

AGENDA ITEM

**MAY 126
Rule 1-650,
Rules of Professional
Conduct,
Return from Public Comment**

DATE: April 24, 2009

TO: Members of the Board of Governors
Members of the Board Committee on Regulation, Admissions and
Discipline

FROM: Randall Difuntorum, Director, Professional Competence

RE: Proposed New Rule 1-650, Rules of Professional Conduct of the State Bar of
California – Return From Public Comment

EXECUTIVE SUMMARY

This agenda item is a report on the public comment received on proposed new Rule of Professional Conduct (“RPC”) 1-650, a rule patterned on American Bar Association Model Rule 6.5 (“MR 6.5”). Like MR 6.5, new RPC 1-650 would impose limitations on conflicts of interest rules that would otherwise apply to a lawyer participating in a limited legal service program.

At its March 5, 2009 meeting, the State Bar’s Board Committee on Planning, Program Development and Budget (“Board Committee on Planning”) considered the issue of expedited adoption of new RPC 1-650 in response to the increased need in lawyer volunteers in legal service programs to assist the many California residents seeking legal assistance due to the severe economic downturn. Among these persons are California residents who are facing foreclosure or who require other legal assistance with mortgage loan modification. In a ballot taken after its meeting, the Board Committee on Planning authorized a 30-day public comment distribution of proposed new RPC 1-650.

The public comment period ended on April 17, 2009. As of the date of this memorandum, 23 comments have been received. Staff has reviewed the comments and recommends some modest revisions in response to the comments. The comments are also being reviewed by the Rules Revision Commission that is scheduled to meet on May 8 & 9, 2009. Input from the Rules Revision Commission will be reported when this item is presented. Staff recommends that the Board adopt the proposed new rule, as amended in response to public comment, and direct that it be transmitted to the Supreme Court for approval. Board members with questions about this matter may contact Randall Difuntorum at (415) 538-2161.

BACKGROUND AND ISSUE

This agenda item presents a report on the public comments received on proposed new RPC 1-650 (Limited Legal Services Programs). (The text of proposed new RPC 1-650, as amended following consideration of public comment, is provided as Attachment 1. A redline/strikeout version showing the changes to the public comment version is provided as Attachment 2.) The Rules of Professional Conduct are attorney conduct rules the violation of which will subject an attorney to discipline. Pursuant to statute, the State Bar of California has the authority to formulate amendments to the Rules of Professional Conduct. (Bus. & Prof. Code sec. 6076.) Amendments adopted by the State Bar are submitted to the Supreme Court for approval. When approved by the Supreme Court, the amendments are binding upon all members of the State Bar. (Bus. & Prof. Code sec. 6077.)

At its March 5, 2009 meeting, the Board Committee on Planning considered the issue of expedited adoption of new RPC 1-650 in response to the increased need in lawyer volunteers in legal service programs to assist the many California residents seeking legal assistance due to the severe economic downturn. Among these persons are: unemployed workers; bankruptcy debtors; crime victims, including victims of increased domestic violence; and thousands of California residents who are facing foreclosure or who require other legal assistance with mortgage loan modification. (The staff memorandum considered by the Board Committee on Planning is provided as Attachment 3.) In a ballot taken after its meeting, the Board Committee on Planning authorized a 30-day public comment distribution of proposed new RPC 1-650.

The public comment period ended on April 17, 2009. This agenda item reports on the twenty-three public comments received. Staff has reviewed the comments and recommends some modest revisions in response to the comments. The comments are also being reviewed by the Rules Revision Commission ("the Commission") that is scheduled to meet on May 8 & 9, 2009. Input from the Commission will be reported when this item is presented. This item presents a recommendation that the Board adopt the proposed new rule, as amended in response to public comment, and authorize staff to transmit it to the Supreme Court for approval.

SUMMARY OF PROPOSAL

Existing professional responsibility standards provide that lawyers are prohibited from representing clients with conflicting interests. (See RPC 3-310 and State Bar Formal Opinion No. 1998-152.)¹ In general, these standards apply to a lawyer who is a member of a law firm who wishes to participate in a legal service program by rendering limited legal advice and assistance to clients who otherwise might not receive any legal assistance. A conflict of interest may arise from a lawyer's personal representation of clients with conflicting interests and may also arise by imputation, either imputed from a lawyer to the lawyer's firm or vice a versa. Consequently, the specter of both personal and imputed conflicts of interest may deter some lawyers and law firms from participating in legal service programs.

The ABA Model Rules include MR 6.5, a rule adopted by a majority of states, which places limits on the application of conflicts rules to a lawyer who participates in certain legal service programs. The California rules do not include a rule comparable to MR 6.5. Proposed new RPC 1-650 would fill this void and alleviate one obstacle to potential increased lawyer participation in legal service programs. Specifically, when participating in a limited legal service program, the proposed rule would limit a

¹ Links to the State Bar rules and ethics opinions, including RPC 3-310 and State Bar Formal Opinion No. 1998-152, are available at: <http://www.calbar.ca.gov/ethics> .

lawyer's exposure to conflicts of interest to only those representations where the lawyer knows that either a personal or imputed conflict is present.² In addition the proposed rule would limit conflicts of interest that might otherwise be imputed to the lawyer's law firm as a result of the lawyer's participation in a limited legal service program.³

Like MR 6.5, the public policy basis of RPC 1-650 is stated in the comments to the rule. In part, the Discussion section to RPC 1-650 provides:

[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 to address 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, wherever 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. . . . ¶ [3] A member who is representing a client in 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. . . . ¶ [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 are inapplicable to a representation governed by this rule except as provided by paragraph (A)(2).

Given the purpose and policy of proposed new RPC 1-650, Board adoption of the rule would be responsive to Recommendation 11 of the *Action Plan for Justice*, a report of the California Commission on the Access to Justice published in April 2007. Adopting MR 6.5 was one of four pro bono resolutions in the *Action Plan for Justice*⁴. As discussed in the report, it is anticipated that

² Proposed new RPC 1-650(A) provides:

(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) is subject to an imputed conflict of interest only if the member knows that another lawyer associated with the member in a law firm would be subject to a conflict of interest under rule 3-310 with respect to the matter.

³ Proposed new RPC 1-650(B) provides: "(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."

⁴ The report is available at http://calbar.ca.gov/calbar/pdf/reports/2007_Action=Plan-Justice.pdf

adoption of a new rule would facilitate attorney participation in advice and counsel clinics, a key service provided by legal service programs.

REPORT ON PUBLIC COMMENTS RECEIVED

The 30-day public comment period began on March 17, 2009 and ended on April 17, 2009. This agenda item reports on the twenty-three public comments received. A synopsis of the public comments is provided as Attachment 4. The full text of the written comments and a table listing the public commentators and their respective position on the proposed rule is provided as Attachment 5. Of these twenty-three written comments, nineteen support the proposed new rule and four support the rule but recommend amendments. None of the public comments received oppose adoption of the rule.

Among the points raised in support of the proposed rule are the following.

- 1) The proposed rule is substantially the same as rules already successful in a majority of states.
- 2) Adoption of the rule would allow a greater percentage of lawyers to meet or exceed the Board of Governor's recommended fifty hours of annual pro bono participation.
- 3) The participation of lawyers in pro bono clinics is blocked by the imputed conflicts rules.
- 4) The proposed rule is a modest step that can make a significant difference, and has already worked well in many other jurisdictions.
- 5) One of the most challenging aspects of the current economic downturn is the ability to provide legal services and the proposed rule would dramatically improve this ability.
- 6) Ironically, the economic downturn means that there are more volunteers available from larger firms so the proposed rule is desperately needed now.
- 7) The proposed rule will provide law firms with the assurance they need to confidently participate in legal services programs.
- 8) The proposed rule is not only a laudable modification of California Rules of Professional Conduct, but is absolutely essential.
- 9) The proposed rule is not inconsistent with the objective of Rule 3-310 because pro bono advice and counsel is limited in both scope and time.
- 10) The proposed rule only abrogates conflicts of interest that are unknown to a lawyer at the time of their limited pro bono service so there is unlikely to be any actual impact on the duty of loyalty owed by the lawyer.
- 11) If California is to maintain its position as the nation's leader in the development and utilization of rules that meet the needs of clients and lawyers, then the proposed rule should be adopted forthwith.
- 12) The proposed rule offers a collateral benefit of enhancing the public image of the legal profession.

- 13) Despite the significant commitment made by many law firms, the demand for pro bono legal services continues to outstrip conventional resources.
- 14) Absent the proposed rule, the vital assistance of clinics could be delayed because of precautions by lawyers to protect their other client-lawyer relationships from imputed disqualification.
- 15) The current rules regarding potential conflicts of interest discourage some pools of potential volunteers.
- 16) The proposed rule would assuage the concerns of law firms that are otherwise reluctant to do pro bono work due to possible conflicts of interest.
- 17) The proposed rule achieves the proper balance between client protection and meeting the needs of the disadvantaged.

The suggested amendments offered by four of the public commentators present three possible changes to the rule as circulated for public comment.

The first change is to paragraph (A) of the proposed rule.⁵ The suggestion is to delete the language referring to Business and Professions Code section 6213 and to add "or" after "law school" so that paragraph (A) would read:

(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: . . .

Staff recommends that this change be implemented.⁶ The rationale for this change is that the language recommended for deletion is redundant and potentially confusing. By deleting this language, the first sentence would adequately identify the relevant categories of legal service programs without the possibility of misinterpreting the Business and Professions Code citation as a qualifier that extends to all of the categories of legal service programs. The cited section primarily relates to IOLTA and status as an IOLTA recipient is not a condition precedent for a legal service program to be within the scope of the proposed rule. In addition, this change would revert paragraph (A) back to the language of the Commission's original draft rule that was submitted to the Board but subsequently modified as the draft was sent out for public comment.

The second change, in concept, is a clarification of Discussion paragraph [1] that would soften the current absolute language stating that a client-lawyer relationship is formed in every instance that a limited legal service program renders services through advice hotlines/clinics and pro se counseling programs.⁷ Specifically, this change would revise the second sentence of Discussion paragraph [1] to read:

⁵ Refer to the public comment letters from: the Commission on Access to Justice; the Legal Aid Association of California; and the comment letter on behalf of "Multiple Law Firms."

⁶ Staff has reviewed the change and has concluded that the change would not require re-distribution for public comment.

⁷ Refer to the public comment letters from: the Commission on Access to Justice; and the Legal Aid Association of California.

In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, wherever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation.

Staff recommends that this change be implemented.⁸ The rationale for this change is that the examples listed in this sentence include activities that clearly involve formation of a client-lawyer relationship (namely, legal advice hotlines and legal advice clinics) but also includes pro se counseling programs which are a type of legal service activity that can be rendered without the formation of a client-lawyer relationship. Accordingly, it is an appropriate clarification to replace the absolute language with a conditional phrase.

The third change is from the Standing Committee on Professional Responsibility and Conduct ("COPRAC"). COPRAC would add a new sentence at the end of Discussion paragraph [4] concerning screening. The new sentence would state:

However, once the conflict is identified, the member should be screened from the member's firm's representation of a client with interests adverse to a client that the member previously represented under the program's auspices.

While COPRAC has astutely linked the concept of imputed conflicts that is present in the proposed rule to the related concept of "ethical walls" or screening, staff does not recommend that this change be implemented in this expedited rule. Instead, if the Board concurs, staff will assure that the Commission considers this change as the Commission continues its study of ABA Model Rule 1.10 [Imputation of Conflicts: General Rule] and all of the other ABA rules that concern imputed conflicts and screening, including the Commission's work on a proposed version of Model Rule 6.5 that would be a part of the Commission's final report and recommendation. To add a screening element to the instant rule would be premature and potentially problematic because the issue of screening requires a fuller treatment that accounts for all related rules.⁹

To summarize, the public comments overwhelmingly support, if not urge, adoption of proposed rule 1-650. Of the three possible amendments recommended by public commentators, staff recommends that two be implemented and the third be referred to the Commission. Staff recommends that the Board adopt proposed rule 1-650 as modified in response to the public comments.¹⁰

⁸ Staff has reviewed the change and has concluded that the change would not require re-distribution for public comment.

⁹ For example, in the ABA Model Rules, Model Rule 1.0 [Terminology] includes paragraph (k) that defines the term "screened" as it is used throughout the ABA Model Rules. The current California rules have no similar definition because the California rules do not include the concept of screening. Adding COPRAC's suggested sentence to the rule 1-650 discussion section would introduce the concept of screening without the necessary framework of any definition.

¹⁰ The Commission subcommittee assigned to review the public comments on proposed Rule 1-650 has submitted its recommendation to the full Commission. A majority of that subcommittee endorses the modifications to paragraph (A) and Discussion paragraph [1]. A majority of the subcommittee is not recommending implementation of COPRAC's screening addition to Discussion paragraph [4]. The full Commission will meet on May 8 & 9, 2009 to consider the subcommittee's recommendations. The Commission's action will be reported at the Board's May meetings.

EFFECTIVE DATE OF PROPOSAL

Amendments to the Rules of Professional Conduct require Supreme Court approval and, if approved, such amendments ordinarily become operative in 30-days. However, given the Board's goal of expedited promulgation of new RPC 1-650, the Board should consider including a request that if the Supreme Court acts to approve the new rule that the Supreme Court consider issuing an order stating the new rule becomes operative "forthwith," that is, as of the day of the Court's order.

FISCAL AND PERSONNEL IMPACT

The Board's adoption of the proposed new rule does not involve any unbudgeted fiscal or personnel impact.

RULE AMENDMENTS

Subject to the Supreme Court's decision on whether to approve the proposed new rule, the Board action requested by this agenda item would add a new rule to the Rules of Professional Conduct of the State Bar of California.

BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

RECOMMENDATION AND PROPOSED BOARD COMMITTEE AND BOARD RESOLUTIONS

Staff recommends that the Board adopt proposed new rule 1-650, as modified in response to the public comments received, and direct that it be submitted to the California Supreme Court with a recommendation that the Supreme Court approve the rule.

Proposed Board Committee Resolution

Should the Board Committee on Regulation, Admissions and Discipline Oversight agree with the recommendation that proposed new rule 1-650 (Limited Legal Service Programs) of the Rules of Professional Conduct be adopted by the Board and transmitted for approval to the Supreme Court, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of comments received, that the Board Committee on Regulation, Admissions and Discipline Oversight, recommends that the Board of Governors of the State Bar of California adopt, Rule 1-650, Rules of Professional Conduct of the State Bar of California, in the form attached to these minutes and made a part hereof, and hereby directs that said rule be transmitted by staff to the Supreme Court with a request that it be approved by the Court.

Proposed Board Resolution

Should the Board of Governors concur with the recommendation of the Board Committee on Regulation, Admissions and Discipline Oversight, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and consideration of comments received, and upon recommendation of the Board Regulation, Admissions and Discipline Oversight Committee, that the Board of Governors of the State Bar of California hereby adopts Rule 1-650, Rules of Professional Conduct of the State Bar of California, in the form attached to these minutes and made a part hereof, and hereby directs that said rule be transmitted by staff to the Supreme Court with the request that it be approved by the Court.