~rule 1-650~~ this rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (Aa)(1) requires compliance with ~~rule 3-310~~ rules 1.7 and 1.9(a) only if the ~~member~~ lawyer knows\* that the representation presents a conflict of interest for the ~~member~~ lawyer. In addition, paragraph (Aa)(2) imputes conflicts of interest to the ~~member~~ lawyer only if the ~~member~~ lawyer knows\* that another lawyer in the ~~member's~~ lawyer's law firm\* would be disqualified under ~~rule 3-310~~ rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the ~~member's~~ lawyer's law firm\*, paragraph (Bb) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (Aa)(2). Paragraph (Aa)(2) imputes conflicts of interest to the participating ~~member~~ lawyer when the ~~member~~ lawyer knows\* that any lawyer in the ~~member's~~ lawyer's firm\* would be disqualified under ~~rule 3-310~~ rules 1.7 or 1.9(a). By virtue of paragraph (Bb), moreover, a ~~member's~~ lawyer's participation in a short-term limited legal services program will not be imputed to the ~~member's~~ lawyer's law firm\* or preclude the ~~member's~~ lawyer's law firm\* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the ~~program's~~ program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with ~~rule 1-650, a member~~this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ~~rule 3-310 and all other rules~~rules 1.7, 1.9(a), and 1.10 become applicable.

## V. RULE HISTORY

Current rule 1-650 is based on Model Rule 6.5. and became operative in 2009 to promote the provision of short-term limited legal services to persons requiring such services in the face of the severe economic downturn at the end of the last decade. In part, both rule 1-650 and Model Rule 6.5 function to increase access to justice through lawyers volunteering to deliver pro bono legal services.

Model Rule 6.5 is one of five rules in Chapter 6 of the Model Rules, which is entitled “Public Service.” The other four rules are:

- 6.1 Voluntary Pro Bono Publico Service
- 6.2 Accepting Appointments
- 6.3 Membership in Legal Services Organization
- 6.4 Law Reform Activities Affecting Client Interests

For the most part, these rules are permissive and not intended as a source of discipline. Rather, they are intended to provide guidance and assurance to lawyers who choose to provide volunteer legal services or engage in other volunteer legal activities.

In 2009, many Californians who confronted serious legal issues because of the severe economic downturn, appeared in the courts as self-represented litigants without the benefit of any legal advice or counsel.<sup>1</sup> The issues included foreclosure, eviction, mortgage loan refinance, domestic violence, unemployment, guardianship, bankruptcy, and other legal problems. To assist people who could not afford lawyers, local bar associations and legal aid providers offered limited, short-term legal assistance at pro bono clinics. Although law firm lawyers were interested in volunteering at such clinics, they were reluctant because of concerns about potential conflicts of interest that would result in the disqualification of the lawyer providing assistance and, by imputation, the lawyer’s firm. A conflict could arise if, after the lawyer provided advice to an individual at the clinic, it is subsequently discovered that the volunteer lawyer or the lawyer’s firm represents a client with interests adverse to the individual.

The concern existed because California, unlike most other jurisdictions, had not adopted a rule similar to Model Rule 6.5. Model Rule 6.5 recognizes that it is impractical to conduct a thorough conflict check in limited legal service situations and, in effect, provides an exception to the imputation of conflicts within a law firm. With the express encouragement of the Board of Governors, the first Commission developed a

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<sup>1</sup> See, Dhyana Levy, “As Foreclosures Rise, Pro Pers Clog the Courts,” San Francisco Daily Journal, May 20, 2009, p. 1, at Exhibit 4.

proposed rule 1-650<sup>2</sup> that was based on Model Rule 6.5 and was drafted to provide a narrow exception to the conflict of interest rules.

The proposed rule, modified for application in California,<sup>3</sup> was adopted by the Board and approved by the Supreme Court, effective August 28, 2009.<sup>4</sup>

Rule 1-650 applies to short-term *and* limited legal services provided by a lawyer to a client under a program sponsored by a court, government agency, bar association, law school,<sup>5</sup> or nonprofit organization, that is, where there is no expectation by the lawyer or client that the lawyer will provide continuing representation. In these circumstances, rule 1-650 provides that: 1) the lawyer is subject to Rule of Professional Conduct 3-310 [Avoiding the Representation of Adverse Interests] only if the lawyer knows that the representation of the client involves a conflict of interest with another client; and 2) the lawyer is subject to an imputed conflict of interest only if the lawyer knows that another attorney in the lawyer's law firm would be subject to a conflict of interest under rule 3-310 with respect to the matter. Except for the latter situation, a conflict of interest

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<sup>2</sup> Number "1-650" was recommended for the rule number so that it followed current rule 1-600 [Legal Services Programs].

<sup>3</sup> The modification to Model Rule 6.5 takes into account the difference in purpose between the California rules and ABA Model Rules. The California rules regulate the professional conduct of members of the State Bar through discipline. (See rule 1-100(A) "Purpose and Function" of the California RPCs, and the Discussion comments to rule 1-100 which further state "These rules are not intended to supersede existing law relating to members in non-disciplinary contexts.") The Model Rules, on the other hand, provide lawyer conduct standards that may have more than one purpose. Some Model Rules are imperatives intended to be enforced through discipline. Other Model Rules, however, provide guidance concerning a lawyer's professional role and general obligations, and may have non-disciplinary consequences in the event of a violation. (See ABA Model Rules, Scope, paragraph [14] (the ABA Model Rules are "partly obligatory and disciplinary" and "partly constitutive and descriptive"). The Model Rules are available at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

Model Rule 6.5 both limits a lawyer's disciplinary exposure and provides guidance to lawyers and courts in determining issues of disqualification in a non-disciplinary context (i.e., a court case). Model Rule 6.5 also refers to Model Rule 1.10, which concerns imputation of conflicts of interests that are prohibited by the Rules. California has no counterpart to Model Rule 1.10, addressing imputation of conflicts in case law. Rule 1-650 takes these differences into account.

<sup>4</sup> The Supreme Court approved proposed rule 1-650 on July 29, 2009. (See Request That The Supreme Court Of California Approve New Rule Of Professional Conduct 1-650, And Memorandum And Supporting Documents In Explanation, May 29, 2009, Supreme Court Case No. S173373.)

<sup>5</sup> The Model Rule is limited to programs sponsored by courts and nonprofit organizations. The first Commission recognized that limited legal services programs are also sponsored by bar associations, government agencies and law schools, some of which are proprietary. There appeared to be no sound reason to exclude limited legal services programs sponsored by these organizations from the protections against disqualification of volunteer lawyer and firm afforded by rule 1-650.

arising from the lawyer's participation in one of the sponsored programs is not to be imputed to the lawyer's law firm.

The Discussion section accompanying the rule describes the important public protection rationale underlying the rule and provides guidance to attorneys.

## **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.

Commission Response: No response required.

2. OCTC supports Comments [2] and [5].

Commission Response: No response required.

3. OCTC is concerned that Comments [1], [3], and [4] are more appropriate for treatises, law review articles, and ethics opinions.

Commission Response: The Commission has made no change. The referenced Comments provide interpretative guidance on the rule's application. Moreover, the Supreme Court recently approved the rule and the Commission is aware of no problems that warrant deleting these Comments because they might have been misleading.

- **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 did not indicate a position. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony did not indicate a position. That testimony and the Commission's response is also in the public comment synopsis table.

## VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

### A. Related California Law

Current rule 1-650 is not strictly a disciplinary rule. Instead, by its terms it creates an express exception to the application of other rules (rule 3-310 concerning conflicts of interest) and case law (concerning the imputation within a law firm of one lawyer's conflict to all other lawyers in the firm). The policy rationale for the rule is not to regulate lawyer conduct through discipline, (compare Bus. & Prof. Code § 6077; rule 1-100(A)), but to encourage lawyers to provide pro bono legal services to people in need of such services without fear of jeopardizing the ability of the lawyers' law firms representing their clients. Put another way, rule 1-650 serves primarily to foster the access to justice.

There are other California laws or pronouncements that serve a similar purpose: The State Bar of California's Pro Bono Resolution, adopted by the Board in 1989 and amended in 2002, and Business & Professions Code §§ 6072-6073.

*Outside of California.* The American Bar Association has included an aspirational pro bono "rule," Model Rule 6.1, that, while recognizing that lawyers have "a professional responsibility to provide legal services to those unable to pay," states only that "[a] lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year." Comment [12] to the rule unambiguously asserts the non-disciplinary nature of the rule: "[10] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process." Nearly every jurisdiction has adopted a counterpart to Model Rule 6.1. In none of the adopting jurisdictions is the rule disciplinary in nature.

1. State Bar of California Pro Bono Resolution (adopted in December 1989 and amended in June 2002):

**RESOLVED** that the Board hereby adopts the following resolution and urges local bar associations to adopt similar resolutions:

**WHEREAS**, there is an increasingly dire need for pro bono legal services for the needy and disadvantaged; and

**WHEREAS**, the federal, state and local governments are not providing sufficient funds for the delivery of legal services to the poor and disadvantaged; and

**WHEREAS**, lawyers should ensure that all members of the public have equal redress to the courts for resolution of their disputes and access to lawyers when legal services are necessary; and

**WHEREAS**, the Chief Justice of the California Supreme Court, the Judicial Council of California and Judicial Officers throughout California have consistently emphasized the pro bono responsibility of lawyers and its importance to the fair and efficient administration of justice; and

**WHEREAS**, California Business and Professions Code Section 6068(h) establishes that it is the duty of a lawyer “Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed”; now, therefore, it is

**RESOLVED** that the Board of Governors of the State Bar of California:

(1) Urges all attorneys to devote a reasonable amount of time, at least 50 hours per year, to provide or enable the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice;

(2) Urges all law firms and governmental and corporate employers to promote and support the involvement of associates and partners in pro bono and other public service activities by counting all or a reasonable portion of their time spent on these activities, at least 50 hours per year, toward their billable hour requirements, or by otherwise giving actual work credit for these activities;

(3) Urges all law schools to promote and encourage the participation of law students in pro bono activities, including requiring any law firm wishing to recruit on campus to provide a written statement of its policy, if any, concerning the involvement of its attorneys in public service and pro bono activities; and

(4) Urges all attorneys and law firms to contribute financial support to not-for-profit organizations that provide free legal services to the poor, especially those attorneys who are precluded from directly rendering pro bono services.

2. Business and Professions Code §§ 6072 – 6073

Business and Professions Code § 6072 provides that a firm having a contract with the state for legal services that exceeds fifty thousand dollars (\$50,000) shall include a certification that the firm agrees to make a good faith effort to provide a minimum number of hours of pro bono legal services, or an equivalent amount of financial contributions to qualified legal services projects and support centers.

“Pro bono legal services” is defined as legal services either (1) without fee or expectation of fee to either; or (2) at no fee or substantially reduced fee to groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights.

The legislature made the following formal declaration:

(a) The provision of pro bono legal services is the professional responsibility of California attorneys as an integral part of the privilege of practicing law in this state.

(b) Each year, thousands of Californians, particularly those of limited means, must rely on pro bono legal services in order to exercise their fundamental right of access to justice in California. Without access to pro bono services, many Californians would be precluded from pursuing important legal rights and protections.

(c) In recent years, many law firms in California have been fortunate to experience a robust increase in average attorney income. However, during the same time period, there has regrettably been a decline in the average number of pro bono services being rendered by attorneys in this state.

(d) Without legislative action to bolster pro bono activities, there is a serious risk that the provision of critical pro bono legal services will continue to substantially decrease.

The intent of the legislature was the following:

(a) To reaffirm the importance and integral public function of California attorneys and law firms striving to provide reasonable levels of pro bono legal services to Californians who need those services.

(b) To strengthen the state's resolve to ensure that all Californians, especially those of limited means, have an effective means to exercise their fundamental right of access to the courts.

Business and Professions Code § 6073 also address the legal profession's tradition of voluntary pro bono legal services by stating the following:

It has been the tradition of those learned in the law and licensed to practice law in this state to provide voluntary pro bono legal services to those who cannot afford the help of a lawyer. Every lawyer authorized and privileged to practice law in California is expected to make a contribution. In some circumstances, it may not be feasible for a lawyer to directly provide pro bono services. In those circumstances, a lawyer may instead fulfill his or her individual pro bono ethical commitment, in part, by providing financial support to organizations providing free legal services to persons of limited means. In deciding to provide that financial support, the lawyer should, at minimum, approximate the value of the hours of pro bono legal service that he or she would otherwise have provided. In some circumstances, pro bono contributions may be measured collectively, as by a firm's aggregate pro bono activities or financial contributions.

Lawyers also make invaluable contributions through their other voluntary public service activities that increase access to justice or improve the law and the legal system. In view of their expertise in areas that critically affect the lives and well-being of members of the public, lawyers are uniquely situated to provide invaluable assistance in order to benefit those who might otherwise be unable to assert or protect their interests, and to support those legal organizations that advance these goals.

## **B. ABA Model Rule Adoptions**

The ABA State Adoption Chart for the ABA Model Rule 6.5, which is the counterpart to current rule 1-650, revised September 15, 2016, is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_6\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_6_5.authcheckdam.pdf) [Last visited 2/7/17]
- Forty-nine jurisdictions have adopted a rule counterpart to Model Rule 6.5. Thirty-four jurisdictions have adopted Model Rule 6.5 verbatim.<sup>6</sup> Fifteen jurisdictions have adopted a modified version of Model Rule 6.5.<sup>7</sup> Only two jurisdictions have not adopted any version of Model Rule 6.5.<sup>8</sup>

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

### **A. Concepts Accepted (Pros and Cons):**

1. Recommend that the current rule be continued without changes in duties.
  - Pros: The current rule is of relatively recent vintage, having been approved by the Supreme Court in 2009. The Commission is not aware of any problems with the current rule and did not identify any issues. The rule promotes legal services activities by lawyers and aids in addressing the current access to justice crisis in California.
  - Cons: None identified.

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<sup>6</sup> The thirty-four jurisdictions are: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia.

<sup>7</sup> The fifteen jurisdictions are: California, District of Columbia, Georgia, Massachusetts, Minnesota, Mississippi, New Hampshire, New Mexico, New York, North Dakota, Ohio, Washington, Wisconsin, and Wyoming.

<sup>8</sup> The two jurisdictions are: Florida and Texas.

2. Recommend substituting references to possible new rules that would be numbered using the Model Rules numbering system, including rules on conflicts and imputation of conflicts.
  - Pros: This is not intended to be a substantive change. It anticipates necessary conforming changes that would follow the Model Rule numbering system. However, Commission's consideration of the conflicts rules (including a potential new rule on conflicts imputation) is pending.
  - Cons: None identified.

#### **B. Concepts Rejected (Pros and Cons):**

1. The Commission considered but rejected a requirement ("shall" or "must") or best practice guidance ("should") that the lawyer participating in a limited legal services program be screened if a conflict subsequently is discovered between a person served in the program and a client of the participating lawyer's firm.
  - Pros: A requirement for, or guidance on, screening would promote confidence in the legal profession and administration of justice by assuring a person who makes use of short-term legal services that the lawyer providing the service will not disclose the person's confidential information to a law firm representing the person's adversary.
  - Cons: Forcing the law firm to implement a screen would add an unnecessary layer of process to the operation of the law firm, which would more likely than not discourage participation in the programs. The point of the rule is to encourage participation, so requiring or even recommending a screen should not be included in the rule. Further, screening is unnecessary because the participating lawyer still owes a duty of confidentiality (and arguably loyalty) to the short-term legal services client.

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. There are no substantive changes in duty. (See, IX.A.1 above.)

#### **D. Non-Substantive Changes to the Current Rule:**

1. Substitute the term "lawyer" for "member".
  - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by

virtue of a special or temporary admission. For example, those eligible to practice *pro hac vice* or as military counsel. (See, e.g., rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)
- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
  - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

#### **E. Alternatives Considered:**

None.

#### **X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION**

##### **Recommendation:**

The Commission recommends adoption of proposed Rule 6.5 [1-650] in the form attached to this Report and Recommendation.

##### **Proposed Resolution:**

RESOLVED: That the Board adopts proposed Rule 6.5 [1-650] in the form attached to this Report and Recommendation.